Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

3 October 2019*

Reference for a preliminary ruling — Public procurement — Directive 2014/24/EU — Article 12(1) — Temporal application — Freedom of the Member States as to choice of how services are provided — Limits — Public contracts subject to so-called '*in house*' awards — In-house transaction — Overlapping of a public contract and an in-house transaction)

In Case C-285/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), made by decision of 13 April 2018, received at the Court on 25 April 2018, in the proceedings brought by

Kauno miesto savivaldybė,

Kauno miesto savivaldybės administracija,

interveners:

UAB 'Irgita',

UAB 'Kauno švara',

THE COURT (Fourth Chamber),

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

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Kauno miesto savivaldybės administracija, initially by L. Ziferman, advocatė, M. Dobilas and A. Mikočiūnienė, advocato padėjėjai, and subsequently by K. Kačerauskas, V. Vaitkutė Pavan, advokatai, and A. Mikočiūnienė, advokato padėjėja,

– UAB 'Irgita', by D. Pakėnas, advokatas,

– UAB 'Kauno švara', by V. Masiulis, advokatas,

* Language of the case: Lithuanian.

– the Lithuanian Government, by K. Dieninis, R. Butvydytė, J. Prasauskienė and R. Krasuckaitė, acting as Agents,

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

– the Polish Government, by B. Majczyna, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 7 May 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(a) and Article 2 of 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); Articles 1, 12 and 18 of Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65); Articles 18, 49, 56 and 106 TFEU, and Article 36 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings brought by Kauno miesto savivaldybė (the Municipality of the City of Kaunas, Lithuania; 'the city of Kaunas) and the Kauno miesto savivaldybės administracija (Administration of the Municipality of the City of Kaunas; 'the contracting authority') concerning the conclusion, between UAB 'Kauno švara' and the contracting authority, of a contract for the supply of services.

Legal context

European Union law

3 Recitals 1, 2, 5, 7, 31 and 32 of Directive 2014/24 state:

'(1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the [FEU Treaty], and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

(2) Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled "Europe 2020, a strategy for smart, sustainable and inclusive growth" … as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council [of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)] and Directive [2004/18] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and

medium-sized enterprises (SMEs) in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

…

(5) It should be recalled that nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. …

…

(7) It should finally be recalled that this Directive is without prejudice to the freedom of national, regional and local authorities to define, in conformity with Union law, services of general economic interest, their scope and the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue their public policy objectives. This Directive should also be without prejudice to the power of national, regional and local authorities to provide, commission and finance services of general economic interest in accordance with Article 14 TFEU and Protocol No 26 on Services of General Interest annexed to the [FEU Treaty] and to the [EU Treaty]. In addition, this Directive does not deal with the funding of services of general economic interest and does not apply to systems of aids granted by Member States, in particular in the social field, in accordance with [EU] rules on competition.

…

(31) There is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of [the Court] is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules.

Such clarification should be guided by the principles set out in the relevant case-law of [the Court]. The sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities.

It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.

(32) Public contracts awarded to controlled legal persons should not be subject to the application of the procedures provided for by this Directive if the contracting authority exercises a control over the legal person concerned which is similar to that which it exercises over its own departments, provided that the controlled legal person carries out more than 80% of its activities in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority, regardless of the beneficiary of the contract performance.

…’

4 Article 1(4) of that directive, that article being headed ‘Subject matter and scope’, provides:

‘This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with State aid rules, and which specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26.’

5 Article 12(1) of that directive, that article relating to ‘Public contracts between entities within the public sector’, provides:

‘A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and

(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

…’

6 Article 18(1) of Directive 2014/24, that article being headed ‘Principles of procurement’, provides:

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

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

7 By virtue of the first paragraph of Article 91 of Directive 2014/24, that directive repealed Directive 2004/18 with effect from 18 April 2016.

Lithuanian law

8 According to Article 10(5) of the Lietuvos Respublikos viešųjų pirkimų įstatymas (Law on Public Procurement of the Republic of Lithuania; ‘the Law on Public Procurement’), in the version in force from 1 January 2014 to 1 July 2017, an in-house transaction ‘[could] be entered into … only with the consent of the Public Procurement Authority’.

