Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 24 February 2022 [1]

Case C-669/20

Veridos GmbH
v
Ministar na vatreshnite raboti na Republika Bulgaria,
Mühlbauer ID Services GmbH – S&T

(Request for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria))

(Reference for a preliminary ruling – Procedures for the award of certain works contracts, supply contracts and service contracts – Directive 2014/24/EU – Directive 2009/81/EC – Setting of a criterion for assessing an abnormally low tender – Existence of at least three tenders)

1. Where certain public contracts are required to be awarded to the most economically advantageous tender or the tender with the lowest price, EU law permits the contracting authority to reject 'abnormally low tenders' for which there is no satisfactory justification.

2. In this request for a preliminary ruling, a number of questions are referred in connection with the conclusion of a public contract for the planning, establishment and management of a system for the issue of Bulgarian identity documents. The referring court seeks to ascertain, in summary:

– Under what conditions and with what scope the contracting authority has an obligation to verify whether any abnormally low tenders exist, for the purposes of Directive 2009/81/EC [2] and Directive 2014/24/EU. [3]

– At what time a judicial review of a contracting authority's assessment ruling out the existence of an abnormally low tender has to be carried out, and whether reasons must be given for that assessment.

[1] Original language: Spanish.

[2] Directive of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76).

[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).

I. Legal framework

A. European Union law

1. Directive 2014/24

3. Recital 90 states:

‘Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender. …

In order to encourage a greater quality orientation of public procurement, Member States should be permitted to prohibit or restrict use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate.

To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision. Contracting authorities should therefore be obliged to indicate the contract award criteria and the relative weighting given to each of those criteria. …’

4. Recital 92 reads:

‘When assessing the best price–quality ratio contracting authorities should determine the economic and qualitative criteria linked to the subject matter of the contract that they will use for that purpose. Those criteria should thus allow for a comparative assessment of the level of performance offered by each tender in the light of the subject matter of the contract, as defined in the technical specifications. In the context of the best price–quality ratio, a non-exhaustive list of possible award criteria which include environmental and social aspects is set out in this Directive. Contracting authorities should be encouraged to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.

The chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective and fair competition and be accompanied by arrangements that allow the information provided by the tenderers to be effectively verified.

…’

5. Article 56 (‘General principles’) provides:

‘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:

…’

6. Article 69 ('Abnormally low tenders') provides:

'1. Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.

…

3. The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed …'

2. Directive 2009/81

7. Recital 15 reads:

'The award of contracts concluded in the Member States by contracting entities as referred to in Directive 2004/17/EC … and by contracting authorities as referred to in Directive 2004/18/EC … is subject to compliance with the principles of the Treaty and in particular the free movement of goods, the freedom of establishment and the freedom to provide services, and with the principles deriving therefrom, such as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

…'

8. Recital 69 is worded as follows:

'Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in a transparent and objective manner under conditions of effective competition. As a result, it is appropriate to allow the application of two award criteria only: "the lowest price" and "the most economically advantageous tender".'

9. Pursuant to Article 38 ('Verification of the suitability and choice of participants and award of contracts'):

'1. Contracts shall be awarded on the basis of the criteria laid down in Articles 47 and 49, taking into account Article 19, after the suitability of the economic operators not excluded under Articles 39 or 40 has been checked by contracting authorities/entities in accordance with the criteria of economic and financial standing, of professional and technical knowledge or ability referred to in Articles 41 to 46 and, where appropriate, with the non-discriminatory rules and criteria referred to in paragraph 3.

…'

10. Article 49 ('Abnormally low tenders') states:

'1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority/entity shall, before it rejects those tenders, request in writing details of the constituent elements of the tender which it considers relevant.

…

2. The contracting authority/entity shall verify those constituent elements by consulting the tenderer, taking account of the evidence supplied.

…'

11. Article 55 ('Scope and availability of review procedures') provides in paragraph 2:

'Member States shall take the measures necessary to ensure that decisions taken by the contracting authorities/entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 56 to 62, on the grounds that such decisions have infringed [EU] law in the field of procurement or national rules transposing that law.'

