



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

18 December 2025*

(Reference for a preliminary ruling – Public procurement – Mixed procurement involving defence – Services directly linked to military equipment – Directive 2009/81/EC – Directive 2014/24/EU – Determining the applicable directive – Contract award criteria – Third subparagraph of Article 67(2) – Prohibition on using price as the sole award criterion – Proportionality – Public contracts for labour-intensive services)

In Case C-769/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy) by a decision of 5 December 2023, received at the Court on 13 December 2023,

in the proceedings

Mara Soc. coop. arl

v

Ministero della Difesa,

Gruppo Samir Global Service Srl,

THE COURT (Third Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, O. Spineanu-Matei, S. Rodin, N. Piçarra and N. Fenger, Judges,

Advocate General: R. Norkus,

Registrar: G. Chiapponi, Administrator,

having regard to the written procedure and further to the hearing on 30 April 2025,

after considering the observations submitted on behalf of:

- Mara Soc. coop. arl, by A. Clarizia, M. Pagliarulo and P. Ziotti, avvocati,
- Gruppo Samir Global Service Srl, by L. Tozzi, avvocato,

* Language of the case: Italian.

- the Italian Government, by S. Fiorentino and G. Palmieri, acting as Agents, and by C. Pluchino, avvocato dello Stato,
 - the French Government, by R. Bénard, B. Fodda and M. Guiresse, acting as Agents,
 - the European Commission, by C. Biz, L. Malferrari and G. Wils, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 10 July 2025,
- gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 49 and 56 TFEU, of Article 67(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2021/1952 of 10 November 2021 (OJ 2021 L 398, p. 23) ('Directive 2014/24'), and of the principle of proportionality.
- 2 The request has been made in proceedings between Mara Soc. coop. arl, on the one hand, and Ministero della Difesa (Ministry of Defence, Italy) and Gruppo Samir Global Service Srl ('Samir'), on the other, concerning the award of a service contract for the needs of the Italian army.

Legal context

European Union law

Directive 2009/81/EC

- 3 Recitals 4, 6 to 9, 16, 17, 20 and 27 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76) state:
 - '(4) One prerequisite for the creation of a European defence equipment market is the establishment of an appropriate legislative framework. In the field of procurement, this involves the coordination of procedures for the award of contracts to meet the security requirements of Member States and the obligations arising from the Treaty.
- ...
- (6) Better coordination of award procedures, for instance for contracts regarding logistics services, transportation and warehousing, also have the potential to reduce costs in the defence sector and significantly lower the sector's environmental impact.

- (7) These procedures should reflect the [European] Union's overall approach to security, which responds to changes in the strategic environment. The emergence of asymmetrical transnational threats has increasingly blurred the boundary between external and internal and military and non-military security.
- (8) Defence and security equipment is vital for both the security and the sovereignty of Member States and for the autonomy of the Union. As a result, purchases of goods and services in the defence and security sectors are often of a sensitive nature.
- (9) This results in specific requirements, particularly in the fields of security of supply and security of information. These requirements relate especially to purchases of arms, munitions and war material for the armed forces, as well as services and works directly relating thereto ...

...

- (16) ... the award of contracts which fall within the field of application of this Directive can be exempted from the latter where this is justified on grounds of public security or necessary for the protection of essential security interests of a Member State. This can be the case for contracts in the fields of both defence and security which necessitate such extremely demanding security of supply requirements or which are so confidential and/or important for national sovereignty that even the specific provisions of this Directive are not sufficient to safeguard Member States' essential security interests ...
- (17) Nevertheless, in accordance with the case-law of the Court of Justice of the European Communities, the possibility of recourse to such exceptions should be interpreted in such a way that their effects do not extend beyond that which is strictly necessary for the protection of the legitimate interests that those Articles help to safeguard. Thus, the non-application of this Directive must be proportionate to the aims pursued and cause as little disturbance as possible to the free movement of goods and the freedom to provide services.

...

- (20) ...

Moreover, ... the Treaty gives Member States the possibility to exempt contracts in the fields of both defence and security from the rules of this Directive if the application of this Directive would oblige them to supply information, the disclosure of which they consider contrary to the essential interests of their security. This can be the case in particular where contracts are so sensitive that their very existence must be kept secret.

...

