Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

14 January 2021 *

(Reference for a preliminary ruling – Public procurement contracts – Directive 2014/24/EU – Article 57(6) – Optional grounds for exclusion – Measures taken by the economic operator to demonstrate its reliability despite the existence of an optional ground for exclusion – Obligation of the economic operator to provide evidence of such measures on its own initiative – Direct effect)

In Case C-387/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Raad van State (Council of State, Belgium), made by decision of 7 May 2019, received at the Court on 17 May 2019, in the proceedings

RTS infra BVBA,

Aannemingsbedrijf Norré-Behaegel BVBA

v

Vlaams Gewest,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby (Rapporteur), S. Rodin and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– RTS infra BVBA and Aannemingsbedrijf Norré-Behaegel BVBA, by J. Goethals, advocaat,

– the Belgian Government, by J.-C. Halleux and by L. Van den Broeck and C. Pochet, acting as Agents, and by F. Judo and N. Goethals, advocaten,

* Language of the case: Dutch.

– the Estonian Government, by N. Grünberg, acting as Agent,

– the Hungarian Government, by M. Z. Fehér, acting as Agent,

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

– the European Commission, by L. Haasbeek and by P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 57(4),(6) and (7) 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) 2015/2170 of 24 November 2015 (OJ 2015 L 307, p. 5), ('Directive 2014/24').

2 The request has been made in proceedings between RTS infra BVBA and Aannemingsbedrijf Norré-Behaegel BVBA and the Vlaams Gewest (Flemish Region, Belgium) concerning the latter's decision to exclude those two companies from a public procurement procedure.

Legal context

EU law

Directive 2014/24

3 Recital 102 of Directive 2014/24 states:

'Allowance should … be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.'

4 Article 18 of that directive, headed ‘Principles of procurement’, provides in paragraph 1 thereof:

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

…’

5 Article 57 of that directive, entitled ‘Exclusion grounds’, provides in paragraphs 4 to 7 thereof:

‘ 4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

…

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

…

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; …

…

5. …

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.'

6 Article 59 of that directive, entitled 'European Single Procurement Document', provides in paragraphs 1 and 2:

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

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

…

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

…

2. The ESPD shall be drawn up on the basis of a standard form. The Commission shall establish that standard form, by means of implementing acts. …'

7 Article 69 of Directive 2014/24, entitled 'Abnormally low tenders', provides in paragraph 1:

'Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.'

8 Article 90(1) of Directive 2014/24 provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 18 April 2016 at the latest, while the first paragraph of Article 91 of that directive provides that

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) is repealed with effect from 18 April 2016.

Implementing Regulation (EU) 2016/7

9 Annex 2, Part III, C, to Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (OJ 2016 L 3, p. 16) contains, inter alia, the following two headings:

‘ …	…
Is the economic operator guilty of grave professional misconduct … ? If yes, please provide details:	[] Yes [] No [……] If yes, has the economic operator taken self-cleaning measures? [] Yes [] No If it has, please describe the measures taken: [……]
…	…
Has the economic operator experienced that a prior public contract, a prior contract with a contracting entity or a prior concession contract was terminated early, or that damages or other comparable sanctions were imposed in connection with that prior contract? If yes, please provide details:	[] Yes [] No [……] If yes, has the economic operator taken self-cleaning measures? [] Yes [] No If it has, please describe the measures taken: [……]
…	…’

Belgian law

10 Article 61(2)(4) of the koninklijk besluit van 15 juli 2011 plaatsing overheidsopdrachten klassieke sectoren (Royal Decree of 15 July 2011 on the award of public contracts in traditional sectors) (*Belgisch Staatsblad* of 9 August 2011, p. 44862), in the version applicable to the dispute in the main proceedings, provides:

‘In accordance with Article 20 of the Law [of 15 June 2006 on public procurement and certain works, supply and service contracts (Wet van 15 juni 2006 overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten, *Belgisch Staatsblad* of 15 February 2007, p. 7355)], a candidate or tenderer may be excluded from the procedure at any time:

…

4) if it has been guilty of grave professional misconduct;

…’

11 Article 70 of the wet van 17 juni 2016 inzake overheidsopdrachten (Law of 17 June 2016 on public procurement) (*Belgisch Staatsblad* of 14 July 2016, p. 44219), which entered into force on 30 June 2017 ('the Law of 17 June 2016'), provides:

'Any candidate or tenderer who is in one of the situations referred to in Articles 67 or 69 may provide evidence to show that the measures it has taken are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If the contracting authority considers that evidence to be sufficient, the candidate or tenderer concerned shall not be excluded from the award procedure.