9 In the version that has been in force since 1 July 2017, Article 10 of the Law on Public Procurement provides:

'1. The requirements of this Law shall not apply to in-house transactions concluded by a contracting authority with another contracting authority in the case where all the following conditions are satisfied:

(1) the contracting authority exercises control over the other contracting authority similar to that which it exercises over its own departments or structural divisions, exercising decisive influence over its strategic goals and significant decisions, including decisions on long-term investments, disposals, leases, securities and mortgages; acquisition or transfer of shareholdings in other economic entities; transfer of management of one branch of another entity. Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority;

(2) income received from contracts concluded with the controlling contracting authority or with legal entities controlled by that contracting authority and intended to meet its/their needs or to perform its/their functions accounts for more than 80% of the average income received by the controlled contracting authority from sales contracts during the previous three financial years. If the controlled contracting authority has been active for less than three years, its results must be estimated on the basis of its business plan;

(3) there is no direct private capital participation in the controlled contracting authority.

2. An in-house transaction may be concluded only in an exceptional case, when the conditions set out in paragraph 1 of this article are satisfied and the continuity, good quality and availability of services cannot be ensured if they are purchased through public procurement procedures.

…

5. Public undertakings, public limited liability companies, and private limited liability companies in which State-owned shares confer more than half of the votes at the general meeting of shareholders may not conclude any in-house transactions.'

10 Article 4 of the Lietuvos Respublikos konkurencijos įstatymas (Law on Competition of the Republic of Lithuania) of 23 March 1999, Žin., 1999, No 30-856 ('the Law on Competition'), provides as follows:

'1. When carrying out the assigned tasks relating to the regulation of economic activities within the Republic of Lithuania, entities of public administration must ensure freedom of fair competition.

2. Entities of public administration shall be prohibited from adopting legal acts or other decisions which grant privileges to, or discriminate against, any individual economic entities or their groups and which give rise to, or may give rise to, differences in the conditions of competition for economic entities competing in a relevant market, except where the difference in the conditions of competition cannot be avoided when complying with the requirements of the laws of the Republic of Lithuania.'

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

11 On 7 February 2014 the contracting authority published notice of a contract for the supply of services relating to the maintenance and management of plantations, forests and parks in the city of Kaunas.

12 That contract, in three parts, was awarded in its entirety to Irgita and led, inter alia, to the signature, on 18 March 2014, of a contract to supply mowing and cutting services for a period of 3 years, that is, until 18 March 2017.

13 That contract made provision for the maximum quantity of services that could be sought from Irgita. However, the contracting authority gave no commitment to order all the services nor the entire quantity of services provided for in that contract. Further, the contracting authority was required to pay Irgita only for those services that were actually performed according to the tariffs laid down in that contract.

14 On 1 April 2016 the contracting authority requested the consent of the Viešųjų pirkimų tarnyba (the Public Procurement Authority, Lithuania) to the conclusion with Kauno švara of an in-house transaction concerning services that were essentially the same as those for which Irgita had been made responsible by the contract of 18 March 2014.

15 Kauno švara, which has legal personality, is controlled by the contracting authority, which own 100% of its shares. Further, in 2015 Kauno švara achieved 90.07% of its turnover from activities performed solely for the benefit of the contracting authority.

16 On 20 April 2016 the Public Procurement Authority consented to the conclusion of a contract between Kauno švara and the contracting authority for the supply of the services concerned, while imposing on the contracting authority the obligation to assess, before the conclusion of that contract, the possibility of obtaining those services by organising a public procurement procedure. In any event, the contracting authority was bound to comply with Article 4(2) of the Law on competition.

17 On 3 May 2016 the city of Kaunas decided to conclude a contract for the supply of mowing and cutting services with Kauno švara and set the tariffs for the services to be performed ('the contested decision').