- (27) In the fields of defence and security, some contracts are so sensitive that it would be inappropriate to apply this Directive, despite its specificity. That is the case for procurements provided by intelligence services, or procurements for all types of intelligence activities, including counter-intelligence activities, as defined by Member States. It is also the case for other particularly sensitive purchases which require an extremely high level of confidentiality, such as, for example, certain purchases intended for

border protection or combating terrorism or organised crime, purchases related to encryption or purchases intended specifically for covert activities or other equally sensitive activities carried out by police and security forces.’

4 Article 1 of that directive, entitled ‘Definitions’, provides:

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

1. “Common Procurement Vocabulary (CPV)” means the reference nomenclature applicable to contracts awarded by contracting authorities/entities, as adopted by Regulation (EC) No 2195/2002 [of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (OJ 2002 L 340, p. 1)];

...

6. “Military equipment” means equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material;

...’

5 Article 2 of that directive, entitled ‘Scope’, provides:

‘... this Directive shall apply to contracts awarded in the fields of defence and security for:

- (a) the supply of military equipment, including any parts, components and/or subassemblies thereof;
- (b) the supply of sensitive equipment, including any parts, components and/or subassemblies thereof;
- (c) works, supplies and services directly related to the equipment referred to in points (a) and (b) for any and all elements of its life cycle;
- (d) works and services for specifically military purposes or sensitive works and sensitive services.’

6 Article 3 of the directive, entitled ‘Mixed contracts’, provides:

‘1. A contract having as its object works, supplies or services falling within the scope of this Directive and partly within the scope of Directive [2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector (OJ 2004 L 134, p. 1)] or Directive 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contract (OJ 2004 L 134, p. 114)] shall be awarded in accordance with this Directive, provided that the award of a single contract is justified for objective reasons.

...

3. The decision to award a single contract may not, however, be taken for the purpose of excluding contracts from the application of this Directive or of Directive [2004/17] or Directive [2004/18].’

- 7 Annex I of Directive 2009/81, entitled ‘Services referred to in Articles 2 and 15’, lists 20 service categories, the tenth category of which, under the name ‘Supporting and auxiliary transport services’, includes reference numbers CPV 63100000-0 to 63111000-0, 63120000-6 to 63121100-4, 63122000-0, 63512000-1 and 63520000-0 to 6370000-6. Under Regulation (EC) No 2195/2002, as amended by Commission Regulation (EC) No 213/2008 of 28 November 2007 (OJ 2008 L 74, p. 1), reference numbers CPV 63100000-0 and 63110000-3 correspond, to ‘Cargo handling and storage services’ and ‘Cargo handling services’, respectively.

Directive 2014/24

- 8 Recitals 89, 90 and 92 of Directive 2014/24 state:

‘(89) ... In order to avoid confusion with the award criterion that is currently known as the “most economically advantageous tender” in Directives [2004/17] and [2004/18], a different terminology should be used to cover that concept, the “best price-quality ratio”. Consequently, it should be interpreted in accordance with the case-law relating to those Directives, except where there is a clearly materially different solution in this Directive.

- (90) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender. It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. ...

In order to encourage a greater quality orientation of public procurement, Member States should be permitted to prohibit or restrict use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate.

...

...

- (92) When assessing the best price-quality ratio contracting authorities should determine the economic and qualitative criteria linked to the subject matter of the contract that they will use for that purpose. Those criteria should thus allow for a comparative assessment of the level of performance offered by each tender to be assessed in the light of the subject matter of the contract, as defined in the technical specifications. In the context of the best price-quality ratio, a non-exhaustive list of possible award criteria which include environmental and social aspects is set out in this Directive. Contracting authorities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.

...’

- 9 Article 1 of Directive 2014/24, entitled ‘Subject matter and scope’, provides, in paragraph 1:

‘This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.’

- 10 Article 3 of that directive, entitled ‘Mixed procurement’, provides, in the second subparagraph of paragraph 3:

‘Where part of a given contract is covered by Article 346 TFEU or Directive [2009/81], Article 16 of this Directive shall apply.’

- 11 Under Article 4 of that directive, entitled ‘Threshold amounts’:

‘This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

...

- (b) EUR 140 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; ...

...’

