Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

13 March 2025*

(Reference for a preliminary ruling – Public procurement in the European Union – Directive 2014/24/EU – Article 25 – Economic operators of a third country which has not concluded an international agreement with the European Union which guarantees access to public procurement in a reciprocal and equal manner – No right for those economic operators to 'no less favourable treatment' – Exclusion of such an economic operator from a public procurement procedure, pursuant to national legislation – Exclusive competence of the European Union)

In Case C-266/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel București (Court of Appeal, Bucharest, Romania), made by decision of 23 March 2022, received at the Court on 20 April 2022, in the proceedings

CRRC Qingdao Sifang Co. Ltd,

Astra Vagoane Călători SA

v

Autoritatea pentru Reformă Feroviară,

Alstom Ferroviaria SpA,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Third Chamber, acting as President of the Fourth Chamber, S. Rodin and O. Spineanu-Matei, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– CRRC Qingdao Sifang Co. Ltd and Astra Vagoane Călători SA, by D. Cristea, avocat,

* Language of the case: Romanian.

– the Autoritatea pentru Reformă Feroviară, by D. Feraru, S.A. Roşeanu and I.-D. Şohan, acting as Agents,

– Alstom Ferroviaria SpA, by C. Ciolan and O. Gavrilă, avocates,

– the Austrian Government, by J. Schmoll, acting as Agent,

– the European Commission, by A. Biolan, G. Gattinara, P. Ondrůšek and G. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of point 13 of Article 2(1), Article 18(1), Article 25 and Article 49 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as well as the principles of legal certainty and the protection of legitimate expectations.

2 The request has been made in proceedings between a consortium comprised of CRRC Qingdao Sifang Co. Ltd and Astra Vagoane Călători SA ('the consortium') and the Autoritatea pentru Reformă Feroviară (the Railway Reform Authority, Romania) ('the ARF') and Alstom Ferroviaria SpA, concerning the ARF's decision to exclude that consortium from a public procurement procedure for the supply of electric trains and of services for the maintenance and repair of those trains, on the ground that CRRC Qingdao Sifang, which is the leader of the consortium, is a company established in China.

Legal context

European Union law

Directive 2014/24

3 Recitals 1 and 17 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 Treaty on the Functioning of the European Union (TFEU), 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.

…

(17) Council Decision 94/800/EC [of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994) (OJ 1994 L 336, p. 1)] approved in particular the World Trade Organization Agreement on Government Procurement (the "GPA"). The aim of the GPA is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. For contracts covered by Annexes 1, 2, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA, as well as by other relevant international agreements by which the Union is bound, contracting authorities should fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.'

4 Article 2 of that directive, entitled 'Definitions', provides in paragraph 1:

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

…

(10) "economic operator" means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market;

…

(13) "procurement document" means any document produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents;

…'

5 Article 7 of that directive, entitled 'Contracts in the water, energy, transport and postal services sectors', provides:

'This Directive shall not apply to public contracts and design contests which, under Directive 2014/25/EU [of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243)], are awarded or organised by contracting authorities exercising one or more of the activities referred to in Articles 8 to 14 of that Directive and are awarded for the pursuit of those activities …

…'

6 Article 18 of Directive 2014/24, entitled 'Principles of procurement', provides, in the first subparagraph of paragraph 1 thereof that contracting authorities are to treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

7 Article 25 of that directive, entitled 'Conditions relating to the GPA and other international agreements', is worded as follows:

'In so far as they are covered by Annexes 1, 2, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA and by the other international agreements by which the Union is bound, contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.'

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

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

…'

9 Article 49 of the same directive, entitled 'Contract notices', provides:

'Contract notices shall be used as a means of calling for competition in respect of all procedures, without prejudice to the second subparagraph of Article 26(5) and Article 32. Contract notices shall contain the information set out in Annex V part C and shall be published in accordance with Article 51.'

Directive 2014/25

10 Recitals 2 and 27 of Directive 2014/25 state:

'(2) In order to ensure the opening up to competition of procurement by entities operating in the water, energy, transport and postal services sectors, provisions should be drawn up coordinating procurement procedures in respect of contracts above a certain value. Such coordination is needed to ensure the effect of the principles of the Treaty on the Functioning of the European Union (TFEU) and 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. …

…

(27) [Decision 94/800] approved in particular the [GPA]. The aim of the GPA is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. For contracts covered by Annexes 3, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA, as well as by other relevant international agreements by which the Union is bound, contracting entities should fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.'

