Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 15 April 2021 [1]

Case C-927/19

UAB Klaipėdos regiono atliekų tvarkymo centras
interveners:
UAB Ecoservice Klaipėda,
UAB Klaipėdos autobusų parkas,
UAB Parsekas,
UAB Klaipėdos transportas

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

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Articles 21, 50 and 55 – Confidentiality – Competence of the contracting authority – Directive (EU) 2016/943 – Applicability – Directive 89/665/EEC – Articles 1 and 2 – Effects of the application for review of the declaration of confidentiality – Statement of reasons – Independent application for review to the contracting authority – Judicial review – Scope of the court's powers)

1. Documentation provided to contracting authorities in a public procurement procedure may include trade secrets and other confidential information, the disclosure of which would be detrimental to the holders thereof.

2. Such circumstances bring together two sets of opposing interests:

– On the one hand, those of the tenderer who, in tendering for a public contract, does not waive his or her right to have confidential information protected in such a way as to prevent others from taking unfair advantage of business endeavours of others.

– On the other hand, those of tenderers who, in the exercise of their right to challenge the decisions of the contracting authority, seek access, in order to substantiate their application for review, to certain information which the successful tenderer has submitted and regards as confidential.

[1] Original language: Spanish.

3. The conflict between those interests is the basis for this reference for a preliminary ruling, in which the referring court seeks an interpretation of Directives 89/665/EEC,[2] 2014/24/EU[3] and (EU) 2016/943.[4]

I. Legal framework

A. EU law

1. Directive 2014/24

4. Article 18 ('Principles of procurement') states:

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

…'

5. Article 21 ('Confidentiality') provides:

'1. Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

2. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.'

6. Article 50 ('Contract award notices') provides:

'… Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.'

7. Article 55 ('Informing candidates and tenderers') states:

'3. Contracting authorities may decide to withhold certain information referred to in paragraphs 1 and 2, regarding contract award, the conclusion of framework agreements or

[2] 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).

[3] Directive 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).

[4] Directive of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1).

admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.'

2. Directive 89/665

8. According to Article 1 ('Scope and availability of review procedures'):[5]

'1. This Directive applies to contracts referred to in Directive 2014/24/EU of the European Parliament and of the Council unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU, 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 Union law in the field of public procurement or national rules transposing that law.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.

4. Member States may require that the person wishing to use a review procedure has notified the contracting authority of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period in accordance with Article 2a(2) or any other time limits for applying for review in accordance with Article 2c.

5. Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

…'

9. Article 2 ('Requirements for review procedures') provides:

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

…

[5] In the wording contained in Article 46 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).

(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;

…'

3. Directive 2016/943

10. Recital 18 states:

'… In particular, this Directive should not release public authorities from the confidentiality obligations to which they are subject in respect of information passed on by trade secret holders, irrespective of whether those obligations are laid down in Union or national law. Such confidentiality obligations include, inter alia, the obligations in respect of information forwarded to contracting authorities in the context of procurement procedures, as laid down, for example, in Directive 2014/24/EU …'

11. Article 1 ('Subject matter and scope') states:

'2. This Directive shall not affect:

…

(b) the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information including trade secrets, to the public or to administrative or judicial authorities for the performance of the duties of those authorities;

(c) the application of Union or national rules requiring or allowing Union institutions and bodies or national public authorities to disclose information submitted by businesses which those institutions, bodies or authorities hold pursuant to, and in compliance with, the obligations and prerogatives set out in Union or national law;

…'

B. Lithuanian law

1. Lietuvos Respublikos viešųjų pirkimų įstatymas (Law on public procurement of the Republic of Lithuania; 'the LCP')

12. Article 20 states:

'1. The contracting authority, the award committee, its members and experts, and any other person shall be prohibited from disclosing to third parties information which suppliers have provided in confidence.

2. The supplier's tender or request to participate may not be classified as confidential in its entirety, but the supplier may indicate that some information presented in his tender is confidential. Confidential information may include, inter alia, trade (manufacturing) secrets and confidential aspects of the tender. Information cannot be classified as confidential:

(1) if it infringes the legal provisions establishing the obligation to disclose or the right to acquire information, and the regulations implementing those legal provisions;

(2) if it constitutes an infringement of the obligations laid down in Articles 33 and 58 of this Law in connection with the publication of concluded contracts, the provision of information to candidates and tenderers, including information on the price of goods, services or works which is mentioned in the call for tenders, with the exception of the constituent elements of such tenders;

(3) where that information has been presented in documents certifying that the supplier is not subject to any grounds for exclusion and fulfils the capacity requirements and the standards for quality management and environmental protection, with the exception of information the disclosure of which would infringe the provisions of the law of the Republic of Lithuania on the protection of personal data or the supplier's obligations under contracts concluded with third parties;

(4) where that information relates to economic operators and subcontractors on whose capacity the supplier draws, with the exception of information the disclosure of which would infringe the provisions of the law on the protection of personal data.