- 12 Article 15 of that directive, entitled ‘Defence and security’, states, in paragraph 1:

‘This Directive shall apply to the awarding of public contracts and to design contests organised in the fields of defence and security, with the exception of the following contracts:

- (a) contracts falling within the scope of Directive [2009/81];

...’

- 13 Article 16 of Directive 2014/24, entitled ‘Mixed procurement involving defence or security aspects’ provides:

‘1. In the case of mixed contracts which have as their subject matter procurement covered by this Directive as well as procurement covered by Article 346 TFEU or Directive [2009/81], this Article shall apply.

2. Where the different parts of a given public contract are objectively separable, contracting authorities may choose to award separate contracts for the separate parts or to award a single contract.

Where contracting authorities choose to award separate contracts for separate parts, the decision of which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

Where contracting authorities choose to award a single contract, the following criteria shall apply to determine the applicable legal regime:

- (a) where part of a given contract is covered by Article 346 TFEU, the contract may be awarded without applying this Directive, provided that the award of a single contract is justified for objective reasons;
- (b) where part of a given contract is covered by Directive [2009/81], the contract may be awarded in accordance with that Directive, provided that the award of a single contract is justified for objective reasons. This point shall be without prejudice to the thresholds and exclusions for which that Directive provides.

The decision to award a single contract shall not, however, be taken for the purpose of excluding contracts from the application of either this Directive or Directive [2009/81].

3. Point (a) of the third subparagraph of paragraph 2 shall apply to mixed contracts to which both point (a) and point (b) of that subparagraph could otherwise apply.

4. Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying this Directive where it includes elements to which Article 346 TFEU applies; otherwise it may be awarded in accordance with Directive [2009/81].’

14 Article 18 of that directive, entitled ‘Principles of procurement’, provides in paragraph 2:

‘Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.’

15 Article 67 of that directive, entitled ‘Contract award criteria’, provides:

‘1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.

2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, ... and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject matter of the public contract in question. Such criteria may comprise, for instance:

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or

- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.

3. Award criteria shall be considered to be linked to the subject matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

- (a) the specific process of production, provision or trading of those works, supplies or services; or
- (b) a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance.

4. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. ...

...'

Italian law

- 16 Article 50(1) of decreto legislativo n. 50 – Codice dei contratti pubblici (Legislative Decree No 50 establishing the Public Procurement Code) of 18 April 2016 (GURI No 91 of 19 April 2016, Ordinary Supplement No 10), in its version applicable to the case in the main proceedings ('the Public Procurement Code'), provides:

'For the award of concession contracts and contracts for works and services other than those of an intellectual nature, in particular those relating to labour-intensive contracts, calls for tenders, tender notices and invitations shall include, in compliance with the principles of the European Union, specific social clauses aimed at promoting occupational stability of employed staff, providing for the application by the successful tenderer of the collective sectoral agreements ... Labour-intensive services are those in which labour costs are at least 50% of the total amount of the contract.'

- 17 Article 95 of the Public Procurement Code stipulates:

'1. Award criteria shall not confer on the contracting authority unrestricted freedom of choice as regards the tender. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. The contracting authorities shall verify the accuracy of the information and proof provided by the tenderers.'

2. Without prejudice to laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall, with respect to the principles of transparency, non-discrimination and equal treatment, base the award of contracts and the organisation of competitions and call for proposals on the criterion of the most economically advantageous tender determined on the basis of the best price-quality ratio or on the basis of the element of price or cost, following a criterion of comparing cost-effectiveness such as the life-cycle costing ...

3. The following shall be awarded exclusively on the basis of the criterion of the most economically advantageous tender determined on the basis of the best price-quality ratio:

(a) contracts relating to social services, and hospital, care and school catering services, as well as labour-intensive services, as defined in Article 50(1), without prejudice to awards within the meaning of Article 36(2)(a);

(b) contracts relating to the award of engineering and architectural services and other services of a technical and intellectual nature for an amount of EUR 40 000 or more;

b-bis) service and supply contracts for an amount of EUR 40 000 or more that have significant technological content or are innovative.

4. The criterion of the lowest price may be used:

...

(b) for services and supplies with standardised characteristics or whose conditions are defined by the market, with the exception of labour-intensive services referred to in paragraph 3(a);

...'