11 Article 11 of Directive 2014/25, entitled 'Transport services', provides:

'This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.'

12 Article 43 of that directive, entitled 'Conditions relating to the GPA and other international agreements', provides:

'In so far as they are covered by Annexes 3, 4 and 5 and the General Notes to the European Union's Appendix I to the GPA and by the other international agreements by which the Union is bound, contracting entities within the meaning of Article 4(1)(a) shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.'

13 Article 45 of that directive, entitled 'Open procedure', provides in paragraph 1:

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

…'

Romanian law

14 Article 3(1)(jj) of the Legea nr. 98/2016 privind achizițiile publice (Law No 98/2016 on public procurement) of 19 May 2016 (*Monitorul Oficial al României*, Part I, No 390, of 23 May 2016), in the version in force on 3 April 2020 ('the Law on Public Procurement'), defined the concept of 'economic operator' as being 'any natural or legal person, whether governed by public or private law, or any group or association of such entities, including any temporary association between two or more such entities, which lawfully offers on the market the performance of works and/or construction, the supply of goods or the provision of services'.

15 Article 236 of the Law on Public Procurement provides:

'1. This Law shall apply to contract award procedures initiated after the date on which it enters into force.

2. The law in force on the date on which the contract award procedure is initiated shall apply to contract award procedures which are ongoing on the date on which this Law enters into force.

3. This Law shall apply to public procurement contracts/framework agreements concluded after the date on which it enters into force.

4. Public procurement contracts/framework agreements concluded before the date on which this Law enters into force shall be subject to the provisions of the law in force on the date on which they were concluded in all matters concerning the conclusion, amendment, interpretation, effects, performance and termination of those contracts/framework agreements.'

16 The Ordonanța de urgență a Guvernului nr. 25/2021 privind modificarea și completarea unor acte normative în domeniul achizițiilor publice (Government Emergency Order No 25/2021 amending and supplementing certain legislative acts in the field of public procurement) of 31 March 2021 (*Monitorul Oficial al României*, Part I, No 346, of 5 April 2021; 'the OUG No 25/2021'), which entered into force on 5 April 2021, amended several provisions of the Law on Public Procurement.

17 Article V of the OUG No 25/2021 provides:

'Contract award procedures in which economic operators have submitted tenders on the date on which this [Government Emergency Order] enters into force shall be subject to the legislation in force on the date on which those procedures were initiated.'

18 Article 3(1)(jj) of the Law on Public Procurement, as amended by the OUG No 25/2021, defined the concept of 'economic operator' as being 'any natural or legal person, whether governed by public or private law, or any group or association of such persons, including any temporary association between two or more such entities, which lawfully offers on the market the performance of works, the supply of goods or the provision of services, and which is/are established in:

(i) a Member State of the European Union;

(ii) a Member State of the European Economic Area (EEA);

(iii) third countries which have ratified [the GPA], in so far as the public contract awarded falls within the scope of Annexes 1, 2, 4, 5, 6 and 7 to the European Union's Appendix I to the GPA;

(iv) third countries acceding to the European Union;

(v) third countries which do not fall within the scope of point (iii) but which are signatories to other international agreements requiring the European Union to grant free access to the public procurement market;'

19 Article 49 of the Law on public procurement, as amended by the OUG No 25/2021, provides:

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

2. In so far as they are covered by Annexes 1, 2, 4 and 5, 6 and 7 of Appendix I … to the GPA and by the other international agreements by which [the Union] is bound, contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of [the Union].'

20 Article 53(1^1) of the Law on Public Procurement, as amended by the OUG No 25/2021, provides:

'The contracting authority shall exclude from the contract award procedure any natural or legal person who is an individual tenderer/associate tenderer/candidate/third party supporter/subcontractor and who does not fall within the definition set out in Article 3(1)(jj) …'

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

21 On 3 April 2020, the ARF launched an open tendering procedure for the award of a public contract by publishing a contract notice for 'the purchase of 20 new interregional electric trains, known as IR-EMUs, and the purchase of the maintenance and repair services necessary for the operation of those trains'.