3. Where the contracting authority has doubts about the confidential nature of the information contained in the supplier's tender, it must ask the supplier to demonstrate why the information in question is confidential. …

4. Not later than six months after the date on which the contract was concluded, the tenderers concerned may ask the contracting authority to grant them access to the successful tenderer's tender or request (just as candidates may ask it for access to requests made by other suppliers who have been invited to submit a tender or participate in a dialogue), but no information may be disclosed which candidates or tenderers have classified as confidential without infringing paragraph 2 of this article.'

13. Article 58 states:

'3. In the cases referred to in paragraphs 1 and 2 of this article, the contracting authority may not disclose information the disclosure of which would infringe the rules on the provision of information and protection of data or otherwise be contrary to the general interest, would prejudice the legitimate commercial interests of a particular supplier or would adversely affect competition between suppliers.'

2. Lietuvos Respublikos civilinio proceso kodeksas (Code of Civil Procedure of the Republic of Lithuania)

14. Article 10[1] provides:

'2. Where there are grounds for considering that a trade secret may be disclosed, the court, at the duly reasoned request of the parties or of its own motion, shall, by reasoned order, name the persons who may:

(1) have access to those parts of the file that contain information which constitutes or may constitute a trade secret, and make and obtain extracts, duplicates and copies (digital copies);

(2) take part in hearings in camera in which information which constitutes or may constitute a trade secret may be disclosed, and have access to the records of those hearings;

(3) obtain a certified copy (digital copy) of a judgment or order containing information which constitutes or may constitute a trade secret.

…

4. In applying the restrictions laid down in paragraph 2 of this article, the court shall take into account the need to guarantee the right to judicial protection and the right to a fair trial, the legitimate interests of the parties and of the other persons taking part in the proceedings and the harm that may be caused by applying or not applying those restrictions.'

II. Facts, dispute and questions referred for a preliminary ruling

15. On 27 September 2018, UAB Klaipėdos regiono atliekų tvarkymo centras ('the contracting authority') published a calls for tenders for the award of a public contract for the provision of services relating to the collection of municipal waste in the municipality of Neringa (Lithuania) and the transportation of that waste to treatment facilities in the region of Klaipėda (Lithuania). [6]

16. On 29 November 2018, that contract was awarded to the grouping of economic operators made up of UAB Klaipėdos autobusų parkas, UAB Parsekas and UAB Klaipėdos transportas ('the Consortium'). UAB Ecoservice Klaipėda ('Ecoservice') was ranked second.

17. On 4 December 2018, Ecoservice asked for the contracting authority's permission to access the information contained in the Consortium's tender. On 6 December 2018, it was provided with the non-confidential information in that tender.

18. On 10 December 2018, Ecoservice filed an application for review of the final outcome of that procedure with the contracting authority on the ground that the Consortium did not meet the requirements of the call for tenders. [7] The contracting authority dismissed that application on 17 December 2018.

[6] According to paragraph 3 of the order for reference, the contract notice states that the provisional value of the contract is in excess of EUR 750 000 (excluding VAT).

[7] More specifically, it argued: (i) that the contracts for the collection and transportation of mixed municipal waste cited by the Consortium as evidence of its economic and financial capacity had not been performed directly by the bodies comprising that Consortium; and (ii) that the vehicles mentioned in the documents submitted by the Consortium do not meet the technical specifications laid down in the tender specifications.

19. On 27 December 2018, Ecoservice brought an action against the contracting authority's decision before the Klaipėdos apygardos teismas (Regional Court, Klaipėda, Lithuania). Along with its application, it submitted a requested for access to all of the information contained in the Consortium's tender, as well as the correspondence exchanged between the latter and the contracting authority.

20. After hearing the contracting authority, which opposed Ecoservice's request, on 15 January 2019, the court of first instance ordered that authority to make available all of the documents requested, with the exception of the correspondence with the Consortium.

21. On 25 January 2019, the contracting authority provided the information, both confidential and non-confidential, contained in the Consortium's tender. It requested that Ecoservice be denied access to the confidential information, which was upheld by the court of first instance.

22. By two subsequent requests, Ecoservice applied to that court for access to: (a) the tender information which had been classified as confidential; and (b) details of the waste management contracts concluded by one of the bodies comprising the Consortium. The court of first instance denied both requests, in each case by unappealable order.