To that end, the candidate or tenderer shall prove on its own initiative that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, has clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.'

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

12 By contract notice published on 11 May 2016 in the *Bulletin der Aanbestedingen* (Public Procurement Bulletin) and on 13 May 2016 in the *Official Journal of the European Union*, the afdeling Wegen en Verkeer Oost-Vlaanderen (Department of Roads and Traffic of East Flanders, Belgium) of the Agentschap Wegen en Verkeer van het Vlaamse gewest (Agency for Roads and Traffic of the Flemish Region, Belgium) launched a public call for tenders for a works contract concerning the remodelling of the Nieuwe Steenweg (N60) junction and the access and exit spurs to and from the E17 in De Pinte. The contract notice referred in particular to the grounds for exclusion under Article 61(1) and (2) of the Royal Decree of 15 July 2011 on the award of public contracts in traditional sectors, in the version applicable to the main proceedings, which included 'grave professional misconduct'.

13 Following the submission of six tenders, including that of the applicants in the main proceedings, the Flemish Region, by decision of 13 October 2016, excluded the applicants from access to the procedure and awarded the contract to the undertaking which had submitted the economically most advantageous tender in order.

14 The Flemish Region justified the exclusion of the applicants in the main proceedings on the ground that, in the context of the performance of earlier contracts awarded by the same contracting authority as in the main proceedings, they had committed acts of 'grave professional misconduct' which had, for the most part, been the subject of penalties and which concerned aspects that were important for the performance of the contract for which they were now tendering. In that context, the Flemish Region took the view that the serious and repeated contractual breaches by the applicants in the main proceedings raised doubts and uncertainties as to their ability to ensure the proper performance of the new contract.

15 The applicants in the main proceedings brought an action before the referring court seeking the annulment of the decision of 13 October 2016. They submit in that regard that, before being excluded on the grounds of alleged grave professional misconduct, they should have had been afforded the opportunity to defend themselves in that regard and to demonstrate that they had remedied the consequences of that misconduct by taking appropriate corrective measures, as provided for in Article 57(6) of Directive 2014/24, which is directly effective.

16 The contracting authority disputes the assertion that Article 57 of Directive 2014/24 can be regarded as being directly effective. The contracting authority also submits that, although it did not enter into force until 30 June 2017, that is to say, after the adoption of the decision of 13 October 2016, the Law of 17 June 2016 provides specifically, in Article 70 thereof, that the economic operator concerned must declare the corrective measures taken on its own initiative. Since Directive 2014/24 does not contain any provision prescribing the time of manner in which evidence of corrective measures should be provided, the contracting authority seeks to rely, in such circumstances, on Article 70 of the Law of 17 June 2016.

17 In order to be able to assess the merits of the action brought before it, the referring court asks whether Article 57(4), (6) and (7) of Directive 2014/24 precludes an economic operator from being excluded from a procurement procedure for grave professional misconduct without first having been invited by the contracting authority or the tender specifications to provide evidence that it remains reliable despite that misconduct.

18 The court notes that, in so far as the classification of the grave professional misconduct alleged against the tenderer concerned is a matter for the discretion of the contracting authority, that classification may prove unforeseeable for the tenderer. Furthermore, according to the referring court, tenderers would not be inclined to engage in a form of self-accusation by providing a list of failures that could possibly be classified by the contracting authority as 'grave misconduct'. Ensuring an adversarial procedure could therefore favour competition in the procurement procedure. On the other hand, the referring court submits that leaving it to the tenderer to provide evidence of the corrective measures taken would allow greater transparency, particularly since that operator knows, because of the maximum duration of exclusion, the period of time during which it must, on its own initiative, report the corrective measures.