22 On 19 April 2021, two economic operators, namely the consortium and Alstom Ferroviaria SpA, submitted tenders.

23 On 2 November 2021, the ARF published the final report of the public procurement procedure in question by which it excluded the tender submitted by the consortium and awarded the contract to Alstom Ferroviaria SpA. The ground for exclusion was that the leader of the consortium, CRRC Qingdao Sifang, did not fall within the concept of 'economic operator', within the meaning of Article 3(1)(jj) of the Law on Public Procurement, as amended by the OUG No 25/2021, in view of the fact that its registered office was located in China.

24 On 11 November 2021, challenging its exclusion, the consortium brought an action before the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Complaints, Romania) ('the CNSC'). In that action, that consortium submitted that that exclusion, based on the retroactive application of the OUG No 25/2021, is contrary to the Romanian Constitution and to EU law.

25 By decision of 31 January 2022, the CNSC rejected that action on the following grounds.

26 In the first place, the CNSC observed that the People's Republic of China did not satisfy any of the conditions laid down in Article 3(1)(jj), (i) to (v), of the Law on Public Procurement, as amended by the OUG No 25/2021.

27 In the second place, the CNSC found that the consortium had submitted its tender on 19 April 2021, namely after the entry into force, on 5 April 2021, of the OUG No 25/2021.

28 In the third place, the CNSC noted that, under the terms of Article V of the OUG No 25/2021, only the public procurement procedures in which economic operators submitted offers before the entry into force of that emergency government order were governed by the legislation in force at the date on which those procedures were launched. By contrast, public procurement procedures in which no offer was submitted before 5 April 2021, the date on which the OUG No 25/2021 entered into force, are governed by that order.

29 On 14 February 2022, the consortium brought an action against the decision of the CNSC before the Curtea de Apel București (Court of Appeal, Bucharest, Romania), which is the referring court.

30 In its action, the consortium submitted that the amendment of the rules of a public procurement procedure, in the course of that procedure, is a breach of several principles of EU law, including, in particular, the principle of protection of legitimate expectations, the principle of legal certainty, the principle of non-retroactivity, the principle of transparency and the principle of equal treatment.

31 The referring court considers that the OUG No 25/2021 amended the legal framework of public contracts and redefined certain general rules for the participation in public procurement procedures, in accordance with Article 25 of Directive 2014/24, which lays down the obligation for the Member States to ensure equal treatment, with economic operators of Member States, only for economic operators of third countries which are signatories to agreements to which that provision refers.

32 In the preamble to the OUG No 25/2021, the Romanian Government referred to a trend, in recent years, of an increase in the number of tenderers from third countries participating in public procurement procedures, which offered reduced guarantees as to compliance with certain requirements such as certified quality standards, environmental and sustainable development standards, requirements related to working conditions and social protection, and competition policies.

33 The referring court observes that Article 25 of Directive 2014/24 does not make a distinction, as regards the treatment of economic operators referred to by that provision, depending on the time at which those operators submitted their tenders in the context of public procurement procedures in which they participate.

34 That court questions the extent to which compliance with, first, the principles of legal certainty and the protection of legitimate expectations, as enshrined in EU law, as well as, secondly, the principles of equal treatment, transparency and proportionality, provided for in Article 18(1) of Directive 2014/24, read in conjunction with point 13 of Article 2(1) and Article 49 thereof, is ensured where a tenderer is excluded on the basis of a legislative act that has the force of law, which, after publication of a contract notice, amends the definition of 'economic operator' in national law.

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

'(1) Do the principles of [legal] certainty … and the protection of legitimate expectations preclude a piece of national legislation which transposed Article 25 of Directive [2014/24] as from 5 April 2021, and which provided that economic operators who do not fall within the scope of those provisions of EU law may continue to participate in public procurement procedures only if they have submitted tenders before the date on which that legislative amendment entered into force?

(2) Do the principles of equal treatment, transparency and proportionality laid down in Article 18(1) of Directive [2014/24], in conjunction with [point 13 of] Article 2(1) and Article 49 thereof, preclude the exclusion of a tenderer on the basis of a legislative act having the force of law adopted by the government of a Member State which lays down a new rule amending the definition of "economic operator" after publication of the contract notice relating to a contract award procedure in which that person is participating?'