18 On 19 May 2016 the contracting authority and Kauno švara concluded that contract ('the contested contract'). That contract, the duration of which was fixed at 5 years, provides, inter alia, that orders for services will depend on the needs of the contracting authority, that the services will be paid for according to the tariffs laid down in the contract and that the term of the contract may be extended.

19 On 20 May 2016 Irgita brought, before the Lithuanian court of first instance with jurisdiction, an action challenging the contested decision and the contested contract. In that action, Irgita claimed that, having regard to the contract of 18 March 2014 concluded between it and the contracting authority, the latter was not in a position to conclude the contested contract.

20 That action having been dismissed at first instance, Irgita's action was then upheld by the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania), which, by a decision of 4 October 2017, annulled the contested decision and declared the contested contract null and void.

21 That court stated that the right to conclude an in-house transaction, provided for in Article 10(5) of the Law on Public Procurement, in the version in force from 1 July 2014 to 1 July 2017, cannot be an exception to the prohibitions on undermining competition between economic operators, on granting privileges to one economic operator, and discriminating against others, as laid down in Article 4(2) of the Law on Competition. The contested contract, according to that court, was unlawful, on the grounds, in particular, that it entailed a reduction in the quantity of services ordered from Irgita and, by concluding an in-house transaction, with no objective need, the contracting authority had granted to the undertaking that it controlled privileges liable to distort the conditions of competition between economic operators in the market for the maintenance of wooded areas in the city of Kaunas.

22 In the appeal on a point of law brought before it by the city of Kaunas and the contracting authority, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) states, first, that the contested contract is clearly an in-house transaction and, second, that the main proceedings raise the general question of the relationship between in-house transactions and compliance with the principle of free competition between independent operators.

23 The referring court observes further that, from the end of 2011 until the middle of 2015, the case-law of the Lietuvos vyriausiasis administracinis teismas (Administrative Supreme Court of Lithuania) had been settled on the point that in-house transactions that satisfied the criteria laid down in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), were lawful. However, from the middle of 2015, taking into consideration two orders of the Lietuvos Respublikos Konstitucinis Teismas (Constitutional Court of the Republic of Lithuania), the Lietuvos vyriausiasis administracinis teismas (Administrative Supreme Court of Lithuania) held that the lawfulness of in-house transactions was subject not only to satisfying the criteria laid down in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), but also to other assessment criteria deriving from, inter alia, the Law on Competition. Those criteria include the continuity, good quality and availability of the service and the effect of the envisaged in-house transaction, first, on equal treatment of other economic operators and, second, on whether those operators have an opportunity to compete in order to supply the services concerned.

24 The referring court considers that the concept of an 'in-house transaction' constitutes an autonomous concept of EU law in that, having regard to the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), it appears to stem from the general concept of 'public contract'. Since the definition of that concept makes no reference to the law of the Member States, that concept falls within the scope of EU law, as is apparent from the judgment of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31).

25 Further, it is apparent from Article 12 of Directive 2014/24, read in the light of recitals 2, 31 and 32 of that directive, that the lawfulness of an in-house transaction for the purposes of that article depends exclusively on the conditions laid down in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), which, according to the referring court, rules out other factors being taken into consideration and suggests that Directive 2014/24 is carrying out a strict harmonisation of in-house transactions.

26 The referring court is conscious however that the Member States retain a degree of discretion. In that regard, in the wording of Article 1(4) of Directive 2014/24, that directive does not affect the freedom of Member States to define, in conformity with EU law, what they consider to be 'services of general economic interest', how those services should be organised and financed, in compliance with State aid rules, and what specific obligations they should be subject to. Equally, that directive does not affect the right of public authorities to decide whether and how they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26. Article 36 of the Charter also provides that the Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the treaties, in order to promote the social and territorial cohesion of the Union.

27 In the opinion of the referring court, the Member States should be able to decide that the possibility of having recourse to an in-house transaction should be subject to compliance with requirements of clarity, predictability and the protection of legitimate expectations in particular, provided that those requirements are clearly laid down in their legislation and do not emerge solely from the case-law.