19 If the answer to the first question is in the affirmative, the referring court also wishes to know whether the abovementioned provisions of Directive 2014/24 have direct effect. In particular, the referring court is uncertain whether certain elements of those provisions constitute, in relation to self-cleaning, minimum guarantees which allow them to be classified as 'sufficiently precise and unconditional' to confer direct effect on them.

20 In those circumstances, the Raad van State (Council of State, Belgium) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1) Should the provisions of Article 57(4)(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of Directive 2014/24 … be interpreted as precluding an application whereby the economic operator is required to provide evidence on its own initiative of the measures that the economic operator has taken to demonstrate its reliability?

2) If so, do the provisions of Article 57(4)(c) and (g), in conjunction with paragraphs 6 and 7 of that article, of [Directive 2014/24] therefore have direct effect?'

The questions referred

Preliminary observations

21 As a preliminary point, it should be noted that, given that the provisions of Article 57(6) of Directive 2014/24, the interpretation of which is sought, do not correspond to any provision in the EU legislation applicable to public procurement until the date of adoption and entry into force of that directive, the questions referred for a preliminary ruling can be relevant only if that directive is applicable to the situation at issue in the main proceedings. The referring court is of the view that this is the case because the publication of the contract notice on 11 and 13 May 2016 took place after 18 April 2016, the date on which, in accordance with Articles 90 and 91 thereof, Directive 2014/24, first, should have been transposed by the Member States and, second, repealed Directive 2004/18.

22 Nevertheless, it is apparent from the documents before the Court that that contract notice was preceded by a prior information notice, which was published on 17 October 2015, the date on which Directive 2004/18 was still applicable.

23 In that regard, it is apparent from settled case-law that the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether a prior call for competition needs to be issued for the award of a public contract. Conversely, the provisions of a directive are not applicable if the period prescribed for its transposition expired after that date (judgment of 27 November 2019, *Tedeschi and Consorzio Stabile Istant Service*, C-402/18, EU:C:2019:1023, paragraph 29 and the case-law cited).

24 In the present case, in view of the fact that the prior information notice was published before the deadline for transposing Directive 2014/24, whereas the contract notice was published after that date, it is for the referring court to ascertain on which date the contracting authority chose the type of procedure which it intended to follow and decided definitively whether or not there was an obligation to issue a prior call for competition for the award of the public contract at issue in the main proceedings.

The first question

25 By its first question, the referring court asks, in essence, whether Article 57(6) of Directive 2014/24 must be interpreted as precluding a practice of a Member State whereby the economic operator concerned is required, at the time of submission of their requests to participate or of their tenders in a public procurement procedure, to provide voluntarily evidence of the corrective measures taken to demonstrate its reliability despite the existence, in respect of that operator, of an optional ground for exclusion referred to in Article 57(4) of that directive, where such an obligation does not arise either from the applicable national rules or from the tender specifications.

26 In that regard, it should be recalled, in the first place, that, under Article 57(6) of Directive 2014/24, any tenderer which is concerned, in particular, by one of the optional grounds for exclusion referred to in Article 57(4) of that directive may provide evidence to show that the measures which it has taken are sufficient to demonstrate its reliability, it being specified that, if that evidence is deemed sufficient, the economic operator concerned may not be excluded from the procurement procedure for that reason. That provision thus introduces a ‘self-cleaning’

mechanism by conferring on tenderers a right which the Member States must guarantee when transposing that directive, in compliance with the conditions laid down by the directive (see, by analogy, as regards Article 38(9) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), which is equivalent to Article 57(6) of Directive 2014/24, judgment of 11 June 2020, *Vert Marine*, C-472/19, EU:C:2020:468, paragraphs 16 and 17).

27 It should be noted that neither the wording of Article 57(6) of Directive 2014/24 nor recital 102 of that directive specifies how or at what stage of the procurement procedure the evidence of corrective measures can be provided.