Procedure before the Court

36 By decision of the President of the Fourth Chamber of 28 September 2023, the proceedings in the present case were suspended pursuant to Article 55 of the Rules of Procedure of the Court until delivery of the judgment in Case C-652/22, *Kolin Inşaat Turizm Sanayi ve Ticaret*.

37 On 23 October 2024, following delivery of the judgment of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret* (C-652/22, EU:C:2024:910), the proceedings were resumed.

The jurisdiction of the Court

38 The ARF and Alstom Ferroviaria submit that the Court lacks jurisdiction to examine the questions referred, since they relate, in reality, not to the interpretation of EU law, but to the interpretation of rules of national law, and the assessment of the fact, which falls within the exclusive jurisdiction of the national court.

39 It should be recalled that, pursuant to Article 19(3)(b) TEU and the first subparagraph of Article 267 TFEU, the Court has jurisdiction, in particular, to give a preliminary ruling on the interpretation of the EU law.

40 In the present case, it is incontestable that the questions referred seek the interpretation of provisions and principles of EU law.

41 Therefore, the Court has jurisdiction to answer those questions.

Admissibility of the questions referred

42 The ARF and Alstom Ferroviaria submit that the questions referred are inadmissible since they lack any relevance for the resolution of the dispute in the main proceedings. In that regard, the ARF observes that CRRC Qingdao Sifang, which was excluded from the public procurement procedure at issue in the main proceedings, is established on the territory of the People's Republic of China, which has not concluded an international agreement with the European Union which guarantees equal and reciprocal access to public procurement. It follows that that company does not fall within the scope of Directive 2014/24.

43 It is clear from settled case-law that, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions referred by national courts concern the interpretation of a provision of EU law, the Court is, in principle, bound to give a ruling. It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 16 January 2025, *Banco de Santander (Representation of individual consumers)*, C-346/23, EU:C:2025:13, paragraph 34 and the case-law cited).

44 In the present case, the conditions that could lead the Court to refuse to rule on the questions referred are not met.

45 The referring court wishes to know whether EU law precludes the exclusion of the consortium from the public procurement procedure at issue in the main proceedings, by application of national legislation which amended the concept of 'economic operator' in order to transpose Article 25 of Directive 2014/24. In those circumstances, it is does not appear that the interpretation of EU law sought is manifestly unrelated to the actual facts of the main action or its purpose or that the problem is hypothetical.

46 Admittedly, it is clear from paragraphs 45, 51 and 67 of the judgment of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret* (C-652/22, EU:C:2024:910), that, in a situation where there is participation in a public procurement procedure in the European Union by an economic operator from a third country which has not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement, that economic operator cannot rely on the rules relating to public procurement contained in EU legislation, such as Article 18 of Directive 2014/24. Since the rules relating to public procurement contained in those directives cannot apply to the tender submitted by an economic operator from such a third country, their interpretation cannot be relevant for the resolution of a dispute brought by that economic operator in order to challenge the manner in which those rules were applied in the procurement procedure at issue. Therefore, in the context of such a dispute, a request for a preliminary ruling by which the referring court seeks such an interpretation is inadmissible.

47 However, where, as in the present case, the dispute relates to the issue of the arrangements by which an economic operator of a third country, which has not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement, may be excluded from a public procurement procedure in the European Union, the lodging of a request for a preliminary ruling seeking the interpretation of provisions or principles of EU law which could, according to the referring court, govern that issue, is capable of being relevant for the resolution of the dispute before it.

48 It follows that the questions referred in the present case are admissible.

Consideration of the questions referred

49 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether the principles of the protection of legitimate expectations and legal certainty, as well as Article 18(1) of Directive 2014/24, read in conjunction with point 13 of Article 2(1) and Article 49 of that directive, must be interpreted as precluding an economic operator from a third country, which has not concluded with the European Union an international agreement referred to in Article 25 of that directive, from being excluded from a public procurement procedure organised in a Member State on the basis of national legislation which entered into force after publication of the contract notice but before that economic operator had submitted its tender.

