Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2023*

(Reference for a preliminary ruling – Procedures for the award of public works contracts, public supply contracts and public service contracts – Directive 2014/24/EU – Point (d) of the first subparagraph of Article 57(4) – Award of public contracts in the transport sector – Directive 2014/25/EU – Article 80(1) – Facultative grounds for exclusion – Obligation to transpose – Economic operator entering into agreements aimed at distorting competition – Competence of the contracting authority – Impact of an earlier decision of a competition authority – Principle of proportionality – Article 47 of the Charter of Fundamental Rights of the European Union – Right to an effective remedy – Principle of sound administration – Obligation to state reasons)

In Case C-66/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), made by decision of 13 January 2022, received at the Court on 2 February 2022, in the proceedings

Infraestruturas de Portugal SA,

Futrifer Indústrias Ferroviárias SA,

v

Toscca – Equipamentos em Madeira Lda,

intervening party:

Mota-Engil Railway Engineering SA,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Prechal, K. Jürimäe, C. Lycourgos (Rapporteur), N. Piçarra and O. Spineanu-Matei, Presidents of Chambers, M. Ilešič, P.G. Xuereb, L.S. Rossi, I. Jarukaitis, A. Kumin, N. Jääskinen, N. Wahl and I. Ziemele, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: L. Carrasco Marco, Administrator,

* Language of the case: Portuguese.

having regard to the written procedure and further to the hearing on 7 March 2023,

after considering the observations submitted on behalf of:

– Futrifer Indústrias Ferroviárias, SA, by G. Guerra Tavares, A. Magalhães e Menezes and L.M. Soares Romão, advogados,

– Toscca – Equipamentos em Madeira Lda, by N. Cunha Rodrigues and J.M. Sardinha, advogados,

– the Portuguese Government, by P. Barros da Costa, F. Batista, P. Moreira da Cruz and M.J. Ramos, acting as Agents,

– the Czech Government, by L. Halajová, M. Smolek and J. Vláčil, acting as Agents,

– the Hungarian Government, by M.Z. Fehér and K. Szíjjártó, acting as Agents,

– the European Commission, by G. Braga da Cruz, 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 (d) of the first subparagraph of Article 57(4) 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), and of Article 41(2)(b) and (c) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in the course of proceedings between, on the one hand, Toscca – Equipamentos em Madeira Lda ('Toscca') and, on the other hand, Infraestruturas de Portugal, SA, and Futrifer Indústrias Ferroviárias, SA ('Futrifer'), concerning the decision of Infraestruturas de Portugal to award a public contract to Futrifer for the purchase of creosoted pine sleepers and rods.

Legal context

European Union law

Directive 2014/24

3 Recital 101 of Directive 2014/24 states:

‘Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. It should be clarified that grave professional misconduct can render an economic operator’s integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.

… [Contracting authorities] should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion.’

4 The second subparagraph of Article 26(5) of that directive provides:

‘Where the contract is awarded by restricted procedure or competitive procedure with negotiation, Member States may provide, notwithstanding the first subparagraph of this paragraph, that sub-central contracting authorities or specific categories thereof may make the call for competition by means of a prior information notice pursuant to Article 48(2).’

5 Under Article 32(1) of that directive:

‘In the specific cases and circumstances laid down in paragraphs 2 to 5, Member States may provide that contracting authorities may award public contracts by a negotiated procedure without prior publication.’

6 Article 55 of that directive, entitled 'Informing candidates and tenderers', provides, in paragraph 2(b) thereof:

'On request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:

…

(b) any unsuccessful tenderer of the reasons for the rejection of its tender …'

7 Article 56 of Directive 2014/24 is worded as follows:

'1. Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 59 to 61 that all of the following conditions are fulfilled:

…

(b) the tender comes from a tenderer that is not excluded in accordance with Article 57 and that meets the selection criteria set out by the contracting authority in accordance with Article 58 and, where applicable, the non-discriminatory rules and criteria referred to in Article 65.

…

(2) …

Member States may exclude the use of the procedure in the first subparagraph for, or restrict it to, certain types of procurement or specific circumstances.'

8 Article 57 of that directive, entitled 'Exclusion grounds', provides:

1. Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons [referred to in points (a) to (f) of the present paragraph.]

…

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

…

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

(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;

…

5. …

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

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

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

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

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

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

Directive 2014/25

9 Article 1 of 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), as amended by Commission Delegated Regulation (EU) 2017/2364 of 18 December 2017 (OJ 2017 L 337, p. 17) ('Directive 2014/25'), provides:

'1. This Directive establishes rules on the procedures for procurement by contracting entities with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 15.