28 Further, even in the event that the national courts might make provision for restrictions on entering into in-house transactions, the referring court doubts whether those restrictions would be well founded. According to the referring court, the reasoning of the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) would amount to calling into question the right of the contracting authority to

enter into an in-house transaction in accordance with the criteria laid down in the judgment of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562), since economic operators other than the controlled undertaking are capable of performing the services concerned.

29 In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Given the circumstances in the case under consideration, does the in-house transaction come within the scope of application of Directive 2004/18 or of Directive 2014/24, when the procedures for the conclusion of the disputed in-house transaction, inter alia, the administrative procedures, were initiated at a time when Directive 2004/18 was still in force but the contract itself was concluded on 19 May 2016, when Directive 2004/18 was no longer in force?

(2) Assuming that the in-house transaction comes within the scope of application of Directive 2004/18:
   (a) Must Article 1(2)(a) of the Directive (but not limited thereto), taking into account the judgments of the Court of Justice of [18 November 1999, *Teckal* (C-107/98, EU:C:1999:562); of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31); and of 6 April 2006, *ANAV* (C-410/04, EU:C:2006:237], and other cases, be understood and interpreted as meaning that the concept of an "in-house transaction" comes within the scope of EU law, and that the content and application of that concept are not affected by the national law of Member States, inter alia, by limitations on the conclusion of such transactions, for example, by the condition that public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided?
   (b) If the answer to the previous question is in the negative, that is to say, the concept of an in-house transaction comes, either partially or fully, within the scope of the law of the Member States, should the abovementioned provision of Directive 2004/18 be interpreted as meaning that Member States have a discretion to establish limitations or additional conditions for the conclusion of in-house transactions (in comparison with EU law and the case-law of the Court of Justice interpreting that law) but can implement that discretion only by means of specific and clear provisions of substantive law governing public procurement?

(3) On the assumption that the in-house transaction comes within the scope of application of Directive 2014/24:
   (a) Must the provisions of Article 1(4) and Article 12 of the Directive and those of Article 36 of the Charter, either together or separately (but not limited thereto), taking into account the judgments of the Court [of 18 November 1999, *Teckal* (C-107/98, EU:C:1999:562); of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31); and of 6 April 2006, *ANAV* (C-410/04, EU:C:2006:237] and other cases, be understood and interpreted as meaning that the concept of an "in-house transaction" comes within the scope of EU law, and that the content and application of that notion are not affected by the national law of Member States, inter alia, by limitations on the conclusion of such transactions, for example, by the condition that public procurement contracts cannot ensure the quality, availability and continuity of the services to be provided;
   (b) If the answer to the previous question is in the negative, that is to say, the concept of an in-house transaction, either partially or fully, comes within the scope of the law of the Member States, should the provisions of Article 12 of Directive 2014/24 be interpreted as meaning that Member States have a discretion to establish limitations or additional conditions for the conclusion of in-house transactions (in comparison with EU law and the case-law of the Court of Justice interpreting that law) but can implement that discretion only by means of specific and clear provisions of substantive law governing public procurement?

(4) Irrespective of which directive covers the disputed in-house transaction, should the principles of equality and non-discrimination of public procurement suppliers and transparency (Article 2 of Directive 2004/18 and Article 18 of Directive 2014/24), the general prohibition of discrimination on grounds of nationality (Article 18 TFEU), the freedom of establishment (Article 49 TFEU), the freedom to provide services (Article 56 TFEU), the possibility of granting undertakings exclusive rights (Article 106 TFEU), and the case-law of the Court of Justice (judgments of 18 November 1999, *Teckal*, C-107/98, EU:C:1999:562; of 6 April 2006, *ANAV*, C-410/04, EU:C:2006:237; of 10 September 2009, *Sea*, C-573/07, EU:C:2009:532; of 8 December 2016, *Undis Servizi*, C-553/15, EU:C:2016:935] and others) be understood and interpreted as meaning that an in-house transaction being concluded by a contracting authority and by an entity legally separate from that contracting authority, where the contracting authority exercises control over that entity similar to that which it exercises over its own departments and the activity of that entity consists mainly of an activity carried out for the benefit of the contracting authority, is in itself lawful, inter alia, does not infringe the right of other economic operators to fair competition, does not discriminate against those other operators, and no privileges are conferred on the controlled entity which concluded the in-house transaction?'