B. Bulgarian law

12. Article 72 of the Zakon za obshtestvenite porachki (Law on Public Procurement), headed 'Abnormally low tenders', provides:

'1. If, in a tenderer's tender, an element that is linked to price or costs and is subject to assessment is more than 20% lower than the mean value of the tenders submitted by the other tenderers in respect of the same criterion for assessment, the contracting authority shall request a detailed written explanation of how that element was prepared, to be submitted within five days of receiving the request.'

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

13. The Ministry of the Interior of the Republic of Bulgaria, in its capacity as a contracting authority, initiated a procedure for the award of a public contract, the subject of which was the 'planning, establishment and management of a Generation 2019 system for the issue of Bulgarian identity documents'. [4]

14. Following the appropriate preselection, Veridos GmbH ('Veridos') and the consortium Mühlbauer ID Services GmbH-S&T ('Mühlbauer') were invited to submit tenders.

15. The contract was ultimately awarded to Mühlbauer. [5]

16. Veridos challenged the award before the Komisia za zashtita na konkurentsiata (Commission for Protection of Competition, Bulgaria), arguing that the successful tender was abnormally low. [6]

4 Notice published by Decision No 5785 MPR-58 of 15 August 2018.

5 Decision No 5785 MPR-35 of 29 April 2020.

6 Order for reference, paragraph 41 *in fine*.

17. By decision of 25 June 2020, the Commission for Protection of Competition rejected the complaint made by Veridos. The Commission for Protection of Competition took the view that Article 72 of the Law on Public Procurement was inapplicable because, as only two tenders had been submitted, it was not possible to calculate the mean value stipulated by that provision for the purpose of determining whether one of those tenders was abnormally low.

18. Veridos appealed against the decision of 25 June 2020 before the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), which has referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 56 of Directive [2014/24] in conjunction with Article 69 thereof, or, respectively, Article 38 of Directive [2009/81] in conjunction with Article 49 thereof, to be interpreted as meaning that a contracting authority, where it is objectively impossible to apply the criterion laid down in national law for the evaluation of an abnormally low tender and in the absence of a different criterion selected by the contracting authority and announced in advance, is not required to verify whether an abnormally low tender exists?

(2) Is Article 56 of Directive 2014/24 in conjunction with Article 69 thereof, or, respectively, Article 38 of Directive 2009/81 in conjunction with Article 49 thereof, to be interpreted as meaning that the contracting authority is required to verify whether abnormally low tenders exist only if there is a suspicion regarding any tender; or, conversely, is the contracting authority required to always ensure that the received tenders are genuine, and state the relevant reasons?

(3) Does such a requirement apply to the contracting authority if only two tenders have been received during the procedure for the award of a public contract?

(4) Is Article 47 of the [Charter of Fundamental Rights of the European Union ('the Charter')] to be interpreted as meaning that the contracting authority's assessment as regards a lack of suspicion that an abnormally low tender exists, or, respectively, that contracting authority's conviction that the first-ranked tenderer has submitted a genuine tender, is subject to judicial review?

(5) Should the previous question be answered in the affirmative: is Article 47 of the [Charter] to be interpreted as meaning that a contracting authority in a procedure for the award of a public contract which has not verified whether an abnormally low tender exists is required to provide justification and reasons as to why there is no suspicion that an abnormally low tender has been submitted, in other words, that the first-ranked tender is genuine?'

III. Procedure before the Court of Justice

19. The request for a preliminary ruling was received at the Registry of the Court on 8 December 2020.

20. On 1 February 2021, the President of the Court of Justice decided not to grant the request that the reference be dealt with under the expedited procedure.

21. Observations were lodged by Veridos, Mühlbauer, the Austrian, Bulgarian, Czech and French governments and the European Commission.

