Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 22 November 2017 [1]

Case C-531/16

Šiaulių regiono atliekų tvarkymo centras,
'Ecoservice projektai' UAB, formerly 'Specializuotas transportas' UAB
interveners:
'VSA Vilnius' UAB,
'Švarinta' UAB,
'Specialus autotransportas' UAB,
'Ecoservice' UAB

(Request for a preliminary ruling
from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania))

(Preliminary ruling — Directive 2004/18/EC — Procedures for the award of public works contracts, public supply contracts and public service contracts — Equal treatment — Transparency — Genuine competition between tenderers — Links between tenderers which submit separate tenders in the same procedure — Duty to disclose links between tenderers — Obligations of the contracting authority and the national court)

1. When two or more related tenderers submit tenders in procedures for the award of public contracts, the suspicion may arise that they are acting in a coordinated (or even collusive) way, to the detriment of transparency and other rules or principles of EU law by which such procedures must be governed.

2. That is the context of the questions referred for a preliminary ruling by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), in view of the fact that two subsidiaries of a third company sought, inter alia, to win the contract for collection and transportation of waste in a Lithuanian municipality.

3. By its questions the referring court seeks to ascertain, in short, whether, even in the absence of a specific legislative provision, those tenderers are obliged to disclose the connections between them to the contracting authority and how the contracting authority must act when it has evidence of the existence of those connections.

4. The reference for a preliminary ruling therefore provides the Court with the opportunity to supplement its case-law on the principles of equal treatment and transparency in procedures governed by Directive 2004/18/EC, [2] where participants in those procedures belong to the same group of companies.

1 Original language: Spanish.

2 Directive 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).

I. Legislative framework

A. EU law

1. Directive 2004/18

5. Recital 46 states:

'Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition ...'

6. In accordance with Article 2:

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

7. According to Article 45(2):

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

(a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations;

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

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

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

(f) has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority;

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

2. Directive 89/665/EEC[3]

8. The third subparagraph of Article 1(1) provides:

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

9. Article 2(1)(b) stipulates:

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

…

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

B. National law

1. Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on Public Contracts)[4]

10. Pursuant to Article 3(1):

'The contracting authority shall ensure that, during procedures relating to procurement and the award of contracts, the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency are observed.'

2. Lietuvos Respublikos konkurencijos įstatymas (Law of the Republic of Lithuania on Competition)[5]

11. In accordance with Article 3(14):

'"group of related economic operators" [means] two or more economic operators which, in so far as they are controlled or owned by each other and are in a position to engage in concerted action, are deemed to form a single economic operator for the purposes of calculating their gross revenue and market share. Unless there is evidence to the contrary, a group of related economic operators will be deemed to be formed by every economic operator concerned and

…

3 Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and No 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

4 Law of 13 August 1996 (Žin., 1996, No 84-2000).

5 Law of 23 March 1999 (Žin., 1999, No 30-856).

(2) economic operators which are jointly managed with it or which share administrative services with it and whose supervisory board, board of directors or other management body is composed, as to at least half, of the same members as those of the economic operator concerned;

(3) economic operators in which the economic operator concerned holds at least one third of the capital or one third of all the voting rights or which have a duty to coordinate their financial decisions with it, are answerable to it for the fulfilment of their obligations to third parties, are required to transfer to it all or part of their profits or have authorised it to use at least one third of their assets;

…'

12. Article 5(1) reads:

'1. Agreements the purpose of which is to restrict competition or which restrict or are liable to restrict competition are prohibited and shall be void from the time of their conclusion, in particular:

(1) agreements which directly or indirectly fix the price of certain goods or other conditions of purchase or sale;

…'

II. Facts

13. On 9 July 2015, the Viešoji įstaiga Šiaulių regiono atliekų tvarkymo centras (the Centre for Waste Management for the Region of Šiauliai; 'the waste management centre') announced a call for tenders for the provision of municipal waste collection and transportation services in the municipality of Šiauliai.

14. According to the information in the order for reference, the invitation to tender prohibited tenderers from submitting variants of their tenders. [6]

15. Four tenderers submitted tenders:

(A) Specialus autotransportas UAB ('tenderer A').

(B) Specializuotas transportas UAB ('tenderer B').

(C) Ekonovus UAB.

(D) Commercial group VSA Vilnius UAB ('VSA Vilnius') and Švarinta UAB.

16. Tenderers A and B are subsidiaries of Ecoservice UAB ('Ecoservice'). [7]

6 Clause 39 of the tender specifications, which contained that prohibition, is transcribed in tenderer B's written observations (point 34).