Consideration of the questions referred

The first question

30 By its first question, the referring court seeks, in essence, to ascertain whether a situation, such as that at issue in the main proceedings, where a public contract has been awarded by a contracting authority to a legal person over which it exercises a control similar to the control it exercises over its own departments, as part of a procedure initiated when Directive 2004/18 was still in force, which led to the conclusion of a contract after the repeal of that directive, falls within the scope of Directive 2004/18 or within the scope of Directive 2014/24.

31 As is apparent from settled case-law, the directive applicable to a public contract is, as a rule, the one in force at the time 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 (see, inter alia, judgments of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 31, and of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83).

32 Since Directive 2004/18 was, in accordance with the first paragraph of Article 91 of Directive 2014/24, repealed with effect from 18 April 2016, it is necessary to examine whether, on that date, the contracting authority had already adopted, in the main proceedings, the definitive decision to have recourse to an in-house transaction.

33 In this case, it is clear from the order for reference that the contracting authority made a request, on 1 April 2016, to the Public Procurement Authority to obtain consent to conclude the in-house transaction at issue in the main proceedings and that that consent was issued to it on 20 April 2016, namely after the repeal of Directive 2004/18.

34 Consequently, as stated by the Advocate General in point 34 of his Opinion, since the Public Procurement Authority issued its consent after the repeal of Directive 2004/18, the situation at issue in the main proceedings necessarily falls within the scope of Directive 2014/24.

35 Further, since a condition of that consent was that the contracting authority was required to assess the possibility of its obtaining the services at issue in the main proceedings by means of a normal public procurement procedure, the contracting authority could not have definitively resolved the question whether it was obliged to initiate a competition procedure prior to the award of the public contract at issue in the main proceedings on the date of repeal of Directive 2004/18, namely 18 April 2016.

36 In those circumstances, the answer to the first question is that a situation, such as that at issue in the main proceedings, where a public contract has been awarded by a contracting authority to a legal person over which it exercises a control similar to the control it exercises over its own departments, as part of a procedure initiated when Directive 2004/18 was still in force, which led to the conclusion of a contract after the date of repeal of that directive, namely 18 April 2016, falls within the scope of Directive 2014/24 where the contracting authority definitively resolved the question whether it was obliged to initiate a prior competition procedure for the award of a public contract after that date.

The second question

37 Having regard to the answer given to the first question, there is no need to answer the second question.

The third question, part (a)

38 First, it must be observed that part (a) of the third question refers, inter alia, to Article 1(4) of Directive 2014/24 and Article 36 of the Charter, provisions which concern services of general economic interest.

39 However, since the order for reference contains no explanation of why an interpretation of the concept of 'services of general economic interest' is relevant to the resolution of the dispute in the main proceedings, it fails to put the Court in a position to give a useful answer to part (a) of the third question, in so far as that question concerns Article 1(4) of Directive 2014/24 and Article 36 of the Charter.

40 It is necessary therefore to reformulate part (a) of the third question, and to hold that, by that question, the referring court seeks to ascertain whether Article 12(1) of Directive 2014/24 must be interpreted as precluding a rule of national law whereby a Member State imposes the requirement that the conclusion of in-house transaction should be subject, inter alia, to the condition that public procurement fails to ensure that the quality of the services performed, their availability or their continuity can be guaranteed.

41 It must be observed, first, that the purpose of Directive 2014/24, as stated in recital 2 thereof, is to coordinate national procurement procedures above a certain value.

42 That consideration can guide the Court in the interpretation of Article 12(1) of Directive 2014/24, according to which 'A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions [set out in Article 12(1)(a) to (c)] are fulfilled'.