28 In those circumstances, it should be noted that, having regard solely to the wording of Article 57(6) of Directive 2014/24, the possibility for tenderers to provide evidence of the corrective measures taken may just as well be exercised on their own initiative or on the initiative of the contracting authority, as well as at the time of submission of requests to participate or of tenders or at a later stage of the procedure.

29 That interpretation is supported by the objective pursued in Article 57(6) of Directive 2014/24. By providing that an economic operator must be able to provide evidence of the corrective measures taken, that provision seeks to underline the importance attaching to the reliability of economic operators and to ensure an objective assessment of economic operators and to ensure effective competition (see, by analogy, judgment of 11 June 2020, *Vert Marine*, C-472/19, EU:C:2020:468, paragraph 22). That objective can be achieved where evidence of corrective measures is provided at any stage of the procedure preceding the adoption of the award decision, the key point being that the economic operator must have the opportunity to put forward and to have examined the measures which, in its view, enable a ground for exclusion concerning it to be remedied.

30 That interpretation is also supported by the context of Article 57(6) of Directive 2014/24. In that regard, it should be borne in mind that, in accordance with Article 57(7) of that directive, the implementing conditions for that article and, furthermore, Article 57(6) of that directive must be specified by the Member States having regard to EU law. Within the framework of the discretion the latter enjoy when determining the procedural terms and conditions of Article 57(6) of that directive (see, by analogy, judgment of 11 June 2020, *Vert Marine*, C-472/19, EU:C:2020:468, paragraph 23), the Member States may provide that evidence of corrective measures must be provided voluntarily by the economic operator concerned at the time of submission of their requests to participate or of their tenders, just as they may also provide that such evidence may be adduced after that economic operator has been formally invited to do so by the contracting authority at a later stage of the procedure.

31 That discretion of the Member States is, however, without prejudice to the provisions of Directive 2014/24 which provide that operators may voluntarily provide evidence of corrective measures at the time of submission of their requests to participate in the public procurement procedure or of their tenders. As the Advocate General observed, in essence, in point 49 of his Opinion, Article 59(1)(a) of Directive 2014/24 provides that the contracting authorities must accept, when submitting such requests or such tenders, the ESPD, by means of which the economic operator declares on its honour that it is concerned by a ground for exclusion and has taken self-cleaning measures, subject to subsequent verification.

32 That said, the provisions in Article 59 of Directive 2014/24, relating to the ESPD, do not preclude Member States from deciding, in the context of the discretion referred to in paragraph 30 of the present judgment, to leave to the contracting authority the initiative to request evidence of corrective measures after the request to participate or the tender has been submitted, even if the request to participate or the tender is accompanied by an ESPD.

33 It is apparent from the textual, teleological and contextual interpretation of Article 57(6) of Directive 2014/24, as set out in paragraphs 27 to 30 of the present judgment, that that provision does not preclude the economic operator concerned from providing evidence of corrective measures on its own initiative or at the express request of the contracting authority, or from that evidence being provided at the time of submission of requests to participate or of tenders, or at a later stage of the procurement procedure.

34 In the second place, it should be noted that, as is apparent from Article 57(7) of Directive 2014/24, the Member States are required, when determining the implementing conditions for Article 57, to comply with EU law. In particular, they must observe not only the principles for the award of contracts set out in Article 18 of Directive 2014/24, which include, inter alia, the principles of equal treatment, transparency and proportionality, but also the principle of respect for the rights of the defence which, as a fundamental principle of EU law, of which the right to be heard in any procedure is an integral part, is applicable where the authorities are minded to adopt a measure which will adversely affect an individual, such as an exclusion decision adopted in the context of a public procurement procedure (judgment of 20 December 2017, *Prequ' Italia*, C-276/16, EU:C:2017:1010, paragraphs 45 and 46 and the case-law cited).