7 According to the order for reference (paragraph 10 of the French version), the parent company holds 100% and 98.12%, respectively, of the shares in tenderers A and B, whose boards of directors are made up of the same persons.

17. Along with its tender,[8] tenderer B voluntarily submitted a declaration of honour to the effect that it was taking part in the call for tenders on an autonomous basis and independently of any other economic operators which might be connected to it, and it requested the waste management centre to treat all other persons as competitors. It further stated that it undertook, should it be so required, to provide a list of economic operators connected to it.

18. The waste management centre rejected tenderer A's tender on the ground that it did not comply with one of the conditions set out in the tender specifications;[9] tenderer A did not contest that decision.[10]

19. The contract was ultimately awarded to tenderer B.

20. VSA Vilnius submitted a complaint, arguing that the tenders submitted by tenderers A and B had not been properly evaluated and that the principles of transparency and equality before the law had been infringed.

21. Following the rejection of its complaint, VSA Vilnius brought an action[11] which was essentially upheld by the Šiaulių apygardos teismas (Regional Court, Šiauliai, Lithuania) by judgment of 18 January 2016; that judgment was confirmed by the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) by order of 5 April 2016.

22. The waste management centre and tenderer B appealed in cassation to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), which has made this reference for a preliminary ruling.

III. The questions referred

23. The questions are worded as follows:

'(1) Must the free movement of persons and services set out, respectively, in Articles 45 TFEU and 56 TFEU, the principles of equality of tenderers and of transparency set out in Article 2 of Directive 2004/18 and the principle, which flows from the aforementioned principles, of free and fair competition between economic operators (together or separately, but without limitation to those provisions) be understood and interpreted as meaning that:

if related tenderers, whose economic, management, financial or other links may give rise to doubts as to their independence and the protection of confidential information and/or may provide the preconditions (potential) for them to have an advantage over other tenderers, have decided to submit separate (independent) tenders in the same public procurement procedure, are they, in any event, under a duty to disclose those links between them to the contracting authority, even if the contracting authority does not inquire of them separately, irrespective of whether or not the national legal rules governing public procurement state that such a duty does in fact exist?

8 In it, tenderer B referred to a subcontractor which is also a subsidiary of Ecoservice and whose board of directors comprises the same natural persons as the boards of tenderers A and B.

9 Specifically, that it did not satisfy the requirement that, for the purpose of providing the service, specific vehicles would be used whose engines were compliant with at least the Euro 5 standard.

10 However, subsequently, when the court of first instance allowed an action brought by an independent tenderer, tenderer A appealed against that judgment.

11 VSA Vilnius contended in its action that, as subsidiaries of Ecoservice, tenderers A and B had to be regarded as related undertakings within the meaning of Article 3(14) of the Law on Competition and that their tenders had to be treated as variants. It further argued that those companies had not participated in the tendering procedure in conditions of genuine competition and had acted in collusion. In view of the fact that variants were prohibited under the tendering conditions, it argued that the tenders submitted by tenderers A and B should be rejected.

(2) If the answer to the first question:

(a) is in the affirmative (that is to say, tenderers must in any event disclose their links to the contracting authority), is the circumstance that that duty was not complied with in such a case, or that it was not properly complied with, sufficient for the contracting authority to take the view, or for a review body (court) to decide, that related tenderers which have submitted separate tenders in the same public procurement procedure are participating without being genuinely in competition (and are engaged in a pretence of competition)?

(b) is in the negative (that is to say, tenderers do not have any additional duty — which is not laid down in legislation or in the tendering conditions — to disclose their links), must the risk posed by participation of related economic operators and the risk of the consequences flowing from this then be borne by the contracting authority, if the contracting authority did not indicate in the public tendering documentation that tenderers were under such a duty of disclosure?

(3) Irrespective of the answer to the first question, and having regard to the judgment of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166), must the provisions of law referred to in the first question and the third subparagraph of Article 1(1) of Directive 89/665 and Article 2(1)(b) of that directive (together or separately, but without limitation to those provisions) be understood and interpreted as meaning that:

(a) if, in the course of the public procurement procedure, it becomes clear, in whatever way, to the contracting authority that significant links (connections) exist between certain tenderers, that contracting authority must, irrespective of its own assessment of that fact and (or) of other circumstances (for example, the formal and substantive dissimilarity of the tenders submitted by the tenderers, the public commitment given by a tenderer to engage in fair competition with other tenderers, and so forth), separately address the related tenderers and request them to clarify whether and how their personal situation is compatible with free and fair competition between tenderers?