Preliminary observations

50 As a preliminary point, it should be observed that, having regard to the object of the public procurement procedure at issue in the main proceedings, namely the acquisition of trains for railway transport and maintenance and repair services, that procedure may fall within the scope not of Directive 2014/24, to which the reference for a preliminary ruling refers, but that of Directive 2014/25.

51 In accordance with Article 7 of Directive 2014/24, the scope of that directive does not extend to public contracts in the transport services sector, as defined in Article 11 of Directive 2014/25 (judgment of 1 August 2022, *Roma Multiservizi and Rekeep*, C-332/20, EU:C:2022:610, paragraph 64).

52 Article 11 of Directive 2014/25, entitled 'Transport services', provides, in its first paragraph, that that directive is to apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport, inter alia, by railway. According to the second paragraph of that article, a network is to be considered to exist where the transport is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

53 In the present case, it is for the referring court to determine whether the public procurement procedure at issue in the main proceedings falls within the scope of Directive 2014/25, pursuant to Article 11 thereof, in which case that procedure does not fall within the scope of Directive 2014/24 in accordance with Article 7 of that latter directive.

54 That being said, Article 25 of Directive 2014/24 is drafted in terms equivalent to those of Article 43 of Directive 2014/25.

55 Therefore, the fact that that procedure may be covered not by Directive 2014/24 but by Directive 2014/25 is not capable of affecting the examination of the questions referred. That examination, which will be undertaken with regard to Article 25 of Directive 2014/24, must be considered as being made also with regard to Article 43 of Directive 2014/25, in the event that the referring court decides that the public procurement procedure at issue in the main proceedings is covered by that latter directive.

Substance

56 The European Union is bound, with respect to certain third countries, by international agreements, in particular the GPA, which guarantee, on a reciprocal and equal basis, access for EU economic operators to public procurement in those third countries and for economic operators of those third countries to public procurement in the European Union. Article 25 of Directive 2014/24 reflects those international commitments of the European Union by providing that, in so far as the GPA or other international agreements by which the European Union is bound so provide, contracting entities of the Member States must accord to economic operators of third countries which are parties to such an agreement treatment no less favourable than that accorded to EU economic operators (see, to that effect, judgment of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret*, C-652/22, EU:C:2024:910, paragraphs 41 and 42).

57 Other third countries have not, to date, concluded such an international agreement with the European Union. The People's Republic of China is included amongst those countries.

58 The right conferred by Article 27(1) of Directive 2014/24 on 'any interested economic operator' to submit a tender in response to a call for competition in the context of an open public procurement procedure in the European Union does not extend to economic operators of those third countries which have not concluded such an international agreement with the European Union. To interpret that provision differently and thus to render unlimited the personal scope of that directive would, as the Advocate General observed in essence in points 65 to 73 of his Opinion, be tantamount to guaranteeing economic operators of those third countries equal access to public procurement procedures in the European Union. That would have the effect of conferring on them a right to no less favourable treatment, contrary to Article 25 of that directive, which limits the benefit of that right to economic operators from third countries which have concluded with the European Union an international agreement such as those referred to in that article (see, to that effect, judgment of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret*, C-652/22, EU:C:2024:910, paragraphs 46 and 47).

59 It follows that Directive 2014/24 must be understood as meaning that access of those economic operators of third countries referred to in paragraph 57 of the present judgment to public procurement procedures in the European Union is not guaranteed. That means that those operators may either be excluded from those procedures, or be admitted to them whilst not being able to rely on that directive and to require that their tender be treated equally to those submitted by tenderers from Member States and by the tenderers from third countries referred to in Article 25 of that directive (see, to that effect, judgment of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret*, C-652/22, EU:C:2024:910, paragraphs 45 and 47).

60 Any act of general application specifically intended to determine, for economic operators from a third country, those arrangements of exclusion or admission, fall within the exclusive competence of the European Union under Article 3(1)(e) TFEU in the area of common commercial policy. This is true of acts which, in the absence of an agreement between the European Union and a third country, determine unilaterally whether and, if so, under what arrangements the economic operators of that third country may participate in public procurement procedures in the European Union. Like such agreements, those unilateral acts have direct and immediate effects on trade in goods and services between that third country and the European Union (see, to that effect, judgment of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret*, C-652/22, EU:C:2024:910, paragraph 57).