23. By judgment of 15 March 2019, the court of first instance held that the Consortium satisfied the requirements governing the supplier's classification [regarding confidentiality] and dismissed Ecoservice's action.

24. Ecoservice brought an appeal against the judgment of the court of first instance to the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania), which, on 30 May 2019, set aside that judgment, annulled the contracting authority's decision and ordered the tenders be re-evaluated.

25. The contracting authority lodged with the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) an appeal in cassation confined to challenging the appeal court's assessment of the Consortium's technical (in)capacity. [8]

26. On 26 July 2019, Ecoservice, before responding to the appeal in cassation, requested access to the confidential documents submitted by the Consortium to the court of first instance, 'which contained highly commercially sensitive information which had been concealed'.

27. It was in those circumstances that the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) referred, inter alia, the following questions for a preliminary ruling:

'(4) Are the third subparagraph of Article 1(1) of Directive 89/665, which lays down the principle of the effectiveness of review procedures, Article 1(3) and (5) thereof, Article 21 of Directive 2014/24 and Directive 2016/943, in particular recital 18 and the third subparagraph of Article 9(2) thereof (together or separately, but without limitation thereto), to be interpreted as meaning that, where a binding pre-litigation dispute settlement procedure is laid down in the national legal rules governing public procurement:

[8] The order for reference (paragraphs 36 and 37) states that, since the appeal in cassation was lodged not by Ecoservice but by the contracting authority, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) was in principle bound only to determine whether the successful tenderer had adequate technical capacity, this being the only question raised by the appellant. The court nonetheless decided of its own motion to go beyond the limits of the appeal in cassation and to rule on other aspects of the dispute.

(a) the contracting authority has to provide to the supplier who initiated the review procedure all information regarding another supplier's tender (regardless of their confidential nature), if the subject matter of that procedure is specifically the lawfulness of the evaluation of that tender and the supplier which initiated the procedure had explicitly requested the contracting authority prior thereto to disclose that information;

(b) irrespective of the answer to the previous question, the contracting authority, when rejecting the claim submitted by a supplier regarding the lawfulness of the evaluation of his competitor's tender, must in any event give a clear, comprehensive and specific reply, regardless of the risk of disclosing confidential tender information entrusted to it?

(5) Are the third subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) of Directive 89/665, Article 21 of Directive 2014/24 and Directive 2016/943, in particular recital 18 thereof (together or separately, but without limitation thereto), to be interpreted as meaning that the contracting authority's decision not to grant a supplier access to the confidential details of another participant's tender is a decision which may be challenged separately before the courts?

(6) If the answer to the previous question is in the affirmative, is Article 1(5) of Directive 89/665 to be interpreted as meaning that the supplier must file a claim with the contracting authority in respect of such a decision by it and, if need be, bring an action before the court?

(7) If the answer to the previous question is in the affirmative, are the third subparagraph of Article 1(1) and Article 2(1)(b) of Directive 89/665 to be interpreted as meaning that, depending on the extent of the information available on the content of the other supplier's tender, the supplier may bring an action before the courts concerning exclusively the refusal to provide information to him, without separately calling the lawfulness of other decisions of the contracting authority into question?

(8) Irrespective of the answers to the previous questions, is the third subparagraph of Article 9(2) of Directive 2016/943 to be interpreted as meaning that the court, having received the applicant's request that the other party to the dispute be ordered to produce evidence and that the court make it available to the applicant, must grant such a request regardless of the actions on the part of the contracting authority during the procurement or review procedures?

(9) Is the third subparagraph of Article 9(2) of Directive 2016/943 to be interpreted as meaning that, after rejecting the applicant's request for disclosure of confidential information of the other party to the dispute, the court should of its own motion assess the significance of the data whose loss of confidentiality is requested and the data's effects on the lawfulness of the public procurement procedure?'

III. Procedure before the Court of Justice

28. The request for a preliminary ruling was received at the Court on 18 December 2019.

29. Written observations have been lodged by Klaipėdos autobusų parkas,[9] Ecoservice, the Republic of Austria, the Republic of Lithuania and the European Commission.

[9] One of the bodies comprising the Consortium.

30. The parties replied in writing to the questions put to them by the Court, in replacement of the hearing.

IV. Assessment

A. Preliminary observations

31. At the Court's request, I shall confine myself to an analysis of the fourth to ninth questions referred for a preliminary ruling. These can be grouped, by subject matter, into three sets:

– In the fourth question, the referring court expresses uncertainty as to the scope of the contracting authority's obligation to maintain the secrecy of the information that a tenderer designates as confidential when adjudicating on an application for review made by another tenderer wishing to access that information.