(b) if the contracting authority has such a duty but fails to discharge it, is there a sufficient basis for the court to declare the actions of that contracting authority to be unlawful, as having failed to ensure procedural transparency and objectivity, and as having failed to request evidence from the applicant or having failed to take a decision, on its own initiative, as to the possible influence that the personal situation of related persons might have on the outcome of the tendering procedure?

(4) Must the legal provisions referred to in the third question and Article 101(1) TFEU (together or separately, but without limitation to those provisions), be understood and interpreted, in the light of the judgments of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166), of 21 January 2016, *Eturas and Others* (C-74/14, EU:C:2016:42), and of 21 July 2016, *VM Remonts and Others* (C-542/14, EU:C:2016:578), as meaning that:

(a) where a tenderer (the applicant) has become aware of the rejection of the lowest-priced tender submitted by one of two related tenderers in a public tendering procedure (tenderer A) and of the fact that the other tenderer (tenderer B) has been declared the successful tenderer, and also having regard to other circumstances connected with those tenderers and their participation in the tendering procedure (the fact that tenderers A and B have the same board of directors; the fact that they have the same parent company, which did not take part in the tendering procedure; the fact that tenderers A and B did not disclose their links to the contracting authority and did not separately provide additional clarifications as to those links, *inter alia* because no inquiries had been made of them; the fact that tenderer A provided, in its tender, inconsistent information on the compliance by the proposed means of transport

(refuse lorries) with the EURO V condition of the call for tenders; the fact that that tenderer, which submitted the lowest-priced tender, which was rejected because of deficiencies identified in it, first, did not challenge the contracting authority's decision and, second, lodged an appeal against the judgment of the court of first instance, in which appeal, *inter alia*, it [challenged] the lawfulness of the rejection of its tender; etc.), and where, in respect of all of those circumstances, the contracting authority did not take any action, is that information alone sufficient to found a claim addressed to the review body that it should regard as unlawful the actions of the contracting authority in failing to ensure procedural transparency and objectivity, and, in addition, in not requiring the applicant to provide concrete evidence that tenderers A and B were acting unfairly?

(b) tenderers A and B did not prove to the contracting authority that they were genuinely and fairly taking part in the public tendering procedure solely because tenderer B voluntarily submitted a declaration of genuine participation, the management quality standards for participating in public tendering were applied by tenderer B, and, in addition, the tenders submitted by those tenderers were not formally and substantively identical?

(5) Can the actions of mutually related economic operators (both of which are subsidiaries of the same company) which are participating separately in the same tendering procedure, the value of which reaches the value for international competitive tendering, and where the seat of the contracting authority which announced the tendering procedure and the place where the services are to be provided are not very far distant from another Member State (the Republic of Latvia), be in principle assessed — regard being had to, *inter alia*, the voluntary submission by one of those economic operators that it would be engaging in fair competition — under the provisions of Article 101 TFEU and the case-law of the Court of Justice which interprets those provisions?'

IV. Proceedings before the Court of Justice and the positions of the parties

24. The reference for a preliminary ruling was received by the Court Registry on 18 October 2016.

25. Written observations were lodged by the waste management centre, VSA Vilnius, Ecoservice projektai UAB (formerly tenderer B), the Lithuanian and Czech governments, and the Commission. It was not considered necessary to hold a hearing.

26. The waste management centre has not specifically stated its position on each of the five questions submitted by the referring court and has confined itself to stating that it was aware of the links between the tenderers as this was public knowledge and that at no time was it misled when it took its decisions.

27. The waste management centre submits that, quite apart from the relationship between the tenderers, which does not of itself imply an absence of competition, there are a number of objective factors in the instant case which enabled it to conclude that those tenderers were in competition with one another.

28. In relation to the first question, all the parties except VSA Vilnius propose a negative answer. They contend in short that neither the TFEU nor Directive 2004/18 preclude the submission of tenders by related undertakings or prohibit a tenderer from submitting more than one tender. Further, EU legislation does not provide for any process whereby operators are informed about the identities of other tenderers, which would enable tenderers to check if there are any links between other tenderers and notify these to the contracting authority. As regards the principles of transparency, equal treatment and non-discrimination, these principles cannot be interpreted as meaning that tenderers are under a duty to declare their mutual links on their own initiative, without prejudice to the duty to provide such information as the contracting authority may require from them.

29. VSA Vilnius, on the other hand, proposes an affirmative answer to Question 1, which leads it to consider the first situation referred to in Question 2. VSA Vilnius contends that it would be disproportionate if tenderers were unable to overturn the presumption of concerted action based on the fact that they failed to declare the links between them. However, their passivity or failure to provide information in that regard may be interpreted, in conjunction with other evidence or other additional proof, as establishing uncompetitive conduct.