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

- 18 On 14 July 2022, the Ministry of Defence launched an open procedure for the award of a public service contract for the needs of the Italian army consisting essentially in loading and unloading operations, stacking and unstacking materials and moving equipment. That contract, for 2023 and renewable for three years, was divided into nine lots.
- 19 The call for tenders at issue in the main proceedings laid down the lowest price as the criterion for the award of the contract, on the ground that the services covered by that contract had standardised characteristics, within the meaning of Article 95(4)(b) of the Public Procurement Code.
- 20 It was stated in that call for tenders that, in the performance of the contract, the salaries were to be paid on the basis of the sectoral collective agreement. Therefore, tenderers could not offer reductions on labour costs. Any reduction had to relate exclusively to the remuneration for the service, so that the gesture of goodwill thus proposed would reduce only the potential profit of the tenderer and not the salaries of its staff.

- 21 For one of the lots of the contract, which concerned the provision of services for the needs of the Aeronautica Militare area nord (Air Force, northern area) and which – taking into account possible renewals – was estimated to amount to EUR 3 463 114.74, three tenderers, including Mara and Samir, offered a 100% reduction on the remuneration for their services. In those circumstances, the bids of these three tenderers were considered to be equivalent. Ultimately, the contract was awarded to Mara by drawing lots.
- 22 Samir brought before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) an action against the decision awarding that lot, claiming, *inter alia*, that the application of the lowest price criterion was contrary to the applicable legislation.
- 23 By judgment of 11 April 2023, that court upheld the action, on the ground that the call for tenders at issue in the main proceedings should, pursuant to Article 95(3)(a) of the Public Procurement Code, have set the criterion of the best price-quality ratio as the criterion for the award of the contract. Given that the services at issue in the main proceedings are labour intensive, Article 95(4)(b) of that code, which refers to the lowest price criterion for the award of service and supply contracts with standardised characteristics, should not have applied.
- 24 Mara brought against that judgment an appeal before the Consiglio di Stato (Council of State, Italy), which is the referring court.
- 25 By that appeal, Mara asserts that the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) infringed Article 95(3)(a) of the Public Procurement Code. In its view, that provision cannot apply to a contract, such as that at issue in the main proceedings, which, although labour-intensive, also has standardised characteristics. It claims that the contracting authority rightly relied on Article 95(4)(b) of that code, setting the criterion of the lowest price as the award criterion.
- 26 In the event that the Consiglio di Stato (Council of State) were to consider that the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) correctly inferred from Article 95 of the Public Procurement Code that the lowest price criterion cannot be used for the award of contracts for services which are labour intensive while having standardised characteristics, Mara submits that that article infringes EU law.
- 27 In its view, while it may be apparent from Directive 2014/24 that its purpose is, *inter alia*, to encourage the use of the criterion of the best price-quality ratio as the criterion for the award of public contracts, by requiring contracting authorities to set that award criterion even where the contract at issue has standardised characteristics, the Italian legislature went beyond what is necessary to achieve that objective of Directive 2014/24 and thereby infringed the principle of proportionality.
- 28 The referring court notes that it is clear from a combined reading of Article 95(3) and (4) of the Public Procurement Code that the call for tenders relating to the contract at issue in the main proceedings should, under the Italian law in force, have relied on the criterion of the best price-quality ratio for the award of that contract.

- 29 However, that court has doubts as to the usefulness of that criterion for the award of a contract relating to services which are characterised by a high degree of repetitiveness and which are largely devoid of customisable elements. For reasons of economic efficiency and expeditiousness of the public procurement procedure, the criterion of lowest price may be more appropriate for that type of public contracts for services with standardised characteristics.
- 30 The referring court states that its plenary session, which is competent to set out the principles of law, ruled, in judgment No 8, delivered on 21 May 2019, on the relationship between paragraphs 3 and 4 of Article 95 of the Public Procurement Code, that the imposition of the criterion of the best price-quality ratio for the award of contracts for labour-intensive services is intended to protect workers and, therefore, that labour-intensive contracts, that is to say those for which labour costs are at least half of the total amount of the contract, are in any event to be awarded on the basis of that criterion, even when they have standardised characteristics.
- 31 The referring court observes that the objective of protecting workers is, in a situation such as that at issue in the main proceedings, already achieved by the prohibition on offering a reduction on labour costs.
- 32 In those circumstances, the Consiglio di Stato (Council of State) stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