22. It was not considered necessary to hold a hearing.

IV. Analysis

A. Preliminary considerations

23. Directive 2009/81 is applicable to this case because it concerns a public contract for the issue of identity documents in relation to 'the fields of defence and security'. [7] As is apparent from the order for reference, the contracting authority published the invitation to tender for the single contract in accordance with that directive. [8]

24. However, the referring court has submitted its questions in relation to the relevant articles of Directive 2009/81 and Directive 2014/24. It justifies its approach on the basis of the 'identical content and analogous function of the relevant provisions of the two directives'. [9] There is no reason not to proceed in this way, since the provisions of the two directives the interpretation of which the referring court seeks are substantially the same, so that the Court's reply will apply equally to all those provisions. [10]

25. In the same vein, the case-law of the Court of Justice in this area can be applied to the present case even where it refers to analogous provisions of public procurement directives other than the two cited above, as I shall explain below.

26. On account of their content, the referring court's questions can be grouped together in two blocks:

– The first three questions seek to determine whether the contracting authority is required to verify whether any abnormally low tenders exist and, where appropriate, under what conditions and with what scope.

7 The Bulgarian Government states (paragraph 9 of its observations) that the technology and materials used for identity documents require or contain classified information and they therefore come under 'sensitive equipment' as referred to in Article 2(b) and (c) of Directive 2009/81.

8 According to the order for reference (paragraph 22), the contracting authority 'took the decision and gave notice of a single contract in accordance with Directive 2009/81', complying with recital 24 of that directive rather than relying on the option made available by recital 13 of Directive 2014/24. In accordance with Article 16(2)(b) of the latter directive, in the case of mixed contracts, 'where part of a given contract is covered by Directive 2009/81/EC, the contract may be awarded in accordance with that Directive, provided that the award of a single contract is justified for objective reasons.'

9 Paragraph 22 of the order for reference.

10 References in legislation to abnormally low tenders have been, and continue to be, a constant in EU public procurement law since Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition, Series I 1971(II), p. 682), Article 29(5). Such a reference was included in Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ 1977 L 13, p. 1), Article 25(5); Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), Article 37; Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 12), Article 27; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), Article 30(4); and Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), Article 34. That wording was repeated in subsequent generations of that legislation, such as Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1), Article 57; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), Article 55; and 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), Article 84.

– The fourth and fifth questions concern the reasoning to be provided by the contracting authority in relation to the absence of an abnormally low tender and the judicial review of that assessment.

B. Obligation to verify whether any abnormally low tenders exist (questions 1, 2 and 3)

27. According to the referring court, the legal dispute concerns only the powers exercised by the national legislature in regulating, in Article 72(1) of the Law on Public Procurement, the criterion for assessing abnormally low tenders. [11]

28. If I have understood the referring court's line of argument correctly, the inference from its interpretation of the national provision appears to be that the *only* criterion for categorising a tender as 'abnormally low' is that that tender is 20% lower than the mean value of the tenders submitted by the other tenderers. If that criterion could not be applied, because only two tenders exist, the contracting authority would not be able to assess whether either of those tenders is abnormally low. [12]

29. Before addressing whether the national provision, as interpreted in that way, [13] is compatible with Directives 2009/81 and 2014/24 (in particular, with Article 49 of the former and Article 69 of the latter), it should be recalled that:

– Article 49 of Directive 2009/81 imposes on the contracting authority the obligation to monitor and verify that tenders are genuine. Should the contracting authority consider any of the tenders to be abnormally low in relation to the goods, works or services, it must request in writing details of the constituent elements of the tender which it considers relevant.

– Pursuant to Article 69 of Directive 2014/24, a contracting authority must 'require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.'

30. As I have pointed out above, those provisions must be read in the light of the Court's case-law because the EU legislature did not provide a definition of what constitutes an abnormally low tender; nor did it provide a specific method of calculating an *anomaly* threshold. [14] That, I repeat, explains the importance of the interpretation given in the case-law, which has been notably consistent in this area over a period of time. [15]

[11] Paragraph 23 of the order for reference. After transcribing that provision, the national court maintains that the criterion of treating as abnormally low a tender that is more than 20% lower than the mean value of the tenders submitted by the other tenderers 'implicitly requires that there are at least three tenders, whereby one tender is assessed against the mean value of the other two tenders.'