30. In relation to the second situation referred to in Question 2, Ecoservice projektai and the Lithuanian Government favour an affirmative reply, drawing attention to the contracting authority's obligation to ensure substantive and not strictly formal compliance with the principles set out in Article 2 of Directive 2004/18.

31. VSA Vilnius maintains that the contracting authority is required to bear the risk of participation by related tenderers only if it becomes aware by other means of the existence of that relationship but does not take steps to examine the circumstances surrounding the participation of those tenderers.

32. The Commission submits that if the contracting authority is not able to prove that a tenderer has committed grave professional misconduct, it cannot prevent that tenderer from participating in the procedure.

33. The parties have examined Questions 3, 4 and 5 together.

34. Ecoservice projektai contends that the contracting authority only has to request information from tenderers if it has reasons to doubt that they are participating in the procedure in a competitive manner, without the circumstances referred to in Question 4 being sufficient for a declaration that the contracting authority's conduct is unlawful. Ecoservice projektai submits that Article 101 TFEU does not justify the examination of the acts of related operators which participate separately in the procedure.

35. VSA Vilnius puts forward the opposite view. VSA Vilnius argues, inter alia, that, according to the Court, contracting authorities must play an active role in the application of the principles which govern public procurement. That duty includes the duty to make enquiries of related operators about the form of their participation in the procedure, since, otherwise, the burden of proving their unfair conduct would rest, unreasonably, on the other tenderers. In VSA Vilnius' submission, the obligation to establish the existence of genuine competition lies with the related operators, without prejudice to the obligation of the contracting authority to demand that they dispel any doubts regarding the nature of their involvement in the procedure.

36. The Lithuanian Government submits that the contracting authority has a duty actively to check that the procedure is carried out transparently. In the case of related tenderers, the contracting authority has to verify whether that relationship affects the content of their respective tenders. If there is objective evidence capable of casting doubt on the transparency of the procedure, the contracting authority should examine all the relevant circumstances and, if appropriate, request information from the parties.

37. The Lithuanian Government further contends that, if steps to ensure transparency are not taken, the contracting authority's conduct will be illegal in two cases: where the contracting authority knew or could have known that two related tenderers might participate but fails to take steps to ensure that their respective tenders are separate, and where, despite having taken those steps, the contracting authority later finds that its action was not sufficient.

38. Lastly, the Lithuanian Government argues that it is apparent from the facts of the situation at issue that the related tenderers form an 'economic unit', with the result that Article 101 TFEU is not applicable.

39. In the Czech Government's submission, the mere existence of links between tenderers is not sufficient to justify their exclusion from the procedure. What matters is whether the links are liable to affect the outcome of the procedure, and this requires the contracting authority to examine the specific situation of the tenderers. Given that the protection of competition in the sphere of public contracts is guaranteed by secondary legislation, it is not necessary to rely on Article 101 TFEU.

40. The Commission observes that the information which a contracting authority may request from tenderers in accordance with Directive 2004/18 does not include a declaration of their links with other tenderers, although the contracting authority does have a duty to confirm that there are no reasons for exclusion. With regard to the case-law of the Court cited by the referring court in its third and fourth questions, the Commission submits that it is not relevant for the purposes of replying to the questions referred.

41. As concerns Article 101 TFEU, the Commission maintains that that article is not applicable to agreements or concerted practices between a parent company and its subsidiary, or between subsidiaries in the same group, and nor does it apply to a parent company which has a decisive influence on its subsidiaries. In the circumstances of the present dispute, subject to the decision adopted by the referring court, tenderers A and B constitute an economic unit, which rules out the application of that provision.

V. Assessment

42. The questions submitted by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) may be grouped together in the manner I suggested at the beginning of this Opinion:

– First (Questions 1 and 2), it is necessary to determine whether related tenderers which submit separate tenders are under a duty, in all cases, to disclose that relationship to the contracting authority and, if so, what the consequences of failure to do so are.

– Second (Questions 3, 4 and 5), it is necessary to establish how the contracting authority — and any court which reviews its actions — must proceed where it becomes aware of the existence of important links between certain tenderers.

A. The duty of tenderers to disclose their links with other tenderers to the contracting authority (Questions 1 and 2)

43. The referring court seeks to ascertain, first, whether related tenderers which participate in a procedure for the award of a public contract are under a duty to disclose that relationship 'even if the contracting authority does not inquire of them separately, irrespective of whether or not the national legal rules governing public procurement state that such a duty does in fact exist'.[12]

44. Of course, the presumption underlying the question — and, in general, the observations of the parties — is that it is not possible simply to prohibit related tenderers from submitting their own tenders in a procedure of that kind. The Court stated as much in the judgment in *Assitur*,[13] without there being any dispute about that presumption.