– In the fifth to seventh questions, the uncertainty has to do with an action before the courts to challenge a contracting authority's decision refusing to grant an operator access to confidential information provided by another operator.

– Finally, the eighth and ninth questions concern the power of the court to disclose confidential information in its possession and, where appropriate, to examine of its own motion the legality of the award.

32. I shall look in the first place at the interpretation of Directives 2014/24 and 2016/943 with respect to the handling of confidential information. I shall then set out my reply to the questions referred, which will include references to Directive 89/665.

B. Protection of confidential information provided in a public procurement procedure

33. According to the Court, 'the principal objective of the Community rules in that field is the opening-up of public procurement to undistorted competition in all the Member States. … In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition'. [10]

34. Directive 2014/24 brings together several rules relating to the publication of information held by the contracting authority. These include [11] Article 21, which, in principle, [12] prohibits the disclosure of 'information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders'.

[10] Judgment of 14 February 2008, *Varec* (C-450/06, EU:C:2008:91; 'the judgment in *Varec*', paragraphs 34 and 35).

[11] Directive 2014/24 contains other provisions on the protection of confidentiality, to which I shall refer later, in the context of contract award notices (Article 50(4)) and information provided to candidates and tenderers (Article 55). Both state that information is not to be published where '[its] release … would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators'.

[12] Unless the directive itself or national law provides otherwise. It would not appear from Article 20 of the LCP that there is any national provision to the contrary.

35. In the light of the arguments put forward by the parties, it is necessary to define what type of confidential information is to be protected by the contracting authority (and the bodies that review its decisions), according to Directive 2014/24. Later, I shall assess the impact of Directive 2016/943 on public procurement procedures.

1. Confidential information under Directive 2014/24

36. A literal and isolated interpretation of Article 21 of Directive 2014/24 would support the inference that confidential information is, quite simply, that which an economic operator designates as such. Protected information would thus in all circumstances mean information which economic operators 'have designated as confidential'.

37. If that interpretative criterion were to be applied, access to any [13] information not authorised [to be released] by the operator that made it available to the contracting authority, whatever its content, would automatically be blocked which is to say that that information could not be disclosed.

38. Such a broad interpretation cannot be accepted. Indeed, Article 21 of Directive 2014/24 mentions as examples of information which may be classified as confidential 'technical or trade secrets and the confidential aspects of tenders'. Thus, it indicates that the classification of information as confidential rests on an *objective* basis rather than on the *subjective* will of the person providing the information.

39. That proposition is borne out, from a schematic point of view, by other provisions of Directive 2014/24 (in particular Article 50(4) and Article 55(3)). In accordance with those provisions, disclosure of information is to be refused where this would harm 'the legitimate commercial interests of a particular economic operator, public or private'. Once again, it is objective rather than subjective factors that take precedence.

40. I therefore take the view that Article 21 of Directive 2014/24, read in context, does not entrust to the economic operator *alone* the task of specifying, at its discretion, which information is to be classified as confidential. Any reasoned request to that effect – essential if the economic operator wishes to restrict publication of the data which it is itself providing – is subject to the subsequent decision of the contracting authority (and, where appropriate, to the decision of the body reviewing that authority's decisions).

41. The purpose of that provision leads to the same conclusion. If that provision, in common with the rest of Directive 2014/24, is intended to avoid distortions of competition, [14] it stands to reason that the power to determine which risks to competition would flow from disclosing allegedly confidential information should be conferred on the contracting authority – rather than unilaterally on the operator concerned. Its duty of impartiality and objectivity in dealings with the various tenderers makes the contracting authority ideally suited to making that judgment.

42. Moreover, in that way, the contracting authority can ensure that all economic operators are treated 'equally and without discrimination', in accordance with the guiding principles of public procurement.

[13] This is not the case with the Lithuanian legislation, inasmuch as it prohibits the *entirety* of a tender from being communicated on a confidential basis.

[14] See point 33 of this Opinion.

2. Application of Directive 2016/943

43. The referring court seeks an interpretation of Article 9 of Directive 2016/943 in conjunction with recital 18 thereof because the test for granting access to certain information is, according to that court, whether it constitutes a trade secret. [15]

44. I should point out, however, that, in accordance with Article 21 of Directive 2014/24, the benefit of protection is not confined to 'trade secrets' but also extends to, inter alia, 'the confidential aspects of tenders'. That provision may therefore cover information that cannot strictly be classified as a trade secret, since those two concepts are not equivalent.