[12] The Bulgarian Government (paragraph 34 of its observations) takes the same view: where there are only two tenders, there is no objective identification criterion for categorising those tenders as abnormally low, meaning that it is impossible for the contracting authority to suspect that one of the tenders is abnormally low.

[13] Although, naturally, it is for the referring court to interpret national law, the question could be asked whether, in fact, the Bulgarian legislation provides for comparison of the price of a tender with the mean value of the other tenders as a simple, non-exclusive, indication of an abnormally low tender. From that perspective, the contracting authority could use other, alternative criteria which, although not specified in that legislation, would enable it to identify whether a tender is in itself abnormally low.

[14] The Commission draws attention to this in its 'Guidance on the participation of third-country bidders and goods in the EU procurement market', Communication of 24 July 2019, C(2019) 5494 final, paragraph 2.1.

[15] That consistency is evident, in particular, in the judgments of 22 June 1989, *Fratelli Costanzo* (103/88, EU:C:1989:256; 'judgment in *Fratelli Costanzo*'); of 27 November 2001, *Lombardini and Mantovani* (C-285/99 and C-286/99, EU:C:2001:640; 'judgment in *Lombardini and Mantovani*'); of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191); of 18 December 2014, *Data Medical Service* (C-568/13, EU:C:2014:2466); of 19 October 2017, *Agriconsulting Europe* v *Commission* (C-198/16 P, EU:C:2017:784); and of 10 September 2020, *Tax-Fin-Lex* (C-367/19, EU:C:2020:685; 'judgment in *Tax-Fin-Lex*').

31. The Court of Justice has ruled:

– In relation to Directive 92/50, that 'it is … for the Member States and, in particular, the contracting authorities to determine the method of calculating an anomaly threshold constituting an "abnormally low tender" …' [16]

– In relation to Directive 93/37, that the contracting authority cannot avoid the obligation to 'identify suspect tenders' and, therefore, to hold the relevant (*inter partes*) examination procedure. [17]

– In relation to Directive 2004/18, [18] that '… the European Union legislature intended *to require the awarding authority to examine* the details of tenders which are abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine'. [19]

32. As concerns Article 69 of Directive 2014/24, the Court has confirmed that:

– Where a tender appears to be abnormally low, contracting authorities are to *require* the tenderer to provide an explanation for the price or costs proposed in the tender, which could relate, inter alia, to the elements set out in paragraph 2 of that article. [20]

– The contracting authority must assess the information provided by consulting the tenderer and it may reject such a tender only where the evidence supplied does not satisfactorily account for the low level of price or costs proposed. [21]

33. In short, the EU legislation imposes on contracting authorities the obligation to examine, in all cases, whether any of the tenders submitted appear prima facie to be abnormally low.

34. It is immaterial for those purposes whether it is impossible 'to apply the criterion laid down in national law for the evaluation of an abnormally low tender' and whether a different criterion selected by the contracting authority was announced in advance. The contracting authority cannot, I repeat, refrain from examining whether the tender (all the tenders) is [(are)] suspected of being frivolous.

35. It is also immaterial whether only two candidates have submitted tenders in the procurement procedure: each of those two tenders must be scrutinised by the contracting authority, which will assess whether they are suspect.

16 Judgment of 18 December 2014, *Data Medical Service* (C-568/13, EU:C:2014:2466, paragraph 49).

17 Judgment in *Lombardini and Mantovani*, paragraph 55.

18 Article 55(1) of which corresponds to Article 49(1) of Directive 2009/81.

19 Judgment of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191, paragraph 28). No italics in the original.

20 Judgment in *Tax-Fin-Lex*, paragraph 32.

21 Ibid., paragraph 33.

36. In principle, as I have explained above, it is for the Member States and the contracting authorities to determine the method of calculating an anomaly threshold constituting an 'abnormally low tender'. In any event, EU law provides guidelines for specifying the subject matter of the details that can be required of anyone who submits a suspect tender. [22]