45. On that basis, the duty to disclose those links does not appear in Directive 2004/18 (or in the Lithuanian Law on public contracts), a matter on which all the parties are also agreed.

12 Question 1, second paragraph, *in fine*.

13 Judgment of 19 May 2009 (C-538/07, EU:C:2009:317, paragraph 28): 'it would run counter to the effective application of Community law to exclude systematically undertakings affiliated to one another from participating in the same procedure for the award of a public contract. Such a solution would considerably reduce competition at Community level'.

46. VSA Vilnius alone contends that that duty is imposed indirectly or implicitly by the need to overturn the presumption that, as a result of the lack of autonomy they entail, links between tenderers are liable to jeopardise the transparency of procurement procedures and distort competition.

47. From the outset, VSA Vilnius' position is faced with a serious obstacle, since the Court has specifically stated that 'the principles of transparency and equal treatment which govern all procedures for the award of public contracts require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those tenderers may know exactly the procedural requirements and be sure that the same requirements apply to all candidates'. [14]

48. A *requirement* (the alleged duty to declare links with other companies) which is not set out in the contract documents, is not provided for in national law and is not laid down in Directive 2004/18 does not pass the transparency test referred to by the Court. The reply to the first question must therefore be that, in the absence of an express legislative provision (of EU law or of national law), related tenderers are not under a duty to disclose the relationship between them to the contracting authority.

49. Is it possible to argue, in line with the argument put forward by VSA Vilnius, [15] that, although not explicit, that duty is apparent from the case-law of the Court on public contracts?

50. I do not believe so, for that case-law acknowledged that undertakings which are part of a group of undertakings may enjoy 'a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts' and be 'governed by specific provisions, for example, of a contractual nature, such as to guarantee both independence and confidentiality in the drawing-up of tenders to be submitted simultaneously … in the same tendering procedure.' [16]

51. In my view, it may be inferred from those assertions that, in the absence of an express provision which requires them to do so, where related undertakings are of the opinion that their tenders are separate, they do not necessarily have to disclose their corporate links to the contracting authority.

52. Further, if — hypothetically — the line of argument advanced by VSA Vilnius were accepted, the duty would not be derived from the inclusion in the contract documents of a '*clearly* defined condition', which is what the Court has required. It would, in those circumstances, be a duty which could be inferred to a greater or lesser extent from the interpretation of EU law and, therefore, would not necessarily be known to tenderers in general. [17]

53. The problem could, perhaps, be approached from another angle, in view of the fact that the tender specifications in this case specifically prohibited [18] the submission of alternative or 'variant' tenders by the same tenderer. [19]

14 Judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404, paragraph 37).

15 Point 18 of its written observations.

16 Judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317, paragraph 31).

17 The Court referred to the criterion of the reasonably well-informed tenderer acting with normal diligence in, for example, the judgment of 4 December 2003, *EVN and Wienstrom* (C-448/01, EU:C:2003:651, paragraph 57).

18 See point 14 of this Opinion. The national court refers to that prohibition in paragraph 18 of the order for reference (in the French version of that document).

19 On alternative or variant tenders, see, for example, Arrowsmith, S.; *The Law of Public Utilities Procurement*, vol. 1, Sweet & Maxwell, London, 3rd ed., 2014, 7-246 to 7-251.

54. Is it possible to infer from that prohibition that tenderers A and B were required to disclose the links between them to the contracting authority? Furthermore, were they under a duty to provide evidence that, notwithstanding their relationship, both tenders were separate and could not be regarded as variants? [20]

55. In fact, that clause of the tender specifications complies with Article 24(2) of Directive 2004/18, applicable to public service contracts, pursuant to which '[c]ontracting authorities shall indicate in the contract notice whether or not they authorise variants: variants shall not be authorised without this indication.' [21] It is appropriate to conclude, therefore, that alternative or variant tenders are prohibited in principle, [22] unless, in the case of certain contracts, the contracting authority allows them.

56. However, I find it difficult to agree that it is possible to infer from the prohibition on the submission of variants — both where it is set out in the tender specifications (as occurred in this case) and where it is not — an implicit duty that related tenderers must disclose their corporate links to the contracting authority.