45. In any event, Directive 2016/943, the purpose of which is to protect 'undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure', provides for a situation contrary to that in the present case. The latter is concerned with the *non* -disclosure of certain confidential information that the contracting authority refuses to communicate to the operator requesting it.

46. I therefore concur with the Commission [16] that Article 9 of Directive 2016/943 is not applicable to the present case, since that provision concerns judicial proceedings relating to the *unlawful* acquisition, use and disclosure of a trade secret. [17]

47. Furthermore, Directive 2014/24 is the *lex specialis* governing the disclosure of information provided by economic operators in the context of a public call for tenders.

48. Recital 18 of Directive 2016/943 is evidence of that when it refers to the obligations on the public authorities to maintain the confidentiality of 'information forwarded to contracting authorities in the context of procurement procedures, as laid down, for example, in Directive 2014/24 …'.

49. It is therefore Directive 2016/943 itself which subjects the treatment of the rules on the protection of confidential information in this field to the regime laid down in Directive 2014/24. If, in the legitimate exercise of its powers, a contracting authority discloses such information, in a manner permitted by Directive 2014/24, this constitutes one of the cases in which Directive 2016/943 is not applicable, as provided for in Article 1(2) and Article 3(2) thereof.

50. The answers to the questions raised by the referring court in connection with the protection of confidentiality must therefore be based on the interpretation of Directive 2014/24. Since its subject matter is related, Directive 2016/943 may be used as a supporting text, but not a primary text.

C. Fourth question

51. By this question, the referring court wishes to ascertain:

– In the first place (point (a)), whether the contracting authority must supply to a tenderer challenging the evaluation of tenders *all* of the information contained in the tender submitted

15 Paragraph 64 et seq. of the order for reference.

16 Paragraphs 70 to 75 of its written observations.

17 This is also follows from recitals 13 and 24 of Directive 2016/943.

by the successful tenderer, in the case where the applicant for review has previously requested that information from the contacting authority itself.

– In the second place (point (b)), whether, if the application for review is dismissed, the contracting authority must 'give a clear, comprehensive and specific reply', even at the risk of disclosing confidential tender information which has been entrusted to it.

52. The referring court explains that national law establishes a 'binding *ex ante* administrative dispute settlement procedure' in respect of which the contracting authority itself is the adjudicator.

1. Point (a)

53. It falls to the contracting authority, as I have already said, to determine which information supplied by the tenderer, which the latter has designated as being confidential, really are confidential. It is that same power which enables the competent authority, at the stage of the application for review, to examine the actions of the contracting authority.

54. The safeguard for confidential information and trade secrets must be applied in such a way as to reconcile it 'with the requirements of effective legal protection and the rights of defence of the parties to the dispute … in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial'. [18]

55. It is implicit in the need to maintain that balance that a request [for the disclosure of confidential information] made to, or the filing of an application for review with, the contracting authority does not require that authority automatically to supply to the applicant for review all of the information contained in the successful tenderer's tender. [19] Neither does it require that authority systematically to refuse to supply that information. [20] The contracting authority must adopt its decision in the light of the grounds for the request - or, where appropriate, the application for review - and the nature of the information requested.

56. As I have said, the contracting authority exercises its powers whether it is responding to a reasoned request for the disclosure of confidential information or adjudicating on an application for review (within the meaning of Article 1(5) of Directive 89/665) [21] of the decision to permit or refuse such disclosure or the decision to award the contract following the evaluation of tenders.

57. Point (a) of the fourth question raised by the referring court concerns the role played by the contracting authority in 'a review procedure'. It falls to the contracting authority, when adjudicating on such a procedure, to strike a balance between the protection of confidentiality and right to an effective remedy within the meaning of Directive 89/665.

[18] Judgment in *Varec*, paragraph 52.

[19] *Ibidem*, paragraph 40: 'the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned. Such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets'.

[20] The order for reference states that, in Lithuania, the customary 'public procurement practice, which the court of cassation consistently attempts to limit', is to refuse to grant access to those requesting information supplied by tenderers.

[21] Article 1(5) of Directive 89/665 authorises the domestic law of a Member State to provide for such a *review*, which is in fact a re-examination procedure conducted by the contracting authority itself. According to the order for reference, this is an administrative process in Lithuania.

58. Consequently, the contracting authority must evaluate the interests and reasons of the person requesting the disclosure of confidential information (provided by a competitor in the call for tenders) and compare them with the need to safeguard the confidentiality of that information. Where appropriate, it may ask the economic operator concerned to explain why the classification of certain information as confidential should be maintained in full or in part.