2. Procurement within the meaning of this Directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 8 to 14 [of this directive].

…'

10 Article 4(1)(a) of Directive 2014/25 provides:

'For the purpose of this Directive contracting entities are entities, which:

(a) are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 8 to 14'.

11 Article 11 of that directive is worded as follows:

'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 15(a) of that directive states, in essence, that the latter is to apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the threshold of EUR 443 000 for supply and service contracts as well as for design contests.

13 Article 80(1) of Directive 2014/25 provides:

'The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships may include the exclusion grounds listed in Article 57 of Directive [2014/24] on the terms and conditions set out therein.

Where the contracting entity is a contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 57(1) and (2) of Directive [2014/24] on the terms and conditions set out in that Article.

If so required by Member States, those criteria and rules shall, in addition, include the exclusion grounds listed in Article 57(4) of Directive [2014/24] on the terms and conditions set out in that Article. …'

Portuguese law

14 Article 55(1)(c) of the Código dos Contratos Públicos (Public Procurement Code), in the version applicable to the dispute in the main proceedings ('CCP'), is worded as follows:

'Prohibitions on procurement

(1) The following entities may not be applicants, tenderers, nor form part of a grouping:

…

(c) natural persons who have received a penalty for grave professional misconduct and who, in the intervening period, have not been rehabilitated, and legal persons the administrative, management or governing bodies of which have received such an administrative penalty and continue to perform their duties;

…'

15 Article 55(1)(f) of that code provides that, in particular, entities that have been subject to the ancillary penalty, imposed by the Portuguese competition authority, of prohibition from participating in public procurement procedures, may not be applicants, tenderers, or form part of any grouping.

16 Article 55 A of that code concerns the lifting of prohibitions, set out in Article 55(1) thereof, by the contracting authority, and states that it is not to apply to the situations referred to in Article 55(1)(f) of that code.

17 Paragraph 70 of the CCP states:

'Evaluation of tenders

…

(2) Tenders shall be excluded where their evaluation indicates:

…

(g) the existence of compelling evidence of acts, agreements, practices or information that may distort the competition rules.

…'

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

18 Toscca brought an action before the Tribunal Administrativo e Fiscal de Viseu (Administrative and Tax Court, Viseu, Portugal) seeking annulment of the decision of Infraestruturas de Portugal of 25 July 2019, consisting in the award to Futrifer of a public contract for the purchase of creosoted pine sleepers and rods intended for use in the railway infrastructure sector, for a base price of EUR 2 979 200. In that action, Toscca also sought to be awarded that public contract.

19 Further to the dismissal of that action by decision of 21 February 2020, Toscca brought an appeal before the Tribunal Central Administrativo Norte (North Central Administrative Court, Portugal). By judgment of 29 May 2020, that court set aside that decision, upheld the appeal brought by Toscca and ordered Infraestruturas de Portugal to award that public contract to that company.

20 By judgment of 22 April 2021, the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal) set aside the judgment referred to in the preceding paragraph on grounds of insufficient reasoning, and referred the case back to the Tribunal Central Administrativo Norte (North Central Administrative Court). On 2 June 2021, the latter delivered a fresh judgment yielding the same outcome as that of the judgment of 29 May 2020. Infraestruturas de Portugal and Futrifer each brought an appeal against that judgment of 2 June 2021 before the Supremo Tribunal Administrativo (Supreme Administrative Court), which is the referring court.

21 That court observes that, on 12 June 2019, Futrifer was ordered by the Autoridade da Concorrência (Competition Authority, Portugal) to pay a fine in respect of a breach of competition rules in the context of public procurement procedures, organised in 2014 and 2015, and relating to the provision of services for the maintenance of equipment and tracks forming part of the national rail network, which infrastructure was under the management of a public undertaking that had merged with Infraestruturas de Portugal in the interim.

22 The referring court states, in that connection, that the exclusion of a tenderer on grounds of lack of reliability on account of a breach of competition rules unrelated to a public procurement procedure, may be accepted only pursuant to Article 55(1)(f) of the CCP, that is to say, by the effect of an express decision delivered by the Competition Authority, imposing on that tenderer the ancillary penalty of prohibition from participating in public procurement procedures for a certain period of time. According to that court, that solution is, however, contrary to Directive 2014/24 and, in particular, point (d) of the first subparagraph of Article 57(4) thereof, in that it undermines the independence of the contracting authority in deciding on the reliability of any tenderer.