57. At most, that prohibition requires related tenderers to establish that their tender is not a mere variant or alternative of another competitor's tender. Accordingly, it is not a question of fulfilling a general obligation to disclose the fact that they are related undertakings, since there is no obligation of that kind in EU law. Directive 2004/18 does not in principle prohibit related economic operators from participating in the same tendering procedure; it does so only where there is a 'real risk of occurrence of practices capable of jeopardising transparency and distorting competition between tenderers'. [23]

58. Following that line of reasoning, it is only in such extreme cases that the clause prohibiting variants laid down in the tender specifications would entail the need for tenderers to disclose the links between them to the contracting authority, in order to remove that risk.

59. However, few practical consequences for the outcome of the dispute can be derived from that line of interpretation of Directive 2004/18, for two reasons.

60. First, in its voluntary declaration of honour, tenderer B guaranteed that it would participate separately and independently of any other economic operators which might be linked to it, and it asked the waste management centre to treat all other tenderers as competitors. The fact that it did not refer expressly to tenderer A in that declaration is irrelevant for the present purposes, since, as the waste management centre has asserted, [24] the connection between the two companies was public knowledge. The important point, in my view, is that, in declaring that its tender was separate, tenderer B may be deemed to have been seeking to comply with the clause of the tender specifications which prohibited the submission of alternative tenders.

20 As Sánchez Graells, A., *Public Procurement and the EU Competition Rules*, Hart, Oxford, 2nd ed., 2015, p. 341, maintains, the basic rule in this area is the prohibition of multiple proposals by a single entity. A corollary of that rule is that that prohibition is extended to entities belonging to the same group.

21 According to paragraph 1 of that article, variants may be submitted only where the criterion for award of the contract is that of the most economically advantageous tender.

22 See Arrowsmith, S., *The Law of Public Utilities Procurement*, op. cit., 7-247.

23 Judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317, paragraph 30).

24 Second paragraph of its observations.

61. Second, the purpose of disclosure to the waste management centre would have been to ensure that the latter was aware of the corporate links between the tenderers so that it could scrutinise their tenders more closely and identify any concerted practices. Since, as has been stated, the waste management centre admits that, in this case, it was aware of those links because they were well known, and it concluded without difficulty that, through their tenders (which were different in content), both operators were genuinely in competition,[25] the disclosure was superfluous.

62. Quite apart from those specific circumstances, which are closely connected to the facts, I believe that, for the present purposes, that interpretation of Directive 2004/18 is rather convoluted, to the extent that it is not compatible with the clarity which the case-law of the Court requires of the definition of the substantive and procedural conditions relating to participation in tendering procedures.[26]

63. Accordingly, I suggest that the answer to Question 1 should be that Articles 45 TFEU and 56 TFEU and Article 2 of Directive 2004/18 should be interpreted as meaning that, in the absence of an express provision or specific requirement in the clauses governing the procedure, related tenderers which submit separate tenders are not under a duty to disclose their links to the contracting authority.

64. The reply to Question 2 follows from the reply to Question 1. In that same situation (no express provision or specific requirement in the clauses governing the procurement procedure), as the referring court states, 'the risk posed by participation of related economic operators and the risk of the consequences flowing from this [must] then be borne by the contracting authority'.

65. However, I would not refer to the *bearing of the risk* by the contracting authority but rather to the duty of the contracting authority to guarantee the equal treatment of tenderers and the transparency of the procedure. In discharging that duty, the contracting authority must ensure that the participation of related tenderers is not detrimental to other tenderers by distorting the competition required between all tenderers. According to the contracting authority itself, that is what occurred in this case.

B. The duties of the contracting authority where there is a relationship between tenderers (Questions 3, 4 and 5)

66. I agree with the Commission's view that Questions 3, 4 and 5 may be answered together, although the rewording I propose is not exactly the same as that proposed by the Commission.[27]

67. In my view, by those questions the referring court wishes to know whether, in circumstances such as those of the main proceedings, the contracting authority is under a duty to ask related tenderers to provide evidence that their situation does not run counter to the principle of competition. The question extends to whether inactivity on the part of the contracting authority would be sufficient for a declaration that its conduct in the procedure is unlawful.

68. As indicated above, it is not disputed that tenderers A and B were related operators or that, from the point of view of the waste management centre, that relationship was public knowledge (which is why it did not consider it necessary to ask them to make a declaration about the matter).

25 Fourth paragraph of its observations.

26 I refer again to the judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404, paragraph 37).

27 The Commission recommends that the three questions should be reworded to the effect that 'the national court seeks to ascertain whether Article 101 TFEU applies to this case and whether Article 101 TFEU (if it is applicable), the provisions of Directives 89/665/EC and 2004/18/EC and the case-law, in particular the judgments in *eVigilo*, *Eturas* and *VM Remonts*, are to be interpreted as meaning that the contracting authority must continue scrutinising the existence of links between two tenderers in the case examined by the national court' (point 42 of the Commission's observations).