59. The contracting authority's response to such an *application for review*, even if this challenges the 'legality of the evaluation of that tender', must include the reasons for its decision. As I have already explained, that response does not necessarily have to be to provide the applicant for review with 'all' of the information contained in another tenderer's tender. To the contrary, that will depend on whether the contracting authority considers, in whole or in part, that maintaining the confidentiality of the information made available to it is justified.

2. Point (b)

60. The referring court wishes to ascertain whether, when dismissing a claim brought by a tenderer challenging the outcome of an evaluation, the contracting authority must give a 'clear, comprehensive and specific reply, regardless of the risk of disclosing confidential tender information entrusted to it'.

61. The answer to that question may be inferred from the answer given to point (a) of the same question.

62. When substantiating a decision dismissing an application for review submitted to it, the contracting authority must respect the rights of both the applicant for review and the other party (the successful tenderer, whose information the applicant for review is seeking to have disclosed). It must set out the reasons for its course of action, thus facilitating any subsequent review of its acts.

63. While the contracting authority's decision does have to be 'clear and specific', it does not necessarily and automatically have to contain *all* the confidential data supplied in the tender. That would be the case only if, after balancing the interests involved [22] as it must, the contracting authority decides that some interests take precedence over others.

D. Fifth, sixth and seventh questions

64. Of these three questions, which must be addressed together, the fifth refers to whether the contracting authority's decision not to grant access to confidential information may be 'challenged separately'. The sixth and seventh questions seem to start from that very assumption.

65. In actual fact, it is not clear from the order for reference [23] that Ecoservice did launch such a *separate* (or independent) challenge when the contracting authority decided to send it only the non-confidential information contained in the Consortium's tender. [24]

[22] The balance between protecting the confidentiality of information and judicial protection is also referred to in Article 9 of Directive 2016/943.

[23] In paragraphs 64 to 76 of that order, the referring court explains its reasons for raising the fourth to ninth questions. The fact remains that those reasons do not always correspond exactly with the wording of the corresponding questions.

[24] Klaipėdos autobusų parkas makes this point in its written observations, paragraphs 81 and 82.

66. It follows from the account of the facts set out in that order that the action taken by Ecoservice was to ask both the contracting authority and, subsequently, the court of first instance (in the latter case, at the same time as bringing its action) to order the full disclosure of the information provided by the Consortium. Therefore, it is doubtful whether that request may be classified as an *independent* application for review within the meaning indicated above.

67. However, that fact does not necessarily render inadmissible the fifth, sixth and seventh questions, which benefit from the presumption of relevance which the Court confers on requests for a preliminary ruling.

68. Those questions could be held to be admissible if the referring court takes the view that Ecoservice had, or could or should have, challenged the decision not to provide it with the information requested separately before the contracting authority and the court of first instance.

69. That being the basis of those questions:

– The fifth question asks whether the contracting authority's decision not to disclose confidential information may be challenged separately before the courts.

– The sixth, on the assumption that the foregoing remedy is available, asks whether the operator 'must file a claim with the contracting authority' in order to challenge the latter's decision to turn down its request for access to confidential information.

– Finally, the seventh asks, if the answers to the previous questions are in the affirmative, whether the operator may 'bring an action before the courts concerning exclusively the refusal to provide [the] information' requested.

70. The answer to those questions must be based on the general provision in the last subparagraph of Article 1(1) of Directive 89/665. The review to which it refers extends to all decisions by the contracting authority which apply EU law in that field. [25]

71. Decisions by the contracting authority which are open to review in this way include, of course, those that award a contract by selecting one of the tenders, but also others of a different kind (for example, those adopting or dismissing provisional measures) which have a bearing on the legal position of the parties concerned. [26]

72. One of the decisions in which the contracting authority applies EU law (in particular, Article 21 of Directive 2014/24), and thus renders it open to potential review, is the decision whether to designate certain information as confidential and not allow its disclosure, or to authorise its full or partial disclosure.

[25] Judgment of 5 April 2017, *Marina del Mediterráneo and Others* (C-391/15, EU:C:2017:268, paragraph 26): 'the wording of Article 1(1) of Directive 89/665 assumes, by using the words "as regards [contract award] procedures", that every decision of a contracting authority falling under EU rules in the field of public procurement and liable to infringe them is subject to the judicial review provided for in Article 2(1)(a) and (b) of that directive'.

[26] *Ibidem*, paragraph 27. The Court therefore supports a 'broad construction of the concept of a "decision" taken by a contracting authority [which] is confirmed by the fact that Article 1(1) of Directive 89/665 does not lay down any restriction with regard to the nature or content of the decisions it refers to'.