23 The referring court wishes to ascertain, moreover, whether the decision to award a public contract to a tenderer who has been found to be in breach of competition rules in an earlier public procurement procedure, conducted by the same contracting authority, may be regarded as sufficiently reasoned, particularly in the light of the right to sound administration, provided for in Article 41(2)(c) of the Charter, where that contracting authority has not carried out an independent and reasoned assessment of the reliability of that tenderer.

24 Furthermore, the referring court is uncertain as to whether national legislation under which the contracting authority is not required, in the context of a public procurement procedure, to carry out an independent assessment of the reliability of a tenderer found to be in breach of competition rules is in conformity with EU law in so far as concerns both the examination of the seriousness of

that breach as well as the impact thereof on the procedure at issue, and the examination of the appropriateness of the measures taken by the tenderer in question to remedy, in the context of the latter procedure, the consequences of that breach (self-cleaning measures). In the latter connection, the referring court states that, under national law, the assessment of such corrective measures falls exclusively to the Competition Authority.

25 That court considers that, in the light of the case-law of the Court of Justice, in particular the judgment of 19 June 2019, *Meca* (C-41/18, EU:C:2019:507), a breach by a tenderer of the competition rules which is unrelated to a public procurement procedure must be subject to a duly reasoned assessment by the contracting authority, in the context of the examination of the reliability of such a tenderer.

26 In those circumstances, the Supremo Tribunal Administrativo (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does the ground for exclusion provided for in Article 57(4)(d) of Directive [2014/24] constitute a matter reserved for decision [“reserva de decisão”] by the contracting authority?

(2) May the national legislature fully replace the decision that should be taken by the contracting authority under Article 57(4)(d) of Directive 2014/24/EU with a generic decision (with the effects of a decision) from its national competition authority to impose an ancillary penalty consisting of prohibition from participating in public procurement procedures for a certain period, adopted in the context of the imposition of a fine for breach of competition rules?

(3) Should the contracting authority’s decision concerning the “reliability” of the economic operator in view of its compliance (or non-compliance) with the rules of competition law, beyond the scope of the specific tendering procedure, be interpreted as requiring an assessment based on the relative suitability of that economic operator, which constitutes a concrete expression of the right to good administration under Article 41(2)(c) of the [Charter]?

(4) May the solution adopted in Portuguese law under Article 55(1)(f) of the CCP, whereby the exclusion of an economic operator from a tendering procedure on grounds of breach of competition rules unrelated to that specific procurement procedure is subject to a decision from the competition authority in the context of an application of an ancillary penalty consisting of a prohibition from tendering, a procedure in which it is the competition authority itself that assesses the relevance of the self-cleaning measures taken, be regarded as consistent with EU law, specifically, Article 57(4)(d) of Directive 2014/24/EU?

(5) Furthermore, may the solution adopted under Portuguese law in Article 70(2)(g) of the CCP, which limits the possibility of excluding a tender due to significant evidence of acts, agreements, practices or information that are liable to distort competition rules in the specific procurement procedure in which such practices are detected, be regarded as consistent with EU law, and in particular with Article 57(4)(d) of Directive [2014/24/EU]?’

The request for an expedited procedure

27 The referring court requested that the present reference for a preliminary ruling be determined pursuant to an expedited procedure under Article 105 of the Rules of Procedure of the Court of Justice, on the ground that the main proceedings were themselves urgent. It referred, in that regard, to Article 36(1)(c) of the Código de Processo nos Tribunais Administrativos (Code of Procedure before the Administrative Courts) and Article 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 (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EC of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) ('Directive 89/665').

28 Article 105(1) of the Rules of Procedure provides that, at the request of the referring court or tribunal or, exceptionally, of his or her own motion, the President of the Court may decide, after hearing the Judge-Rapporteur and the Advocate General, that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time.

29 It should be recalled, in that connection, that such an expedited procedure is a procedural instrument meant for an exceptional situation of urgency, the existence of which must be established in the light of exceptional circumstances specific to the case in connection with which an application for an expedited procedure is made (order of the President of the Court of 25 February 2021, *Sea Watch*, C-14/21 and C-15/21, not published, EU:C:2021:149, paragraph 22).

30 In the present case, on 23 March 2022, the President of the Court decided, after hearing the Judge-Rapporteur and the Advocate General, to reject the referring court's request referred to in paragraph 27 above.

31 That court in fact confined itself to stating that the main proceedings were urgent and referring to provisions of national law and EU law whilst failing to indicate the extent to which there may, in the present case, be exceptional urgency, which is nonetheless necessary in order to justify an expedited procedure.