‘Do the principles of freedom of establishment and freedom to provide services, referred to in Articles 49 and 56 [TFEU], the [EU law] principle of proportionality and Article 67(2) of Directive [2014/24] preclude the application of national legislation on public procurement, such as the Italian legislation in Article 95(3)(a) and (4)(b) of [the Public Procurement Code], and in Article 50(1) of that [code], as also arising from the principle of law laid down by the Plenary Session of the [Consiglio di Stato (Council of State)] in judgment No 8 of 21 May 2019, according to which, in the case of contracts concerning services with standardised characteristics and, which are, at the same time, labour-intensive, the contracting authority is prohibited from providing for, as an award criterion, the lowest price, even where the tender rules provide for the reduction only on the premium or potential profit of the undertaking, without prejudice to the labour costs?’

Procedure before the Court

- 33 In accordance with Article 62(1) of the Rules of Procedure of the Court of Justice, the Court sent questions for written answers to the parties and interested parties concerning the scope of Directive 2009/81 and Directive 2014/24. Mara, the Italian Government and the European Commission replied to those questions with their observations lodged on 26 November 2024, 19 November 2024 and 20 November 2024, respectively.

Consideration of the question referred

Preliminary observations

- 34 In their observations submitted to the Court, the parties to the main proceedings and the Italian Government stated that the services covered by the public contract at issue in the main proceedings concern, in part, the handling of cargo with ammunition and explosives. Those goods constitute military equipment within the meaning of Article 1(6) of Directive 2009/81.

- 35 To that extent, those services may, as the Advocate General observed in point 28 of his Opinion, be ‘directly related to [military] equipment’ within the meaning of Article 2(c) of that directive. The provision of cargo handling services – which, according to the CPV reference numbers referred to in paragraph 7 above, fall within the tenth category of services called ‘supporting and auxiliary transport services’ referred to in Annex I to that directive – may involve physical access to the military equipment contained in such cargo, as well as access to certain sensitive information relating to that equipment.
- 36 In the light of the sensitive nature, highlighted in recitals 8 and 9 of Directive 2009/81, of purchases of goods and services in the field of defence, that directive establishes a specific legislative framework. The coordination of procedures for the award of public contracts in that field must, as is apparent from recitals 4, 6 and 7 of that directive, meet security requirements, while also making it possible to reduce costs, in particular regarding logistics services, transportation and warehousing.
- 37 Because of that specific feature, the award of public contracts covered by Directive 2009/81 is, pursuant to Article 15(1)(a) of Directive 2014/24, excluded from the scope of the latter directive.
- 38 In the present case, the parties to the main proceedings and the Italian Government have noted that only some cargo which are the subject of the handling services in question contain military equipment, within the meaning of Article 1(6) of Directive 2009/81, whereas other contain goods which, although intended for the Italian army, are not designed or adapted for military purposes. In view of that information, which it is for the referring court to verify, the contract at issue in the main proceedings must be classified as ‘mixed’, in the sense that it relates both to purchases falling within the scope of Directive 2009/81 and to purchases which fall within the scope of Directive 2014/24.
- 39 In that regard, it should be noted that Article 3 of Directive 2009/81 and Article 16 of Directive 2014/24 each contain provisions intended to determine the directive applicable to such mixed contracts.
- 40 Those provisions diverge in part of their respective scopes. In particular, while Article 3 of Directive 2009/81 lays down, in principle, an obligation for the contracting authority to apply that directive to mixed contracts, Article 16 of Directive 2014/24 provides only for the possibility, under certain conditions, of applying Directive 2009/81 to such contracts.
- 41 Article 3 of Directive 2009/81 provides that a contract having as its object works, supplies or services falling within the scope of Directive 2009/81 and partly within the scope of Directive 2004/18, now replaced by Directive 2014/24, is to be awarded in accordance with Directive 2009/81, provided that the requirement set out in paragraph 1 of that article – that the award of a single contract is justified for objective reasons – is met and that the condition set out in paragraph 3 of that article – that the decision to award a single contract may not be taken for the purpose of excluding the contract concerned from the application of Directive 2014/24 – is satisfied.
- 42 Article 16 of Directive 2014/24 distinguishes between mixed contracts the different parts of which are either ‘objectively separable’ or ‘objectively not separable’.