37. The Bulgarian Government submits that the identification of abnormally low tenders may be based only on arithmetical calculations, like that referred to in the national legislation. In its submission, that approach ensures an objectivity which cannot be ensured if the identification of suspect tenders is based on the contracting authority's subjective assessment. [23]

38. I do not agree with that argument. The contracting authority has to identify tenders which appear suspect (and are therefore subject to the *inter partes* examination procedure) in the light of all the features of the subject matter of the invitation to tender. Comparison with the other, competing tenders, however useful it may be in certain cases for the purpose of identifying any anomalies, cannot be held up as the *sole* criterion used by the contracting authority. The examination of all components, as such, of the tender enables the contracting authority to determine whether, despite appearances and the distance between its price and those of other tenderers, [24] the suspect tender is sufficiently genuine.

39. In addition, the Court has ruled that the use of a mere mathematical criterion may be contrary to the development of effective competition in the field of public procurement. That is what occurred in the cases giving rise to the judgments in *Fratelli Costanzo* and *Lombardini and Mantovani*:

– In the former case, the Italian measure treated as abnormal, and excluded from the tendering procedure, 'tenders with a percentage discount greater than the average percentage divergence of the tenders admitted, increased by a percentage which must be stated in the call for tenders'. Pursuant to that call for tenders, tenders which did not exceed the basic amount by at least 9.48% were automatically eliminated. [25]

– In the latter case, the percentage giving rise to the contracting authority's obligation to undertake an examination of an anomalous tender was fixed at 'a measure equal to the arithmetic mean of the discounts, in percentage terms, in the case of all tenders admitted, increased by the average arithmetic divergence of the discounts, in percentage terms, which exceed the said mean.' [26]

40. The Court held that 'a mathematical criterion in accordance with which tenders which exceeded the basic value fixed for the price of the work by a percentage more than 10 points below the average percentage by which the tenders admitted exceeded that amount would be considered anomalous and consequently eliminated, deprives tenderers who have submitted

[22] In accordance with Article 49 of Directive 2009/81, those details may refer to: (1) the economics of the construction method, manufacturing process or services provided; (2) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods or services; (3) the originality of the work, supplies or services proposed by the tenderer; (4) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed; (5) the possibility of the tenderer obtaining State aid. The wording of Article 69 of Directive 2014/24 is substantially identical.

[23] Paragraph 18 of the Bulgarian Government's written observations.

[24] In the judgment in *Tax-Fin-Lex*, the Court did not rule out that, in certain circumstances, even a zero-price tender may be admissible (that is to say, not abnormally low), no matter how much it may differ from the other tenders submitted.

[25] Judgment in *Fratelli Costanzo*, paragraphs 6 to 10.

[26] Judgment in *Lombardini and Mantovani*, paragraph 8.

particularly low tenders of the opportunity to demonstrate that those tenders are genuine ones, so that application of such a criterion is contrary to the aim of Directive 71/305, namely to promote the development of effective competition in the field of public contracts'. [27]

41. On that basis, it may be inferred that a national provision pursuant to which the *sole* criterion for assessing whether a tender is abnormally low is that its value is 20% lower than the mean value of the tenders submitted by the other tenderers does not comply with EU law.

42. The obligation to examine the genuine nature of *all* the competing tenders is intended to ensure compliance with the principles of transparency, non-discrimination and equal treatment, in accordance with which public contracts must be awarded. [28]

43. That aim would be undermined if national legislation were to confine to mere percentage criteria (in relation to the other competitors) the situations in which a tender may warrant the classification of 'abnormally low', thereby superseding the provisions of Article 49 of Directive 2009/81 and Article 69 of Directive 2014/24.

C. Statement of reasons for and judicial review of the contracting authority's assessment of whether an abnormally low tender exists (questions 4 and 5)

44. Article 55(2) of Directive 2009/81 provides for the right to a review of decisions taken by a contracting authority. [29] The provision is aligned with the rules laid down in Directive 89/665/EC [30] and, as the Commission points out, ensures respect for the rights laid down in Article 47 of the Charter. [31]

45. Generally, and in accordance with Article 55(4) of Directive 2009/81, Member States have an obligation to make available 'review procedures … at least to any person having or having had an interest in obtaining a particular contract who has been or risks being harmed by an alleged infringement.'