Consideration of the questions referred

Admissibility

32 Futrifer takes the view that the request for a preliminary ruling is inadmissible on the ground that the Court's reply to the questions referred is not necessary in order to resolve the dispute in the main proceedings. It maintains, in that regard, that the Portuguese Republic legitimately chose not to transpose point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 into national law, with the result that those questions are hypothetical.

33 In that regard, it should be noted that, according to settled case-law, in the context of the cooperation between the Court of Justice 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 of Justice.

Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (see, to that effect, judgments of 16 December 1981, *Foglia*, 244/80, EU:C:1981:302, paragraph 15, and of 28 April 2022, *Caruter*, C-642/20, EU:C:2022:308, paragraph 28).

34 The Court may refuse to give a ruling on a question referred by a national court only where it is obvious that the interpretation of EU law that is sought bears no relation to the 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 (judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 61, and of 28 April 2022, *Caruter*, C-642/20, EU:C:2022:308, paragraph 29).

35 In the present case, the questions relate, in essence, to the interpretation of the facultative grounds for exclusion laid down in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, which covers the case in which the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.

36 In the connection, in the first place, it is apparent from the order for reference that the dispute in the main proceedings relates to the lawfulness of the decision to award a public contract to a tenderer who has been ordered by the national competition authority to pay a fine in respect of a breach of the competition rules in the context of earlier public procurement procedures. By questions 1 to 3 and 5 referred for a preliminary ruling, the referring court seeks to ascertain, in essence, the scope of the discretion which point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 confers on the contracting authority where, under Portuguese legislation, the latter authority is bound by the assessment, carried out by the competition authority, of the reliability of the tenderer who has committed such a breach in the context of a public procurement procedure, irrespective of whether or not that assessment led to an ancillary penalty consisting of prohibition from participating in public procurement procedures.

37 Consequently, it cannot be held that those questions bear no relation to the actual facts of the main action or its purpose or that they are hypothetical. As to the fact, alleged by Futrifer, that the Portuguese Republic legitimately chose not to transpose point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 into national law, that relates to substantive aspects and is in no way such as to affect the admissibility of the questions put to the Court. It follows that Questions 1 to 3 and 5 are admissible.

38 In the second place, in the context of the fourth question, the referring court asks, in essence, whether Article 57(4) of Directive 2014/24 precludes national legislation under which the competition authority alone is competent to assess the relevance of the corrective measures taken by the economic operator who, on account of a breach of competition rules, is subjected to a penalty imposed by that authority, prohibiting that operator from participating in public procurement procedures for a certain period of time.

39 It is not apparent from the information before the Court that Futrifer has relied, at any point in time, on the taking of corrective measures such as those referred to in Article 57(6) of Directive 2014/24.

40 It follows that the fourth question referred is hypothetical and must, accordingly, be ruled inadmissible.

Substance

Preliminary observations

41 In the first place, it should be recalled that, in accordance with settled case-law, under the procedure laid down by Article 267 TFEU, which provides for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. In that regard, the Court may also find it necessary to consider provisions of EU law to which the national court has not referred in its question (see, to that effect, judgment of 22 June 2023, *K.B and F.S. (Raising ex officio of an infringement in criminal proceedings)*, C-660/21, EU:C:2023:498, paragraph 26 and the case-law cited).

42 In the present case, it is stated in the request for a preliminary ruling that the subject matter of the contract at issue in the main proceedings is the purchase, by a public undertaking – namely, Infraestruturas de Portugal – of creosoted pine sleepers and rods intended for use in the railway infrastructure sector, for a base price of EUR 2 979 200.

43 In that connection, it should be observed that, in accordance with Article 1(2) and Article 11 of Directive 2014/25, procurement within the meaning of that directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, for activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, inter alia. Article 4(1)(a) of that directive states that, for the purpose thereof, contracting entities are entities, which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 8 to 14 of that directive.

44 Furthermore, it is clear from Article 1(1) of Directive 2014/25 that the latter establishes rules on the procedures for procurement by contracting entities with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 15 of that directive.

45 In those circumstances, and in the light of the information set out in the order for reference, it is apparent from the information before the Court that the contract at issue in the main proceedings falls within the scope of Directive 2014/25; this is, however, a matter for the referring court to ascertain.

46 In such a situation, Article 80(1) of that directive would be applicable to the dispute in the main proceedings.

47 In the second place, since the questions referred for a preliminary ruling relate, in particular to whether point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 precludes the national legislation at issue in the main proceedings, it is necessary to determine beforehand whether the Member States are under the obligation to transpose into their national law both the first subparagraph of Article 57(4), in the event that the dispute in the main proceedings should fall within the scope of Directive 2014/24, and the third subparagraph of Article 80(1) of Directive 2014/25, in the event that that dispute should fall within the scope of the latter directive.