- 43 As regards, in the first place, mixed contracts the different parts of which are ‘objectively not separable’, Article 16(4) of Directive 2014/24 provides that such a contract ‘may be awarded without applying [that] directive where it includes elements to which Article 346 TFEU applies’ and ‘otherwise it may be awarded in accordance with Directive [2009/81]’.
- 44 The first situation, which concerns the application of Article 346 TFEU, is, in the light of recitals 16, 17, 20 and 27 of Directive 2009/81, reserved for situations in which the award of the contract in question meets such a level of security or confidentiality requirement that even the specific provisions of that directive would not be sufficient to safeguard the essential security interests of the Member State concerned. There is nothing in the file submitted to the Court to suggest that such a situation exists in the present case, which it is, however, for the referring court to verify.
- 45 In the second situation, which concerns mixed contracts comprising ‘objectively not separable’ parts to which Article 346 TFEU does not apply, Article 16(4) of Directive 2014/24 allows, but does not require, the contract at issue to be awarded in accordance with Directive 2009/81 and therefore leaves it to the contracting authority to decide whether to award that contract in accordance with the rules laid down in that directive or in accordance with the rules laid down in Directive 2014/24.
- 46 As regards, in the second place, mixed contracts the different parts of which are ‘objectively separable’, Article 16(2) of Directive 2014/24 allows the contracting authority either to award separate contracts for the separate parts, with the directive applicable to each contract then being determined on the basis of their specific characteristics, or to award a single contract, which thus remains ‘mixed’.
- 47 That said, where the contracting authority chooses to apply Directive 2009/81 to that single contract, its decision not to award separate contracts must, under point (b) of the third subparagraph of that Article 16(2), be ‘justified for objective reasons’. However, that requirement does not apply where the contracting authority chooses to award a single contract by applying Directive 2014/24.
- 48 Furthermore, under the fourth subparagraph of that Article 16(2), the decision to award a single contract despite the existence of objectively separable parts of the contract is ‘not [to] be taken for the purpose of excluding contracts from the application of either [Directive 2014/24] or Directive [2009/81]’.
- 49 That requirement, unlike that referred to in paragraph 47 above, also applies where the single contract is awarded in accordance with the provisions of Directive 2014/24. Therefore, since, first, it is a requirement of good faith on the part of the contracting authority and, second, that requirement must not render ineffective the requirement set out in the third subparagraph of Article 16(2) of Directive 2014/24, that requirement in the fourth subparagraph of that article must be considered to have been infringed where, in the light of all the relevant factors, it appears that the decision of the contracting authority to award a single contract can only be understood as reflecting the contracting authority’s intention to avoid the application of either Directive 2009/81 or Directive 2014/24.
- 50 The rules on conflict between Directive 2009/81 and Directive 2014/24 laid down in Article 16 of the latter directive are more recent and, moreover, more detailed than those contained in Article 3 of Directive 2009/81. Article 16 of Directive 2014/24 therefore expresses the intention of the EU

legislature at the time of adoption of that directive and must be applied to the detriment of Article 3(1) of Directive 2009/81, which, as the Advocate General observed in points 39 and 40 of his Opinion, has a different scope, but must be regarded as having been superseded by the legislative developments brought about by Directive 2014/24.

- 51 According to the observations submitted by the Italian Government to the Court, the Ministry of Defence considered that the various parts of the service contract at issue in the main proceedings were, admittedly, objectively separable, but, because of the simultaneous cargo handling operations, had to be regarded as forming part of a single contract which had to be awarded in accordance with the provisions of Directive 2014/24.
- 52 As stated in paragraph 47 above, in such a situation, the condition laid down in point (b) of the third subparagraph of Article 16(2) of Directive 2014/24, according to which the decision to award a single contract must be ‘justified for objective reasons’, does not apply. By contrast, the condition laid down in the fourth subparagraph of Article 16(2) of that directive, according to which that decision is ‘not [to] be taken for the purpose of excluding contracts from the application of either [that] Directive or Directive [2009/81]’, applies.
- 53 Consequently, the Court’s examination of the question referred concerning the interpretation of Article 67(2) of Directive 2014/24 can be made only subject to the prior verification by the referring court that there has been no failure in the present case to comply with the requirement set out in the fourth subparagraph of Article 16(2) of that directive.