43 The effect of that provision, which thus does no more than state the conditions which a contracting authority must observe when it wishes to conclude an in-house transaction, is solely to empower the Member States to exclude such a transaction from the scope of Directive 2014/24.

44 That provision cannot, consequently, deprive the Member States of the freedom to give preference to one means of providing services, performing work or obtaining supplies to the detriment of others. That freedom implies a choice which is at a stage prior to that of procurement and which cannot, therefore, fall within the scope of Directive 2014/24.

45 The freedom of the Member States as to the choice of means of providing services whereby the contracting authorities meet their own needs follows moreover from recital 5 of Directive 2014/24, which states that 'nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive', thereby reflecting the case-law of the Court prior to that directive.

46 Thus, just as Directive 2014/24 does not require the Member States to have recourse to a public procurement procedure, it cannot compel them to have recourse to an in-house transaction where the conditions laid down in Article 12(1) are satisfied.

47 Further, the freedom thus left to the Member States is more clearly distinguished in Article 2(1) 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 states:

'This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the performance of works or the provision of services, to ensure in particular a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights in public services.

Those authorities may choose to perform their public interest tasks with their own resources or in cooperation with other authorities or to confer them upon economic operators.'

48 The freedom of the Member States as to the choice of the management method that they judge to be most appropriate for the performance of works or the provision of services cannot however be unlimited. That freedom must, on the contrary, be exercised with due regard to the fundamental rules of the FEU Treaty, in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency (see, by analogy, judgments of 9 July 1987, *CEI and Bellini*, 27/86 to 29/86, EU:C:1987:355, paragraph 15; of 7 December 2000, *Telaustria and Telefonadress*, C-324/98, EU:C:2000:669, paragraph 60; and of 10 September 2009, *Sea*, C-573/07, EU:C:2009:532, paragraph 38).

49 Within those limits, it is open to a Member State to impose on a contracting authority conditions, not laid down in Article 12(1) of Directive 2014/24, if it is to conclude an in-house transaction, including conditions to guarantee the continuity, good quality and availability of the service.

50 In the light of the foregoing, the answer to part (a) of the third question is that Article 12(1) of Directive 2014/24 must be interpreted as not precluding a rule of national law whereby a Member State imposes a requirement that the conclusion of an in-house transaction should be subject, inter alia, to the condition that public procurement fails to ensure that the quality of the services performed, their availability or their continuity can be guaranteed, provided that the choice made in favour of one means of providing services in particular, made at a stage prior to that of public procurement, has due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

The third question, part (b)

51 By its third question, part (b), the referring court seeks, in essence, to ascertain whether Article 12(1) of Directive 2014/24, read in the light of the principle of transparency, must be interpreted as meaning that the conditions to which Member States subject the conclusion of in-house transactions must be made known by means of precise and clear rules of the substantive law governing public procurement.

52 As stated in paragraph 44 of the present judgment, Directive 2014/24 does not have the effect of depriving Member States of the freedom to give preference, at a stage prior to that of public procurement, to one means of providing services, performing work or obtaining supplies to the detriment of others.

53 It follows that, where a Member State introduces rules under which one such means of providing services, performing work or obtaining supplies is given preference over others, as has been done, in this case, with respect to the conditions subject to which Lithuanian law permits the conclusion of in-house transactions for the purposes of Article 12(1) of Directive 2014/24, the introduction of those rules cannot be covered by the transposition of that directive.

54 The fact remains, however, that where the Member States decide to proceed in that way, they continue to be subject, as stated in paragraph 48 of the present judgment, to the need to respect various principles, including the principle of transparency.

55 The principle of transparency requires, like the principle of legal certainty, that the conditions to which the Member States subject the conclusion of in-house transactions should be made known by means of rules that are sufficiently accessible, precise and predictable in their application to avoid any risk of arbitrariness.

56 In the light of the foregoing, it is for the referring court to assess whether the changes in the interpretation of the provisions of the Law on Competition that have been effected by the higher courts of Lithuania as from the middle of 2015 have emerged with sufficient clarity and precision and whether those changes have been sufficiently publicised so that both the contracting authorities and the economic operators concerned might reasonably have been aware of them.