46. In relation to abnormally low tenders, the answer to this second block of questions must be approached from a twofold perspective:

– First, by reference to the explicit or implicit nature of the contracting authority's decision regarding the genuineness of any of the competing tenders.

– Second, by reference to the judicial review of the contracting authority's assessment.

[27] Judgment in *Lombardini and Mantovani*, paragraph 47, citing the judgment in *Fratelli Costanzo*, paragraph 18. The latter judgment states that the EU provisions on public procurement, like those at issue here, create direct effect because of their content, unconditionality and precision.

[28] This is reflected in recital 69 of Directive 2009/81.

[29] 'Member States shall take the measures necessary to ensure that decisions taken by the contracting authorities/entities may be reviewed effectively and, in particular, as rapidly as possible … on the grounds that such decisions have infringed [EU] law in the field of procurement or national rules transposing that law.'

[30] 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). Article 55(2) of Directive 2009/81 reproduces the wording of the fourth subparagraph of Article 1(1) of Directive 89/665, which means that the Court's judgments on the latter directive may be applied by analogy.

[31] The Commission refers to recital 36 of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31). According to that recital, the directive 'seeks to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second subparagraphs of Article 47 of the Charter.'

1. Nature of the contracting authority's decision (and any reasons on which it is based)

47. In referring to abnormally low tenders, Article 49 of Directive 2009/81 does not impose on a contracting authority an indiscriminate obligation *explicitly to state its views* on whether the tender concerned is abnormally low.

48. Rather, that obligation arises if, 'for a given contract', the contracting authority considers that 'tenders appear to be abnormally low in relation to the goods, works or services'.

49. As I have already stated, the obligation on 'the contracting authority is …, first, to identify suspect tenders',[32] in the light of all the characteristics of the subject matter of the invitation to tender and, as the case may be, the relationship between each characteristic and the other characteristics.

50. If the contracting authority takes the view that none of the tenders thus assessed is abnormally low, it is not required to issue an ad hoc statement to that effect. I agree with Mühlbauer and the French Government on this point: mere acceptance of a tender by a contracting authority implicitly demonstrates the latter's belief that that tender is not abnormally low.

51. An ad hoc determination is necessary only where, after noting that a tender may be abnormally low, the contracting authority has allowed the tenderer (under Article 49(1) of Directive 2009/81) to demonstrate its genuineness by asking it to provide the details which the contracting authority considers appropriate.

52. On completion of that *inter partes* procedure, the contracting authority must, in accordance with the case-law of the Court, assess 'the merits of the explanations provided by the persons concerned' in order to take the 'decision as to whether to admit or reject [the] tenders' that were initially suspect.[33] Naturally, that decision must be supported by a sufficient statement of reasons.

53. Therefore, where it is suspected that a tender is abnormally low, and following the appropriate *inter partes* examination procedure, the contracting authority must *decide* whether to admit or reject that tender. When it does this, the contracting authority must set out its view in a reasoned decision in order to respect the rights of the person concerned.[34]

54. That follows from Article 35 of Directive 2009/81, pursuant to which the contracting authority must, 'at the earliest opportunity, inform candidates and tenderers of decisions reached concerning the award of a contract'.

55. On the other hand, if the contracting authority does not consider prima facie that any of the tenders might be abnormally low, no *inter partes* examination procedure will take place and there will be no explicit decision in that regard.

[32] Judgment in *Lombardini and Mantovani*, paragraph 55.

[33] Judgment in *Lombardini and Mantovani*, paragraph 55.

[34] As the Court observed in the order of 14 February 2019, *Cooperativa Animazione Valdocco* (C-54/18, EU:C:2019:118, paragraph 33), according to settled case-law 'the effectiveness of the judicial review guaranteed by Article 47 of the Charter requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question'.