Article 67(2) of Directive 2014/24 and the principle of proportionality

- 54 The question referred, as formulated by the referring court, concerns the interpretation of Articles 49 and 56 TFEU, Article 67(2) of Directive 2014/24 and the principle of proportionality.
- 55 In that regard, it should be noted, first, that that question seeks to enable the referring court to assess the compatibility of certain provisions of the Public Procurement Code with EU law. It is common ground that that code transposes Directive 2014/24 into Italian law.
- 56 Second, it follows from the facts set out in the request for a preliminary ruling and summarised in paragraph 21 above that the estimated value of the contract at issue in the main proceedings exceeds the threshold laid down in Article 4 of that directive for it to be applicable.
- 57 Third and last, it is apparent from that request that the subject matter of the dispute in the main proceedings concerns the option provided for in the third subparagraph of Article 67(2) of that directive to prohibit the use of the ‘price only ... as the sole award criterion’ of the contract – the criterion of the ‘lowest price’ in the words used by the referring court – and the obligation of the Member States to comply with the principle of proportionality where that option is exercised.
- 58 Under those circumstances, it is both necessary and sufficient to examine the question referred for a preliminary ruling in the light of Directive 2014/24 and the principle of proportionality (see, by analogy, judgment of 4 June 2020, *Asmel*, C-3/19, EU:C:2020:423, paragraphs 44 to 48).
- 59 It follows that, by its question, the referring court asks, in essence, whether Article 67(2) of Directive 2014/24 and the principle of proportionality must be interpreted as precluding national legislation under which, in the case of public contracts for services with standardised characteristics but for which labour costs are at least half of the total value, the contracting

authority is prohibited from using price as the sole criterion for the award of such contracts, even where the call for tenders provides that any reduction offered by a tenderer must apply solely to the remuneration for those services without leading to a reduction in the remuneration of the workers employed by that tenderer.

- 60 As is apparent from the explanations provided by the referring court, the handling services referred to in the public contract at issue in the main proceedings have ‘standardised characteristics’ within the meaning of the Italian legislation, since those services consist of repetitive and not very technical tasks. That court also finds that those tasks are largely manual tasks, with the result that the services at issue in the main proceedings are ‘labour-intensive’, within the meaning of that legislation, that is to say, labour costs represent at least half of the total amount of the contract.
- 61 In order to determine whether public contracts relating to such services fall outside the option, granted to Member States by the third subparagraph of Article 67(2) of Directive 2014/24, to prohibit the use of price as the sole criterion for the award of such contracts, it should be noted at the outset that that provision does not limit the option which it lays down to contracts relating to specific types of goods or services and that it does not contain any exception to, or derogation from, that option. More generally, it does not make the possibility of prohibiting the use of price as the sole criterion for the award of a contract subject to any conditions. Thus, as the Advocate General observed in point 46 of his Opinion, it is clear from the wording of that provision that it confers a broad discretion on Member States.
- 62 The existence of that broad discretion is borne out by the scheme of Article 67 of that directive, taken as a whole.
- 63 Paragraph 1 of that article provides that contracting authorities are to base the award of public contracts on the most economically advantageous tender. Paragraph 2 thereof sets out that that tender is to be identified using a cost-effectiveness approach and expressly provides, in the first subparagraph of that paragraph, for the possibility of identifying that tender on the basis of the best price-quality ratio.
- 64 The choice of that approach involves setting award criteria that include not only price but also qualitative aspects linked to the subject matter of the public contract concerned. In order for those qualitative aspects to be regarded as linked to the subject matter of the public contract, it is sufficient, in accordance with paragraph 3 of that article, that they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle.
- 65 It therefore follows from reading Article 67 of Directive 2014/24 as a whole that the introduction, by a Member State, of a prohibition on contracting authorities using price as the sole criterion for the award of a public contract does not in any way have the effect of introducing, in the implementation of that directive, an exception to a rule with a different scope. The sole effect of the exercise, by a Member State, of the option provided for in the third subparagraph of paragraph 2 of that article is that, within the territory of that Member State, the possibility given by the first subparagraph of paragraph 2 to contracting authorities of using criteria including qualitative aspects is replaced by an obligation for them to include one or more such criteria in their calls for tenders.