61 It follows that only the European Union has competence to adopt an act of general application concerning access, within the European Union, to public procurement procedures for economic operators of a third country which has not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement, by establishing either a system of guaranteed access to those procedures for those economic operators or a system which excludes them or provides for an adjustment of the result arising from a comparison of their tenders with those submitted by other economic operators (judgment of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret*, C-652/22, EU:C:2024:910, paragraph 61).

62 By virtue of Article 2(1) TFEU, in the areas of exclusive competence of the European Union, only the European Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the European Union or for the implementation of EU acts. However, the European Union has not empowered the Member States to legislate or adopt

legally binding acts concerning access to public procurement procedures for economic operators of a third country which has not concluded an international agreement with the European Union. Nor has the European Union, to date, adopted any acts of that nature which the Member States could implement (judgment of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret*, C-652/22, EU:C:2024:910, paragraph 62).

63 In the absence of acts adopted by the European Union, it is for the contracting authority to assess whether economic operators of a third country which has not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement should be admitted to a public procurement procedure and, if it decides to admit them, whether provision should be made for an adjustment of the result arising from a comparison between the tenders submitted by those operators and those submitted by other operators (judgment of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret*, C-652/22, EU:C:2024:910, paragraph 63).

64 In the present case, there was no provision of EU law which required the admission to or the exclusion from public procurement procedures of economic operators of a third country which has not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement. In view of the rules recalled in paragraphs 60 to 62 of the present judgment, according to which, in the absence of an EU-derived power or an EU act that may be implemented, it is prohibited for Member States to legislate in the area of the common commercial policy, the national legislation at issue in the main proceedings requiring the contracting authority to exclude those economic operators cannot be applied. It is incumbent on the contracting authority to decide, in the circumstances referred to in the preceding paragraph of the present judgment, whether it is appropriate to admit or exclude the consortium.

65 In those circumstances, it is irrelevant that that national legislation entered into force after the contract notice was published but before the Chinese economic operator had submitted its tender.

66 It should moreover be noted that, since economic operators of third countries which have not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement do not enjoy a right to no less favourable treatment under Article 25 of Directive 2014/24, it is open to the contracting authority to set out, in the procurement documents, arrangements for treatment intended to reflect the objective difference between the legal situation of those operators, on the one hand, and that of economic operators of the European Union and of third countries which have concluded such an agreement with the European Union, within the meaning of Article 25 of that directive, on the other hand. While it is conceivable that those treatment arrangements should comply with certain principles and requirements, such as the principle of protection of legitimate expectations and of legal certainty, an action raising a complaint that the contracting authority has infringed those principles can be examined only in the light of national law and not of EU law (see, to that effect, judgment of 22 October 2024, *Kolin Inşaat Turizm Sanayi ve Ticaret*, C-652/22, EU:C:2024:910, paragraphs 64 and 66).

67 In the light of all the foregoing considerations, the answer to the questions referred is that Article 3(1)(e) TFEU, which confers on the European Union an exclusive competence in the area of common commercial policy, read in conjunction with Article 2(1) TFEU, must be interpreted as precluding, in the absence of an EU act requiring or prohibiting access to public procurement of economic operators of a third country which has not concluded an international agreement referred to in Article 25 of Directive 2014/24, a contracting authority of a Member State from

excluding an economic operator of such a third country on the basis of a legislative act that that Member State adopted without having been empowered to do so by the European Union, it being irrelevant in that regard that that legislative act entered into force after the publication of the contract notice.

Costs

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

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

Article 3(1)(e) TFEU, which confers on the European Union an exclusive competence in the area of common commercial policy, read in conjunction with Article 2(1) TFEU,

must be interpreted as precluding, in the absence of an EU act requiring or prohibiting access to public procurement procedures of economic operators of a third country which has not concluded an international agreement referred to in Article 25 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, a contracting authority of a Member State from excluding an economic operator of such a third country on the basis of a legislative act that that Member State adopted without having been empowered to do so by the European Union, it being irrelevant in that regard that that legislative act entered into force after the publication of the contract notice.

[Signatures]