48 As regards, first, the first subparagraph of Article 57(4) of Directive 2014/24, that provision states that 'contracting authorities may exclude or may be required by Member States to exclude any economic operator from participation in a procurement procedure' in any of the situations referred to in points (a) to (i) of that provision.

49 In that connection, it admittedly follows from certain judgments of the Court which interpreted the first subparagraph of Article 57(4) of Directive 2014/24 that the Member States can decide whether or not to transpose the facultative grounds for exclusion referred to in that provision. The Court has in fact held that, in accordance with Article 57(4) and (7) of Directive 2014/24, the Member States are free not to apply the facultative grounds for exclusion set out in that directive or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level (see, to that effect, judgments of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraph 33; of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraphs 34 and 40; and of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 28).

50 However, an analysis of the wording of the first subparagraph of Article 57(4) of Directive 2014/24, the context into which that provision fits, and the aim that the latter pursues within the framework of that directive, shows that contrary to what is apparent from those judgments, the Member States are under the obligation to transpose that provision into their national law.

51 As regards, first of all, the wording of that first subparagraph of Article 57(4), it is clear that the choice as to the decision whether or not to exclude an economic operator from a public procurement procedure on one of the grounds set out in that provision falls to the contracting authority, unless the Member States decide to transform that option to exclude into an obligation to do so. Accordingly, the Member States must transpose that provision either by allowing or by requiring contracting authorities to apply the exclusion grounds laid down by the latter provision. By contrast, and contrary to the arguments put forward by Futrifer and the Portuguese Government, a Member State cannot omit those grounds from its national legislation transposing Directive 2014/24 and thus deprive contracting authorities of the possibility – which must, at the very least, be conferred on them by virtue of that provision – of applying those grounds.

52 Next, in so far as concerns the context into which the first subparagraph of Article 57(4) of Directive 2014/24 fits, it should be noted that recital 101 of that directive states that 'contracting authorities should … be given the possibility to exclude economic operators which have proven unreliable'. That recital thus confirms that a Member State must transpose that provision in order not to deprive contracting authorities of the possibility referred to in the preceding paragraph and that recital.

53 This interpretation of the first subparagraph of Article 57(4) of Directive 2014/24 is also confirmed *a contrario* by the wording of the provisions of that directive, in respect of the transposition of which the Member States are expressly granted discretion. That is the case, in particular, for Article 26(5) and Article 32(1) of that directive, according to which 'the Member States may provide …', or even the second subparagraph of Article 56(2) of that directive, which employs the terms 'Member States may exclude …'.

54 Article 57(7) of Directive 2014/24 is not such as to call that interpretation into question. That provision confers, generally, on the Member States the power to determine the conditions for application of Article 57 of that directive, be it by legislative, regulatory or administrative

provision. That power concerns the manner in which they may implement that article. The choice thus left to the Member States therefore cannot be extended to the question whether or not the facultative grounds for exclusion referred to in Article 57(4) of that directive are to be transposed. It must further be held that Article 57(7) of Directive 2014/24 is also applicable to the mandatory ground for exclusion laid down in Article 57(1) of that directive. It cannot reasonably be argued that the power provided for in Article 57(7) may be used by the Member States in order not to transpose such exclusion grounds into their national law.

55 Lastly, as to the objective pursued by Directive 2014/24 in so far as concerns the facultative grounds for exclusion, the Court has acknowledged that that objective is reflected in the emphasis placed on the powers of contracting authorities. Thus the EU legislature intended to confer on the contracting authority, and on it alone, the task of assessing whether a candidate or tenderer must be excluded from a procurement procedure during the stage of selecting the tenderers (see, to that effect, judgments of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraph 34, and of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93*, C-267/18, EU:C:2019:826, paragraph 25).

56 The option, or indeed obligation, for the contracting authority to apply the exclusion grounds set out in the first subparagraph of Article 57(4) of Directive 2014/24 is specifically intended to enable it to assess the integrity and reliability of each of the economic operators participating in a public procurement procedure.

57 The EU legislature thus intended to ensure that contracting authorities have, in all Member States, the possibility of excluding economic operators who are regarded as unreliable by those authorities.

58 It follows from the foregoing considerations that the first subparagraph of Article 57(4) of Directive 2014/24 contains an obligation, for the Member States, to transpose the facultative grounds for exclusion set out in the provision into their national law. In the context of that obligation to transpose, those States must provide for either the option or the obligation for contracting authorities to apply those grounds.