- 66 The broad discretion enjoyed by Member States when exercising that option is also borne out by the purpose of Directive 2014/24. As is apparent from recitals 89, 90 and 92 of that directive, the EU legislature intended to link the concept of ‘most economically advantageous tender’ predominantly to that of the ‘best price-quality ratio’. While stating that, in the absence of national legislation, contracting authorities remain free to use price or cost as the sole criterion for the award of a public contract, the EU legislature considered it necessary, in order to promote more quality-oriented public procurement, to authorise Member States to prohibit or limit the use of price or cost as the sole criterion for the purpose of awarding a public contract. It found it necessary, in addition, for contracting authorities to be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.
- 67 In accordance with the principle of proportionality, which is a general principle of EU law, the rules laid down by the Member States or contracting authorities in implementing the provisions of Directive 2014/24 must not go beyond what is necessary to achieve the objectives of that directive (judgments of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 45, and of 6 October 2021, *Conacee*, C-598/19, EU:C:2021:810, paragraph 42).
- 68 The exercise of the option provided for in the third subparagraph of Article 67(2) of Directive 2014/24 would infringe the principle of proportionality if a Member State decided to prohibit the use of price or cost as the sole award criterion for a type of public contract the nature of which is such that it proves impossible or excessively difficult to determine criteria that would allow for a qualitative differentiation between the works, supplies or services provided for in the tenderers’ bids.
- 69 In the present case, a rule such as that laid down by the Italian legislature, according to which public contracts for labour-intensive services must, even if they have ‘standardised characteristics’, be awarded on the basis of the criterion of the most economically advantageous tender according to the best price-quality ratio, appears, notwithstanding the fact that that rule covers services which are by nature not very technical, to be compatible with that directive and with the principle of proportionality.
- 70 As the Advocate General observed in point 56 of his Opinion, several qualitative aspects, such as the organisation and experience of the staff assigned to perform such services, may affect the quality of performance of the contracts and, as a result, the economic value of the tenders. In those circumstances, it is neither impossible nor excessively difficult to differentiate, from a qualitative point of view, between the services provided for in the tenderers’ bids.
- 71 That interpretation is not invalidated by the fact that contracting authorities to which national legislation such as that at issue in the main proceedings is addressed must include in their calls for tenders the rule that any reduction offered by a tenderer must relate solely to the remuneration for the services provided by that tenderer and not to the remuneration of the workers employed by that tenderer. Since it is provided for by law, that prohibition on offering a reduction which may lead to a reduction in the remuneration of the workers must be observed equally by all tenderers. Since such a prohibition does not allow for a comparison of tenders, it remains necessary, in the light of Article 67(4) of Directive 2014/24, which, read in conjunction with recital 90 of that directive, requires the establishment of award criteria ensuring the possibility of effective competition and therefore a comparison of tenders (see, to that effect, judgment of 20 September 2018, *Montte*, C-546/16, EU:C:2018:752, paragraph 31), to base the

award on criteria unrelated to that prohibition, which allow for a comparison of tenders. As is apparent from the preceding paragraph, the setting of criteria based on qualitative aspects may be appropriate for that purpose and therefore cannot be regarded as disproportionate.

- 72 In the light of all the foregoing considerations, the answer to the question referred is that Article 67(2) of Directive 2014/24 and the principle of proportionality must be interpreted as not precluding national legislation under which, in the case of public contracts for services with standardised characteristics but for which labour costs are at least half of the total value, the contracting authority is prohibited from using price as the sole criterion for the award of such contracts. It is irrelevant in that regard that the call for tenders provides that any reduction offered by a tenderer must apply solely to the remuneration for those services without leading to a reduction in the remuneration of the workers employed by that tenderer.

Costs

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

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

Article 67(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC and the principle of proportionality

must be interpreted as not precluding national legislation under which, in the case of public contracts for services with standardised characteristics but for which labour costs are at least half of the total value, the contracting authority is prohibited from using price as the sole criterion for the award of such contracts. It is irrelevant in that regard that the call for tenders provides that any reduction offered by a tenderer must apply solely to the remuneration for those services without leading to a reduction in the remuneration of the workers employed by that tenderer.

[Signatures]