69. Furthermore, all the indications are that the two tenderers, A and B, form an economic unit on account of the fact that they are subsidiaries of the same parent company, in circumstances from which it may be presumed that the latter exercises a decisive influence over both of them.[28] Since that is the case, it will be sufficient, as most of the parties have observed, to conclude that Article 101 TFEU is not applicable to this case.

70. It is well known that, in accordance with the case-law of the Court, that article does not apply where the agreements or practices it prohibits are carried out by undertakings which constitute an economic unit.[29]

71. In the area of tendering procedures, the aim is not so much to protect the (general) competition between independent operators in the internal market as to protect the (more specific) competition which must operate in procedures for the award of public contracts.[30] From that perspective, what really matters is the separateness of and *genuine* difference between the respective tenders (which will enable the contracting authority to choose the tender most favourable to public interests), whether the tenderers are independent or related economic operators. That is why, as the Czech Government states,[31] the protection of competition in tendering procedures must be sought, first, in secondary legislation; in this case, Directive 2004/18.[32]

72. The inapplicability of Article 101 TFEU to the instant case does not mean, however, that the case-law invoked by the referring court in its third and fourth questions is irrelevant.

73. Although *eVigilo*[33] concerned a conflict of interests between the contracting authority and the experts who had evaluated the tenders submitted, the Court made a statement of principle in that case which may be applied to the present case. The Court declared that, where there is objective evidence calling into question the impartiality of an expert, 'it is for that contracting authority to examine all the relevant circumstances having led to the adoption of the decision relating to the award of the contract in order to prevent and detect conflicts of interests and remedy them, including, where appropriate, requesting the parties to provide certain information and evidence.'[34]

74. The Court pointed out that that obligation is a consequence of the 'active role' assigned to the contracting authority for the purpose of applying the principles of public procurement, on account of the duty to treat economic operators equally and to act in a transparent way, as required by Article 2 of Directive 2004/18.[35] The Court observed that that duty 'relates to the very essence of the public procurement directives (see judgment of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 45)'.[36]

28 See, for example the judgment of 16 June 2016, *Evonik Degussa and AlzChem* v *Commission* (C-155/14 P, EU:C:2016:446, paragraph 28).

29 In that connection, see the judgments of 4 May 1989, *Bodson* (30/87, EU:C:1988:225, paragraph 19), and of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro* (66/86, EU:C:1989:140, paragraph 35).

30 Naturally, there may be collusive conduct between unrelated undertakings seeking to distort competition in public procurement procedures by agreeing not to submit a tender or to do so in conditions unlawfully agreed between them.

31 Point 10 of its written observations.

32 As I pointed out above, that directive does not preclude the participation of related tenderers in principle.

33 Judgment of 12 March 2015 (C-538/13, EU:C:2015:166).

34 Judgment of 12 March 2015, *eVigilio* (C-538/13, EU:C:2015:166, paragraph 44).

35 Ibid., paragraph 42.

36 Ibid., paragraph 43.

75. The judgments in *Eturas and Others*[37] and *VM Remonts and Others*,[38] as the Commission rightly observes,[39] concerned collusion on prices between independent undertakings and the liability of a tenderer for the acts of an independent provider supplying it with services. Nevertheless, a number of the assertions made in those judgments regarding proof of collusive behaviour may be helpful in this case.

76. For example, the judgment in *Eturas and Others* states that 'the principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent.'[40] The judgment in *VM Remonts and Others* states that, in the absence of EU rules on the matter, 'the rules relating to the assessment of evidence and the requisite standard of proof … are covered … by the procedural autonomy of the Member States'.[41]

77. Applying that case-law to the facts at issue in the main proceedings, where the contracting authority is aware that related tenderers are participating in the procedure, the 'active role' expected of it, as the guarantor of genuine competition between tenderers, should normally lead it to make certain that the tenders submitted by those tenderers are separate.[42]

78. In short, that requirement is just one of the measures aimed at '[examining] all the relevant circumstances … in order to prevent and detect conflicts of interests and remedy them, including, where appropriate, requesting the parties to provide certain information and evidence.'[43]

79. However, the contracting authority may, in cases such as the present one, dispense with a communication to the related tenderers, asking them, in the words of the question from the referring court, 'to clarify whether and how their personal situation is compatible with free and fair competition between tenderers'. Clearly, 'where appropriate, requesting the parties to provide certain information and evidence' may be important if the information and evidence available to the contracting authority is not sufficient for it to form a view regarding the risk that the tenders are not separate and distort competition.