57 The answer therefore to part (b) of the third question is that Article 12(1) of Directive 2014/24, read in the light of the principle of transparency, must be interpreted as meaning that the conditions to which the Member States subject the conclusion of in-house transactions must be made known by means of precise and clear rules of the substantive law governing public procurement which must be sufficiently accessible, precise and predictable in their application to avoid any risk of arbitrariness, which it is, in this case, for the referring court to determine.

The fourth question

58 By its fourth question, the referring court seeks, in essence, to ascertain whether the conclusion of an in-house transaction which satisfies the conditions laid down in Article 12(1)(a) to (c) of Directive 2014/24 is, as such, compatible with EU law.

59 It follows from Article 12(1)(a) to (c) of Directive 2014/24 that a public contract awarded by a contracting authority to a legal person governed by private or public law does not fall within the scope of that directive where (i) the contracting authority exercises a control over that legal person which is similar to that which it exercises over its own departments, (ii) more than 80% of the

activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by the latter and (iii) there is, as a rule, no direct private capital participation in that legal person.

60 However, that provision concerns solely the scope of Directive 2014/24 and cannot be construed as establishing the conditions governing whether a public contract is to be awarded in the form of an in-house transaction.

61 As follows, in essence, from paragraph 48 of the present judgment, the fact that an in-house transaction, within the meaning of Article 12(1) of Directive 2014/24, does not fall within the scope of that directive cannot relieve the Member States or the contracting authorities of the obligation to have due regard to, inter alia, the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

62 It must moreover be observed that recital 31 of that directive states, in relation to cooperation between entities belonging to the public sector, that it should be ensured that any cooperation of that kind, which is excluded from the scope of that directive, does not result in a distortion of competition in relation to private economic operators.

63 In this case, it is particularly the task of the referring court to assess whether, by concluding the in-house transaction at issue in the main proceedings, the subject matter of which overlaps with that of a public contract still in force and performed by Irgita, as the party to whom that contract was awarded, the contracting authority has not acted in breach of its contractual obligations, arising from that public contract, and of the principle of transparency; whether it had to be established that the contracting authority failed to define its requirements sufficiently clearly, in particular by not guaranteeing the provision of a minimum volume of services to the party to whom that contract was awarded, or, further, whether that transaction constitutes a substantial amendment of the general structure of the contract concluded with Irgita.

64 The answer therefore to the fourth question is that the conclusion of an in-house transaction which satisfies the conditions laid down in Article 12(1)(a) to (c) of Directive 2014/24 is not as such compatible with EU law.

Costs

65 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. **A situation, such as that at issue in the main proceedings, where a public contract has been awarded by a contracting authority to a legal person over which it exercises a control similar to the control it exercises over its own departments, as part of a procedure initiated when 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 was still in force and which led to the conclusion of a contract after the date of repeal of that directive, namely 18 April 2016, falls within the scope 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 where the contracting authority definitively resolved the question of whether it was obliged to initiate a prior competition procedure for the award of a public contract after that date.**

2. **Article 12(1) of Directive 2014/24 must be interpreted as not precluding a rule of national law whereby a Member State imposes a requirement that the conclusion of an in-house transaction should be subject, inter alia, to the condition that public procurement does not ensure that the quality of the services performed, their availability or their continuity can be guaranteed, provided that the choice made in favour of one means of providing services in particular, made at a stage prior to that of public procurement, has due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.**

3. **Article 12(1) of Directive 2014/24, read in the light of the principle of transparency, must be interpreted as meaning that the conditions to which the Member States subject the conclusion of in-house transactions must be made known by means of precise and clear rules of the substantive law governing public procurement, which must be sufficiently accessible, precise and predictable in their application to avoid any risk of arbitrariness, which it is, in this case, for the referring court to determine.**

4. **The conclusion of an in-house transaction which satisfies the conditions laid down in Article 12(1(a) to (c) of Directive 2014/24 is not as such compatible with EU law.**

[Signatures]