35 In those circumstances, it should be recalled at the outset, first, that, in accordance with the principle of transparency, all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way (judgment of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 40 and the case-law cited). Second, the principle of equal treatment requires tenderers interested in a public contract to be afforded equality of opportunity when formulating their tenders, to be made aware of the exact constraints of the procedure and to be in fact assured that all tenderers are subject to the same conditions (judgment of 14 December 2016, *Connexxion Taxi Services*, C-171/15, EU:C:2016:948, paragraph 39 and the case-law cited).

36 It follows that, where a Member State provides that evidence of corrective measures can be provided only voluntarily by the economic operator at the time of submission of requests to participate or of tenders, without that operator having the opportunity to provide such evidence at a later stage of the procedure, the principles of transparency and equal treatment require, as the Advocate General observed, in essence, in points 66 and 67 of his Opinion, that economic operators be openly informed in advance, in a clear, precise and unequivocal manner, of the existence of such an obligation, whether that information results directly from the tender specifications or from a reference in those documents to the relevant national rules.

37 Next, the right to be heard means that, as the Advocate General observed, in essence, in points 90 and 91 of his Opinion, those economic operators must be in a position to make known their views effectively in that request or in that tender, to identify, by themselves, the grounds for exclusion which may be relied on against them by the contracting authority in the light of the information contained in the tender specifications and the national rules on that subject.

38 Lastly, in so far as it does not constitute an unreasonable obstacle to the exercise of the system of corrective measures, the obligation on tenderers to voluntarily provide evidence of corrective measures in their request to participate or in their tender is, since it is exercised under the conditions set out in paragraphs 36 and 37 of the present judgment, consistent with the principle of proportionality, under which the rules laid down by the Member States or contracting authorities in the context of the implementation of the provisions of Directive 2014/24, such as the rules intended to specify the implementing conditions for Article 57 of that directive, must not go beyond what is necessary to achieve the objectives of that directive (see, to that effect, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 45 and the case-law cited).

39 In the present case, it should be noted, as the referring court points out, that, although the Kingdom of Belgium transposed into its national law, by means of Article 70 of the Law of 17 June 2016, Article 57(6) of Directive 2014/24, specifying that evidence of corrective measures must be provided on the initiative of the economic operator, that law had not entered into force on the date of publication of the contract notice or even on the date of submission of the applicants' tender in the main proceedings. Furthermore, it is apparent from the documents before the Court that, although they referred to the grounds for exclusion laid down by the national legislation in force at the time, the tender specifications did not expressly state that such evidence had to be provided voluntarily by the economic operator concerned.

40 In those circumstances, and without prejudice to the obligation on the applicants in the main proceedings, in accordance with the requirements of transparency and fairness, to inform the contracting authority of the grave professional misconduct that they had committed in the context of the performance of earlier contracts awarded by the same contracting authority, those applicants could reasonably expect, solely on the basis of Article 57(6) of Directive 2014/24, that they would subsequently be invited by the contracting authority to provide evidence of the corrective measures taken to remedy any optional ground for exclusion which that authority may have identified.

41 It is also apparent from paragraphs 34 to 37 of the judgment of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93* (C-267/18, EU:C:2019:826), which relates to national legislation which did not specify whether evidence of corrective measures had to be provided voluntarily by the economic operator or at what stage of the procedure it should be provided, that, although it is for economic operators to inform the contracting authority, upon submission of their request to participate or their tender, of the termination of a previous contract on grounds of serious deficiency, the contracting authority, where it concludes that there is a ground for exclusion arising from such termination or from the withholding of information relating to such termination, must nevertheless give the operators concerned the possibility of providing evidence of the corrective measures taken.

42 In the light of the foregoing considerations, the answer to the first question referred is that Article 57(6) of Directive 2014/24 must be interpreted as precluding a practice whereby an economic operator is required, at the time of submission of their requests to participate or of their tenders, to provide voluntarily evidence of the corrective measures taken to demonstrate its reliability despite the existence, in respect of that operator, of an optional ground for exclusion referred to in Article 57(4) of that directive, where such an obligation does not arise either from the applicable national rules or from the tender specifications. By contrast, Article 57(6) of that directive does not preclude such an obligation where it is laid down in a clear, precise and unequivocal manner in the applicable national rules and is brought to the attention of the economic operator concerned by means of the tender specifications.