73. Directive 89/665 has not 'formally laid down the time from which the possibility of review, as provided for in Article 1(1), must be open'. [27] The Court's position is that it must be ensured that decisions by contracting authorities can be reviewed effectively and, in particular, as quickly as possible.

74. The EU legislature has entrusted to the Member States the task of laying down the 'detailed rules' of the procedures for reviewing decisions by contracting authorities (Article 1(3) of Directive 89/665). [28]

75. The Member States also have the option, within the margins made available by Article 2 of Directive 89/665, to entrust those reviews either to the courts in the strict sense of that term or to other bodies. [29] It follows from the order for reference, however, that, in Lithuania, reviews of decisions adopted by a contracting authority, including its decision in the pre-litigation dispute settlement procedure, are conducted by the courts.

76. It is therefore open to Member States, in principle, to legislate on applications for review of decisions adopted by a contracting authority by providing that they are to be made either jointly or separately (with/from the main challenge). Directive 89/665 neither prescribes nor excludes either of those mechanisms.

77. If Member States, availing themselves of their procedural autonomy, choose to prescribe a joint challenge, they must do so without contravening the purposes of Directive 89/665 in relation to the required effectiveness and speed. They must, in addition, take into consideration:

– That the Directive 'does not authorise Member States to make the exercise of the right to apply for review conditional on the fact that the public procurement procedure in question has formally reached a particular stage'. [30]

– That, depending on its characteristics, national legislation which 'requires, in all cases, a tenderer to wait for a decision awarding the contract in question before it may apply for a review of a decision allowing another tenderer to participate in that …procurement procedure infringes the provisions of Directive 89/665'. [31]

78. The objectives of speed and effectiveness are more easily attained through the 'separate challenge' mechanisms to which the referring court refers. A review of this kind not only satisfies the requirement of speed but is also able to do so at the same time as meeting the need for effectiveness, inasmuch as it allows the (principal) challenge to the substantive decision (that is to say, the award) to be brought once the party in question has the information necessary to enable it to mount an effective defence of its rights. [32]

[27] *Ibidem*, paragraph 31.

[28] *Ibidem*, paragraph 32: 'In the absence of EU rules laying down the time from which a possibility of review must be open, it is for national law to lay down the detailed rules of judicial procedures governing actions for safeguarding rights which individuals derive from EU law', subject to the limitations inherent in the principles of effectiveness and equivalence.

[29] Article 2(9) provides for the possibility for bodies responsible for review procedures not to be judicial in character and for 'independent bodies' to be set up which are comprised of members having a status similar in some regards to that of judges.

[30] Judgment of 5 April 2017, *Marina del Mediterráneo and Others* (C-391/15, EU:C:2017:268, paragraph 31).

[31] *Ibidem*, paragraph 34.

[32] Ecoservice requested access to the information necessary to prepare its application for review of the contract award decision on 4 December 2018.

79. One might raise the objection that independent reviews entail a risk of delay to the conclusion of the contractor selection process. In the view of the Court, that objection is countered by the '… justification of reasonable time limits for applying for review of decisions which may be challenged and not the barring of an independent review'. [33]

80. In principle, therefore, since an independent challenge is consistent with Directive 89/665, there is no reason why national law should not allow it.

81. If, on the other hand, national law were to require that an application for review of the decision on confidentiality should be made jointly with the application for review of the decision awarding the contract, the court would have to assess whether that requirement preserves the effectiveness of Directive 89/665 to the same extent from the point of view of the speed and efficacy of such a challenge mechanism.

82. The procedural autonomy of the Member States also extends to the – optional – introduction of a pre-litigation application for review to the contracting authority. Article 1(5) of Directive 89/665 does not preclude national legislation from 'requir[ing] the person concerned to apply for review in the first place to the contracting authority'.

83. Article 2 of Directive 89/665 sets out the requirements governing the review procedures provided for in Article 1, whether such a procedure entails an application for review made initially to the contracting authority, or an application made subsequently to a review body (in this case, of a judicial nature).

84. In the light of those considerations, I take the view that Directive 89/665 does not prevent:

– A party from bringing a separate challenge, before the courts, against the contracting authority's decision not to disclose the confidential information provided in a participant's tender in the tendering procedure.

– National legislation from requiring the person concerned to apply in the first place to the contracting authority for review of the latter's decision turning down its request for access to confidential information.

– The person concerned from bringing an action before the courts exclusively in connection with the refusal to provide it with the information requested.