80. Therefore, what matters is not that the contracting authority contacts the related tenderers, asking them for information about their relationship and seeking their view regarding the protection of the principle of competition between tenderers. The decisive factor is, rather, that the contracting authority is in a position to conclude that the simultaneous participation of those related operators does not jeopardise competition. The contracting authority may, of course, reach that conclusion by requesting that information or that view from the tenderers but it may also do so by referring to the information already available in the procedure and therefore without the need to approach the tenderers.

81. The Court has also held that 'the question whether the relationship of control at issue influenced the respective content of the tenders submitted by the undertakings concerned in the same public procurement procedure requires an examination and assessment of the facts which it is for the contracting authorities to carry out.'[44]

37 Judgment of 21 January 2016 (C-74/14, EU:C:2016:42).

38 Judgment of 21 July 2016 (C-542/14, EU:C:2016:578).

39 Points 46 and 47 of its written observations.

40 Judgment of 21 January 2016, *Eturas and Others* (C-74/14, EU:C:2016:42, paragraph 37).

41 Judgment of 21 July 2016, *VM Remonts and Others* (C-542/14, EU:C:2016:578, paragraph 21).

42 A wide range of tenders is likely to increase competition between tenderers, so that each tender is genuinely 'contestable' (to use an expression from competition law) by the others and the contract is awarded to whoever deserves it on his own merits.

43 Judgment of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166, paragraph 44).

44 Judgment of 19 May 2009, *Assitur* (C-538/07, EU:C:2009:317, paragraph 32).

82. As the waste management centre states in its written observations, its examination and assessment of the facts led it to declare that, since it was aware — because it was well known — of the connection between tenderers A and B, it was able to conclude that their respective tenders were competitive based on a number of objective factors:

– The fact that one of the related tenderers voluntarily declared that its tender was independent constituted 'conduct that was fair and compatible with the provisions' of national legislation.

– The tenderers submitted by the related tenderers were different in form and content.

– The tender submitted by tenderer A was rejected 'completely independently of its wishes, in other words, on the initiative of the contracting authority'. [45]

83. Based on the information in its possession, the waste management centre took the view that there was no risk of distortion of competition between tenderers A and B. The waste management centre added that, if it had found that those tenderers 'were behaving in a way which demonstrated that they did not wish to be awarded the contract', that fact 'could constitute evidence which might lead it to investigate their links and consider that their conduct during the procurement procedure might constitute a concerted practice'. [46]

84. It could be debated whether the information held by the waste management centre was sufficient to rule out any risk to competition between the tenderers, but that is an assessment which at all events falls to the waste management centre, subject to subsequent review by the national court which, if called on to do so, must scrutinise its decisions.

85. To my mind, the Court should not intervene in the dispute regarding the extent of the probative value to be attributed to the evidence to which the referring court refers in Question 4(a) and (b). That is an adjudication on factual circumstances and on the assessment of the evidence in proceedings which must be resolved exclusively by the national court, in accordance with the rules of reasoned opinion and applying its domestic provisions on evidence. [47]

86. Returning, therefore, to the question whether the contracting authority is under an ineluctable duty to make enquiries of the related operators in the manner set out above, I believe that that question should be answered in the negative, both in general terms and in this particular instance. Everything will depend on the sufficiency or insufficiency of the available evidence and, therefore, on the objective soundness of the contracting authority's decision to allow related tenderers to participate in the tendering procedure, on which it ultimately falls to the national court to rule.

45 Fourth paragraph of the waste management centre's observations.

46 Sixth paragraph of the contracting authority's observations. In the same paragraph, the contracting authority goes on to state that concerted practices are possible not only between related operators but also between operators which formally compete with one another but enter into agreements prohibited by competition law.

47 I refer to the judgment of 21 July 2016, *VM Remonts and Others* (C-542/14, EU:C:2016:578, transcribed at point 76).

VI. Conclusion

87. In the light of the foregoing considerations, I propose that the Court reply as follows to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania):

Articles 45 TFEU and 56 TFEU and Article 2 of Directive 2004/18/EC of the European Parliament and 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 must be interpreted as meaning that, in circumstances such as those of the main proceedings:

(1) in the absence of an express legislative provision or a specific requirement in the specifications governing the conditions for the award of a service contract, related tenderers which submit separate tenders in the same procedure are not under an ineluctable duty to disclose their links to the contracting authority;

(2) the contracting authority will be obliged to request from those tenderers the information it considers necessary if, in the light of the evidence available in the procedure, it harbours doubts concerning the risk that the simultaneous participation of those tenderers will undermine transparency and distort competition between operators tendering to provide the service.