56. In those circumstances, the decision bringing the tendering procedure to an end will implicitly include a decision not to regard as abnormally low any of the tenders submitted. The reasoning on which that decision is based is simply the lack of any evidence which would have necessitated the specific examination of a suspect tender.

2. Judicial review of the decision that a tender is abnormally low

57. In order to determine how the required judicial review of the contracting authority's decision should be carried out, it is necessary to distinguish between the two situations referred to above: either the contracting authority has explicitly stated its view on the suspicions aroused by a particular tender or it has done so implicitly, by deciding on the outcome of the procedure for the award of the contract without expressing any doubts as to the genuine nature of that or any other tender.

58. Even though it is Directive 2009/81 that is directly applicable, I shall refer to the Court's case-law in relation to Directive 89/665,[35] since, as I have noted, the former directive contains rules that are similar to those in Directive 89/665 as regards the institution of proceedings.

59. The review to which the general provision in the last subparagraph of Article 1(1) of Directive 89/665 refers extends to all decisions by the contracting authority which apply EU law in that field.[36]

60. 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 which have a bearing on the legal position of the parties concerned.[37]

61. 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'.[38] The Court's position is that it must be ensured that decisions by contracting authorities can be reviewed effectively and as quickly as possible.[39]

62. The EU legislature has entrusted to the Member States with the task of laying down the 'detailed rules' of the procedures for reviewing decisions by contracting authorities (Article 1(3) of Directive 89/665).[40]

[35] The considerations set out below (points 59 to 64) incorporate those which I set out in the Opinion in *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:295).

[36] Judgment of 5 April 2017, *Marina del Mediterráneo and Others* (C-391/15, EU:C:2017:268; 'judgment in *Marina del Mediterráneo*', paragraph 26): 'the wording of Article 1(1) of Directive 89/665 assumes, by using the words "as regards … 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.'

[37] Ibid., 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'.

[38] Ibid., paragraph 31.

[39] Judgment of 12 December 2002, *Universale-Bau and Others* (C-470/99, EU:C:2002:746, paragraph 74).

[40] Judgment in *Marina del Mediterráneo*, paragraph 32: 'It is settled case-law that, 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.

63. 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.

64. 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:

– the fact 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'. [41]

– the fact 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'. [42]

65. However, it must be borne in mind that the safeguarding of the principle of legal certainty 'would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringements of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements'. [43]

66. The case-law laid down in that judgment cited above is linked to the Court's case-law in connection with the action for annulment provided for in Article 263 TFEU.

67. As the French Government has observed, only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his or her legal position may be the subject of an action for annulment. [44]

68. With regard to acts or decisions which are drawn up in different stages, the measures which are open to challenge are those which definitively determine the position of the decision-making body 'upon the conclusion of an administrative procedure, and which are intended to have legal effects … and not intermediate measures whose purpose is to prepare for the final decision …' [45]

69. The Court has held that, for the purposes of the fourth subparagraph of Article 1(1) of Directive 89/665, the concept of 'decisions taken by the contracting authorities' must be interpreted broadly, as the wording of that provision – which 'refers generally to the decisions of a contracting authority without distinguishing between those decisions according to their content or time of adoption and does not lay down any restriction with regard to the nature or content of the decisions to which it refers' – 'implies that every decision of a contracting authority falling under the EU rules in the field of public procurement and liable to infringe them is subject to … judicial review'. [46]

41 Ibid., paragraph 31.

42 Ibid., paragraph 34.

43 Judgment of 12 March 2015, *eVigilo* (C-538/13, EU:C:2015:166, paragraph 51 and the case-law cited). However, the principle of legal certainty cannot be decoupled from the requirement of the effectiveness of the directives in the field of public procurement.

44 See, for example, judgment of 26 January 2010, *Internationaler Hilfsfonds* v *Commission* (C-362/08 P, EU:C:2010:40, paragraph 51).

45 See, for example, judgment of 17 July 2008, *Athinaïki Techniki* v *Commission* (C-521/06 P, EU:C:2008:422, paragraph 42).