59 In so far as concerns, second, the third subparagraph of Article 80(1) of Directive 2014/25, this provides that, if Member States so request, the objective rules and criteria for the exclusion and selection of candidates and tenderers, inter alia in open, restricted or negotiated procedures, are to include the exclusion grounds listed in Article 57(4) of Directive 2014/24 on the terms and conditions set out in that article.

60 It follows from the wording of the third subparagraph of Article 80(1) that it falls to the Member States to decide whether the facultative grounds for exclusion laid down in Article 57(4) are to be applied, by contracting entities, as criteria for excluding tenderers. In the absence of any decision in that regard, it nonetheless follows from the first subparagraph of Article 80(1) of Directive 2014/25 that the Member States must, when transposing that directive, at the very least make provision for the possibility for contracting entities to include, amongst the rules and exclusion criteria applicable in public procurement procedures which fall within the scope of that directive, the exclusion grounds set out in Article 57(4) of Directive 2014/24.

61 Accordingly, as regards the exclusion grounds set out in Article 57(4) of Directive 2014/24, the Member States must, in accordance with their obligation to transpose the first subparagraph of Article 80(1) of Directive 2014/25, make provision for the possibility for contracting entities to

include those exclusion grounds amongst the objective exclusion criteria in procedures which fall within the scope of the latter directive, without prejudice to any decision on the part of those States, taken pursuant to the third subparagraph of Article 80(1) of that directive, and consisting in requiring that those entities include those grounds amongst those criteria.

62 As regards, in the third place, Futrifer's argument that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 cannot be relied upon by an unsuccessful tenderer – such as Toscca, in the present case – it is sufficient to observe, for the purposes of the answer to be given to the present request for a preliminary ruling, that the Court has already ruled that if the right to an effective remedy – as guaranteed by Article 47 of the Charter – is not to be disregarded, a decision by which a contracting authority refuses, even implicitly, to exclude an economic operator from a procurement procedure on one of the facultative grounds for exclusion laid down in the first subparagraph of Article 57(4) of Directive 2014/24 must necessarily be capable of being challenged by any person having or having had an interest in obtaining a specific contract or having been or at risk of being harmed by a breach of that provision (judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 143).

63 On the very same grounds, an identical assessment must be relied upon in the event of a refusal to exclude an economic operator from a public procurement procedure on one of the facultative grounds for exclusion referred to in the third subparagraph of Article 80(1) of Directive 2014/25.

64 It is therefore appropriate to answer the questions referred for a preliminary ruling while taking the preceding preliminary observations into consideration.

The fifth question

65 By its fifth question, which it is appropriate to examine in the first place, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 must be interpreted as precluding national legislation which limits the possibility of excluding a tender from a tenderer on account of the existence of significant evidence of conduct on the latter's part liable to distort the competition rules in the public procurement procedure in the context of which that type of conduct has arisen.

66 In interpreting provisions of EU law, it is necessary to consider not only their wording but also the context in which they occur and the objectives pursued by the rules of which they are part (judgment of 16 March 2023, *Colt Technology Services and Others*, C-339/21, EU:C:2023:214, paragraph 39 and the case-law cited).

67 First, it should be observed that, by providing for the scenario in which the contracting authority 'has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition', the wording of point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 does not limit the application of that ground for exclusion to the public procurement procedure in the context of which that type of behaviour has arisen.

68 As regards, second, the context into which that provision fits, that interpretation is supported by the second subparagraph of Article 57(5) of that directive, which permits the contracting authorities, at any time during the procedure, to exclude or be required by the Member States to

exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4 of that Article 57.

69 Third, that interpretation enables the contracting authority, in accordance with the objective pursued by Directive 2014/24 in so far as concerns the facultative grounds for exclusion set out in the first subparagraph of Article 57(4) of that directive, as recalled in paragraph 56 of the present judgment, to ascertain the integrity and reliability of each of the economic operators participating in the public procurement procedure at issue (see, to that effect, judgment of 15 September 2022, *J. Sch. Omnibusunternehmen and K. Reisen*, C-416/21, EU:C:2022:689, paragraph 42), which integrity and reliability are liable to be cast into doubt not only in the event of the participation of such an operator in anticompetitive conduct in the context of that procedure, but also in the event of that operator's participation in such conduct in the past.

70 In the present case, the referring court observes that Article 70(2)(g) of the CCP limits the possibility for the contracting authority to exclude a tender on account of the existence of compelling evidence of acts, agreements, practices or information that may distort the competition rules solely in the public procurement procedure in the context of which those anticompetitive practices have arisen, with the result that such exclusion may only be decided by the contracting authority if the anticompetitive practices in question occurred prior to that procedure.