E. Eighth and ninth questions

85. These questions concern the interpretation of the third subparagraph of Article 9(2) of Directive 2016/943. It is my view, however, as I said earlier, that Directive 2016/943 is not directly applicable in the present case.

86. Nevertheless, Directive 89/665 provides a basis for giving a useful answer to the referring court.

[33] Judgment of 5 April 2017, *Marina del Mediterráneo and Others* (C-391/15, EU:C:2017:268, paragraph 35).

87. Both questions concern the process to be followed by the court called upon to settle the dispute in terms of: (a) having regard to the contracting authority's prior actions (eighth question); and (b) assessing of its own motion the data the disclosure of which is sought (ninth question). [34]

88. It is for to the contracting authority to decide whether it is appropriate to disclose the confidential information provided by a tenderer in its tender. That decision (or the later decision by which the contracting authority itself confirms the earlier one in the course of adjudicating on an application for review under national law) is open to review in the manner laid down in Article 2 of Directive 89/665.

89. If, as in the present case, that review is to be made by a court, the latter must be able to conduct a full examination of the contracting authority's decisions. It may therefore annul them, in full or in part, if it considers that they are unlawful.

90. Where one of the contracting authority's decisions which it must subject to judicial review is the refusal to disclose certain information accompanying a tender, the reviewing court may declare that refusal to be either justified or unfounded.

91. Before formulating its judgment, whatever that may be, that court must 'have regard to the actions by the contracting authority during the procurement or review procedures', to use the form of words contained in the order for reference.

92. Of course, that does not mean that the reviewing court is bound by the contracting authority's actions the lawfulness of which forms the subject of its examination. To deny the court the power to correct and, where appropriate, to annul the contracting authority's decisions would be to confer on purely administrative acts adopted by that authority a force equivalent to the force of *res judicata*, in breach of the right to judicial protection and of the system of guarantees provided for in Directive 89/665.

93. The refusal to provide the information requested on the ground that it cannot be disclosed does not, however, prevent the reviewing court from analysing 'the importance of the data the disclosure of which is requested'.

94. That analysis will allow it to access to the full file, including confidential information. The Court has already held in that regard that 'the body responsible for the review must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and business secrets'. [35]

95. Whether that assessment can be conducted by the reviewing body of its own motion or only at the request of one of the parties is, once again, something which will depend on the powers which the domestic legislation confers on each of the bodies competent in the context of judicial review procedures.

[34] The referring court recognises that, as a 'court of cassation[, it] it is required to rule only on the issues raised by the defendant in its appeal in cassation, in particular whether tenderer B complies with the technical capacity requirement'. However, it 'is contemplating going, of its own motion, beyond the limits of the appeal in cassation and ruling on other aspects of the dispute between the parties, … not only on the basis of protecting the public interest but also in the light of the specific situation that has arisen in the present case, in which the applicant was essentially denied all of the information to which it had requested access at the pre-litigation stage and in the proceedings' (paragraphs 36 and 37 of the order for reference).

[35] Judgment in *Varec*, paragraph 53.

F. Conclusion

96. In the light of the foregoing, I propose that the answers to the fourth to ninth questions referred for a preliminary ruling by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) should be as follows:

(1) Articles 21, 50 and 55 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 do not necessarily require the contracting authority to provide to a participant in a procurement procedure who is challenging before that authority the latter's evaluation of tenders *all* of the information contained in the tender submitted by the selected tenderer.

When adjudicating on an application for review of the decision evaluating tenders, the contracting authority must substantiate its response by expressing the reasons for its decision, so that this may be effectively challenged before a review body. The duty to state reasons does not in itself entail a requirement to disclose the confidential information that has been entrusted to that authority, in the case where it considers such disclosure to be inappropriate.

(2) Articles 1 and 2 of Council Directive 89/665/EEC 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 are to be interpreted as meaning that they do not prohibit:

– A party from bringing a separate challenge, before the courts, against the contracting authority's decision not to disclose the confidential information provided in a participant's tender in the tendering procedure.

– National legislation from requiring the person concerned to apply in the first place to the contracting authority for review of the latter's decision turning down its request for access to confidential information.

– The person concerned from bringing an action before the courts exclusively in connection with the refusal to provide it with the information requested.

(3) Articles 1 and 2 of Directive 89/665 are to be interpreted as meaning that the body competent to review the decisions of the contracting authority:

– Must be empowered to annul the decisions that the contracting authority has adopted in respect of the disclosure of the confidential information made available to it, and, where appropriate, to order that that information be provided to the applicant for review.

– May, if national law authorises it, evaluate of its own motion the lawfulness of the acts adopted by the contracting authority, having regard to the confidential information made available to it.