The second question

43 By its second question, the referring court asks, in essence, whether Article 57(6) of Directive 2014/24 must be interpreted as having direct effect.

44 In that regard, it is settled case-law that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the Member State concerned where that state has failed to transpose the directive into national law within the time limit or has transposed it incorrectly (judgment of 13 February 2019, *Human Operator*, C-434/17, EU:C:2019:112, paragraph 38).

45 In the present case, it should be noted that, as is apparent, in essence, from the order for reference, the Law of 17 June 2016 intended to transpose Directive 2014/24 into Belgian law did not enter into force until 30 June 2017, that is to say, after the expiry of the period for transposition of that directive, namely 18 April 2016. Therefore, the question of the direct effect of Article 57(6) of that directive is relevant.

46 The Court has stated that a provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States and, second, sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms (judgment of 1 July 2010, *Gassmayr*, C-194/08, EU:C:2010:386, paragraph 45 and the case-law cited).

47 Furthermore, the Court has held that even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it (see, to that effect, judgments of 5 October 2004, *Pfeiffer and Others*, C-397/01 à C-403/01, EU:C:2004:584, paragraphs 104 and105, and of 14 October 2010, *Fuß*, C-243/09, EU:C:2010:609, paragraphs 57 and 58).

48 In the present case, it must be held that, by providing that any tenderer may provide evidence to show that the measures it has taken are sufficient to demonstrate its reliability despite the existence of a ground for exclusion concerning that tenderer, Article 57(6) of Directive 2014/24 confers on tenderers a right which, first, is formulated in unequivocal terms and, second, places on the Member States an obligation as to the result to be achieved which, although its material and procedural conditions of application must be adopted by the Member States pursuant to Article 57(7) of that directive, is not dependent on transposition into national law in order to be invoked by the economic operator concerned and applied to its benefit.

49 Irrespective of the specific rules for the application of Article 57(6) of Directive 2014/24, that provision provides in a sufficiently precise and unconditional manner, within the meaning of the case-law cited in paragraph 46 of the present judgment, that the economic operator concerned cannot be excluded from the procurement procedure if it is able to establish, to the satisfaction of the contracting authority, that the corrective measures taken restore its reliability despite the existence of a ground for exclusion concerning that operator. Consequently, Article 57(6) of that directive provides, for the benefit of that economic operator, a minimum level of protection irrespective of the margin of discretion left to Member States in determining the procedural

conditions of that provision (see, to that effect, judgments of 14 July 1994, *Faccini Dori*, C-91/92, EU:C:1994:292, paragraph 17, and of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 105). That is all the more true given that, as the Advocate General observed, in essence, in point 102 of his Opinion, Article 57(6) of that directive lays down the fundamental elements of the system of corrective measures and the right conferred on the economic operator by indicating the minimum elements to be proved and the assessment criteria to be met.

50 In the light of the foregoing considerations, the answer to the second question referred is that Article 57(6) of Directive 2014/24 must be interpreted as having direct effect.

Costs

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

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

1. **Article 57(6) 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, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015, must be interpreted as precluding a practice whereby an economic operator is required, at the time of submission of their requests to participate or of their tenders, to provide voluntarily evidence of the corrective measures taken to demonstrate its reliability despite the existence, in respect of that operator, of an optional ground for exclusion referred to in Article 57(4) of that directive, as amended by Delegated Regulation 2015/2170, where such an obligation does not arise either from the applicable national rules or from the tender specifications. By contrast, Article 57(6) of that directive, as amended by Delegated Regulation 2015/2170, does not preclude such an obligation where it is laid down in a clear, precise and unequivocal manner in the applicable national rules and is brought to the attention of the economic operator concerned by means of the tender specifications.**

2. **Article 57(6) of Directive 2014/24, as amended by Delegated Regulation 2015/2170, must be interpreted as having direct effect.**

[Signatures]