71 In that connection, it is clear from paragraphs 51, 58, 60 and 61 of the present judgment that, irrespective of whether the public procurement procedure in question falls within the scope of Directives 2014/24 or 2014/25, the Member States must, at the very least, provide for the possibility for contracting authorities to include the exclusion grounds set out in Article 57(4) of Directive 2014/24 amongst the objective exclusion criteria in public procurement procedures, without prejudice to any decision by those Member States to transform that option into an obligation to do so. The Member States therefore cannot, in any event, restrict the scope of those exclusion grounds.

72 It follows from the foregoing that the answer to the fifth question must be that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 must be interpreted as precluding national legislation which limits the possibility of excluding a tender from a tenderer on account of the existence of significant evidence of conduct on the part of that tenderer liable to distort competition rules in the public procurement procedure in the context of which that type of conduct has arisen.

The first and second questions

73 By its first and second questions, which it is appropriate to answer together, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 must be interpreted as precluding national legislation which confers the power to decide to exclude economic operators from public procurement procedures, on the grounds of a breach of competition rules, solely on the national competition authority.

74 It should be recalled, in that regard, that in accordance with Article 56(1)(b) of Directive 2014/24, the contracting authority is under the obligation to verify, during the public procurement procedure, whether the tender comes from a tenderer that is not excluded in accordance with

Article 57 of that directive; that obligation extends to all economic operators who have submitted a tender (see, to that effect, judgment of 30 January 2020, *Tim* (C-395/18, EU:C:2020:58, paragraph 46).

75 As is clear from the case-law cited in paragraphs 55 and 56 of the present judgment, the EU legislature intended to entrust the contracting authority, and only the contracting authority, with the task of assessing whether a candidate or tenderer is to be excluded from a public procurement procedure by determining the integrity and reliability of each of the economic operators participating in that procedure.

76 In particular, the facultative ground for exclusion mentioned in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in conjunction with recital 101 of that directive, is based on an essential element of the relationship between the successful tenderer in question and the contracting authority, namely the reliability of the successful tenderer, on which the contracting authority's trust is founded (judgment of 15 September 2022, *J. Sch. Omnibusunternehmen and K. Reisen*, C-416/21, EU:C:2022:689, paragraph 41 and the case-law cited).

77 According to the case-law of the Court, where contracting authorities apply facultative grounds for exclusion, they must have particular regard to the principle of proportionality, which requires that they carry out a specific and individual assessment of the conduct of the individual concerned, on the basis of all the relevant factors (see, to that effect, judgments of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 40), and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraphs 156 and 157).

78 It follows that, in a situation such as that at issue in the main proceedings, in which there is a specific procedure regulated by EU law or by national law for pursuing certain breaches of competition rules and in which the national competition authority is entrusted with carrying out investigations in this connection, the contracting authority must, within the context of the assessment of the evidence provided, rely in principle on the outcome of such a procedure (see, to that effect, judgment of 24 October 2018, *Vossloh Laeis*, C-124/17, EU:C:2018:855, paragraph 25).

79 The decision of such an authority, finding that such a breach has been committed and, on that ground, imposing a financial penalty on a tenderer, may take on particular significance, and all the more so if that penalty is accompanied by a temporary prohibition on participation in public procurement procedures. Where such a decision may lead the contracting authority to exclude that economic operator from the public procurement procedure in question, conversely, the absence of such a decision can neither prevent nor exempt the contracting authority from carrying out such an assessment.

80 That assessment should be carried out having regard to the principle of proportionality and taking into account all the relevant factors in order to determine whether the application of the ground for exclusion referred to in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 is justified.

81 In the case in the main proceedings, the referring court states that Article 55(1)(f) of the CCP entrusts exclusively to the national competition authority the assessment of the consequences which a breach of competition rules can have in the context of future public procurement procedures. Thus, that legislation appears, on the one hand, to require that contracting authorities comply with a decision of that authority which imposes a penalty on an economic

operator prohibiting the latter from participating in such procedures for a certain period of time and, on the other hand, to prevent those contracting authorities from excluding from those procedures an economic operator who has not been subjected to such a penalty. It follows that a tenderer may be excluded from a public procurement procedure, following a decision of that authority, without the contracting authority being able either to assess the conduct of that tenderer – and, consequently, the latter's integrity and reliability to perform the contract in question – or to decide independently, having regard to the principle of proportionality, whether the exclusion of that tenderer is justified on the ground referred to in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24.