46 Judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraph 105).

70. That interpretation of the concept of 'decisions amenable to review' led the Court to consider that a decision of a contracting authority allowing an economic operator to participate in a public procurement procedure constitutes such a decision. [47]

71. However, the *generosity* of that interpretation [48] has been limited in all cases to positive decisions, *actually adopted* by the contracting authority – in other words, decisions which entail an act of will whereby a contracting authority adopts a position when a legal provision requires it to make a decision.

72. As I have pointed out, it is important to differentiate between:

– Decisions in which the contracting authority explicitly states its view on any suspicions which may have been aroused by a particular tender, bringing to an end an *inter partes* examination procedure for determining whether or not that tender is abnormally low. In my view, that decision, in either of its two possible variations, affects the interests of tenderers, in particular, any tenderer whose tender is rejected for being abnormally low. The alteration of such a tenderer's position in the tendering procedure, together with the autonomy of the procedure in which the contracting authority has made its determination, lend support to the classification of that decision as one which is final and amenable to judicial review from the time it is adopted.

– Implicit decisions of the contracting authority which, in the absence of any doubts as to the genuine nature of the tenders, become part of the decision awarding the contract. Such decisions must be challenged before the courts using the appropriate action for contesting a final decision of that kind.

73. In so far as is important for these proceedings, it can be inferred from the information available that the contracting authority had no doubts which led it to suspect that either tender was abnormally low. Therefore, it did not have an obligation to commence the appropriate examination procedure.

74. In acting in that way, the contracting authority did not adopt any *decision* which Directive 2009/81 provides may be the subject of a separate review at that time. I stress that, under Article 49 of that directive, the contracting authority was not required to adopt an express decision on whether all the tenders were abnormally low but rather only to follow a certain procedure before rejecting any tenders which it 'considered' to be abnormally low.

[47] Ibid., paragraph 106, citing the judgment in *Marina del Mediterráneo*, paragraph 28. Also regarded as amenable to review is '… a decision by which a contracting authority refuses to disclose to an economic operator the information deemed confidential submitted to it by a candidate or a tenderer.'

[48] Although it may initially appear otherwise, I do not believe that such a broad interpretation is inconsistent with the case-law which, for the benefit of legal certainty, prohibits tenderers from claiming at any time that there have been infringements of the rules governing the award of public contracts. Both lines of case-law come together in an exercise which weighs legal certainty, on the one hand, against the judicial review of legality, on the other. The aim is to strike a balance with the criterion of the relative autonomy, as regards their content, of the successive decisions of the contracting authority. Thus, for example, the possibility of review has been ruled out in the case of 'acts which constitute a mere preliminary study of the market or which are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure', as stated in the judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraph 35). Since all the acts in the procedure are *preparatory* to the final award of the contract, not all of them provide the same *density* of content, and only those which have a level of decision-making that is sufficient to endow them with a certain amount of autonomy are open to challenge.

75. As the French Government maintains, that article and, in parallel, Article 69 of Directive 2014/24, in conjunction with Article 47 of the Charter, mean only that, for the purposes of applying for a review of the award of the contract, a tenderer who has not been selected may challenge that award on the ground that the selected tender is abnormally low. [49]

V. Conclusion

76. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria):

'(1) Articles 38 and 49 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, must be interpreted as meaning that contracting authorities have an obligation to check, in all cases, for the presence of any abnormally low tenders. For those purposes, the number of tenders submitted is irrelevant, as is the fact that it is not possible to apply the criteria laid down in that respect by national legislation; a situation in which contracting authorities must, by reason of its direct effect, comply with Article 49 of Directive 2009/81/EC.

(2) Article 55(2) of Directive 2009/81/EC, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, if the contracting authority has no reason to commence the procedure for examining whether a tender is genuine, its assessment may be subject to judicial review in the context of proceedings against the final decision awarding the contract.'

[49] According to the order for reference, that is what occurred in this case, since Veridos was able to challenge the award of the contract by relying on the abnormally low nature of the tender submitted by Mühlbauer.