82 Such legislation, which ties the assessment of the integrity and reliability of tenderers to the findings in a decision of the national competition authority in relation to, in particular, future participation in public procurement procedures, undermines the discretion to be afforded to the contracting authority in the context of the first subparagraph of Article 57(4) of Directive 2014/24.

83 The considerations set out in the preceding paragraph also apply in the case where the public procurement procedure at issue in the main proceedings falls within the scope of Directive 2014/25 since, as has been recalled in paragraph 71 of the present judgment, the Member States are required, in accordance with their obligation to transpose the first subparagraph of Article 80(1) of that directive, to provide for the option for those contracting entities to include the exclusion grounds set out in Article 57(4) of Directive 2014/24 amongst the objective exclusion criteria in procedures falling within the scope of Directive 2014/25, without prejudice to any decision on the part of the Member States to transform that option into an obligation to do so. The Member States therefore cannot, in any event, restrict the discretion to be afforded to the contracting authority in that context.

84 It follows from the foregoing that the answer to the first and second questions is that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 must be interpreted as precluding national legislation which confers the power to decide to exclude economic operators from public procurement procedures, on the grounds of a breach of competition rules, solely on the national competition authority.

The third question

85 By its third question, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in the light of Article 41(2)(c) of the Charter, must be interpreted as meaning that the decision of the contracting authority as to the reliability of an economic operator, adopted pursuant to the ground for exclusion laid down in that provision of Directive 2014/24, must be reasoned.

86 It should be observed, at the outset, that Article 41(2)(c) of the Charter relates exclusively to the obligation to state reasons for decisions which is incumbent on the 'institutions, bodies, offices and agencies of the Union'. That provision is therefore irrelevant in the context of the dispute in the main proceedings.

87 It should, however, be recalled that the contracting authority must comply with the general principle of EU law relating to sound administration, which carries with it requirements which the Member States must observe when implementing EU law. Among those requirements, the obligation to state reasons for decisions adopted by the national authorities is particularly important, since it puts their addressee in a position to defend its rights and decide in full

knowledge of the circumstances whether it is worthwhile to bring an action against those decisions (see, to that effect, judgments of 15 October 1987, *Heylens and Others*, 222/86, EU:C:1987:442, paragraph 15, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraph 120).

88 It follows that, in the context of public procurement procedures, the contracting authority is under that obligation to state reasons. That obligation relates, inter alia, to decisions by way of which the contracting authority excludes a tenderer by applying, in particular, a facultative ground for exclusion, such as that provided for in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24.

89 As is clear from Article 55(2)(b) of Directive 2014/24, on request from the tenderer concerned, the contracting authority is to inform any unsuccessful tenderer of the reasons for the rejection of its tender, as quickly as possible, and in any event within 15 days from receipt of a written request.

90 It should, furthermore, be noted that the contracting authority must also state reasons for its decision when it finds that a tenderer is in one of the situations covered by Article 57(4) of that directive, but it nonetheless decides not to exclude that tenderer, for example, on the ground that such an exclusion would constitute a disproportionate measure. A decision not to exclude a tenderer, where a facultative ground for exclusion appears to apply, affects the legal situation of all the other economic operators participating in the public procurement procedure in question, who must therefore be able to defend their rights and, where applicable, decide, on the basis of the reasons set out in that decision, to bring an action against it. In that connection, the statement of reasons for the decision not to exclude a tenderer may be included in the final decision to award the contract to the successful tenderer.

91 In the light of the foregoing, the answer to the third question is that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in the light of the principle of sound administration, must be interpreted as meaning that the decision of the contracting authority as to the reliability of an economic operator, adopted pursuant to the exclusion ground laid down in that provision, must be reasoned.

Costs

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

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

1. **Point (d) of the first subparagraph of Article 57(4) 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**

   must be interpreted as precluding national legislation which limits the possibility of excluding a tender from a tenderer on account of the existence of significant evidence of conduct on the part of that tenderer liable to distort competition rules in the public procurement procedure in the context of which that type of conduct has arisen.

2. Point (d) of the first subparagraph of Article 57(4) of Directive 2014/24

must be interpreted as precluding national legislation which confers the power to decide to exclude economic operators from public procurement procedures, on the grounds of a breach of competition rules, solely on the national competition authority.

3. Point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in the light of the general principle of sound administration,

must be interpreted as meaning that the decision of the contracting authority as to the reliability of an economic operator, adopted pursuant to the exclusion ground laid down in that provision, must be reasoned.

[Signatures]