Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

3 June 2021 *

(Reference for a preliminary ruling – Public procurement of service, supply and works contracts – Directive 2014/24/EU – Conduct of the tendering procedure – Choice of participants and award of contracts – Article 63 – Tenderer relying on the capacities of another entity in order to meet the requirements of the contracting authority – Article 57(4)(6) and (7) – Untruthful declarations submitted by that entity – Exclusion of that tenderer without requiring or permitting it to replace that entity – Principle of proportionality)

In Case C-210/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 20 February 2020, received at the Court on 30 March 2020, in the proceedings

Rad Service Srl Unipersonale,

Cosmo Ambiente Srl,

Cosmo Scavi Srl

v

Del Debbio SpA,

Gruppo Sei Srl,

Ciclat Val di Cecina Soc. Coop.,

DAF Costruzioni stradali Srl,

other party:

Azienda Unità Sanitaria Locale USL Toscana Centro,

THE COURT (Ninth Chamber),

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

Advocate General: M. Campos Sánchez-Bordona,

* Language of the case: Italian.

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Del Debbio SpA, Gruppo Sei Srl and Ciclat Val di Cecina Soc. Coop., by A. Manzi and F. Bertini, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli and S.L. Vitale, avvocati dello Stato,

– the European Commission, by G. Gattinara, P. Ondrůšek and K. Talabér-Ritz, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The present request for a preliminary ruling concerns the interpretation of Articles 49 and 56 TFEU and of Article 63 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).

2 The request has been made in proceedings between, on the one hand, Rad Service Srl Unipersonale, Cosmo Ambiente Srl and Cosmo Scavi Srl, members of the Rad Service ad hoc consortium ('the Rad Service ad hoc consortium'), and, on the other hand, Del Debbio SpA, Gruppo Sei Srl, Ciclat Val di Cecina Soc. Coop., ('the Del Debbio ad hoc consortium') as well as the ad hoc consortium made up of DAF Costruzioni stradali Srl, GARC SpA and Edil Moter Srl ('the DAF ad hoc consortium'), relating to the decision of the Azienda Unità Sanitaria Locale Toscana Centro (Local Health Authority of the Central Tuscany Region, Italy) to exclude the Del Debbio ad hoc consortium from a tendering procedure for a public works contract.

Legal context

Directive 2014/24

3 Recitals 84, 101 and 102 of Directive 2014/24 are worded as follows:

'(84) Many economic operators, and not least [small and medium-sized enterprises (SMEs)], find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example through use of a European Single Procurement Document (ESPD) consisting of an updated self-declaration, could result in considerable simplification for the benefit of both contracting authorities and economic operators.

The tenderer to which it has been decided to award the contract should, however, be required to provide the relevant evidence and contracting authorities should not conclude contracts with tenderers unable to do so. Contracting authorities should also be entitled to request all or part of the supporting documents at any moment where they consider this to be necessary in view of the proper conduct of the procedure. This might in particular be the case in two-stage procedures – restricted procedures, competitive procedures with negotiation, competitive dialogues and innovation partnerships - in which the contracting authorities make use of the possibility to limit the number of candidates invited to submit a tender. Requiring submission of the supporting documents at the moment of selection of the candidates to be invited could be justified to avoid … contracting authorities [inviting] candidates which later prove unable to submit the supporting documents at the award stage, depriving otherwise qualified candidates from participation.

It should be set out explicitly that the ESPD should also provide the relevant information in respect of entities on whose capacities an economic operator relies, so that the verification of the information regarding such entities can be carried out together with and on the same conditions as the verification in respect of the main economic operator.

…

(101) 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.

Bearing in mind that the contracting authority will be responsible for the consequences of its possible erroneous decision, contracting authorities should also remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any appropriate means that the economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions, unless otherwise provided by national law. They 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.

(102) Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.'

4 Article 18 of Directive 2014/24, entitled 'Principles of procurement', provides in the first subparagraph of paragraph 1:

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

5 Article 57 of that directive, entitled 'Exclusion grounds', provides in paragraphs 4 to 7:

'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;

…

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; or

(i) where the economic operator has undertaken … to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

…

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.'

6 Under Article 59 of Directive 2014/24, entitled 'European Single Procurement Document':

'1. At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:

(a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;

(b) it meets the relevant selection criteria that have been set out pursuant to Article 58;

(c) where applicable, it fulfils the objective rules and criteria that have been set out pursuant to Article 65.

Where the economic operator relies on the capacities of other entities pursuant to Article 63, the ESPD shall also contain the information referred to in the first subparagraph of this paragraph in respect of such entities.

The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority. The ESPD shall further identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

Where the contracting authority can obtain the supporting documents directly by accessing a database pursuant to paragraph 5, the [ESPD] shall also contain the information required for this purpose, such as the internet address of the database, any identification data and, where applicable, the necessary declaration of consent.

…

4. A contracting authority may ask tenderers and candidates at any moment during the procedure to submit all or part of the supporting documents where this is necessary to ensure the proper conduct of the procedure.

Before awarding the contract, the contracting authority shall, except in respect of contracts based on framework agreements where such contracts are concluded in accordance with Article 33(3) or point (a) of Article 33(4), require the tenderer to which it has decided to award the contract to submit up-to-date supporting documents in accordance with Article 60 and, where appropriate, Article 62. The contracting authority may invite economic operators to supplement or clarify the certificates received pursuant to Articles 60 and 62.

5. Notwithstanding paragraph 4, economic operators shall not be required to submit supporting documents or other documentary evidence where and in so far as the contracting authority has the possibility of obtaining the certificates or the relevant information directly by accessing a national database in any Member State that is available free of charge, such as a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system.

…’

7 Article 60 of Directive 2014/24, entitled ‘Means of proof’, provides:

‘1. Contracting authorities may require the certificates, statements and other means of proof referred to in paragraphs 2, 3 and 4 of this Article and Annex XII as evidence for the absence of grounds for exclusion as referred to in Article 57 and for the fulfilment of the selection criteria in accordance with Article 58.

Contracting authorities shall not require means of proof other than those referred to in this Article and in Article 62. In respect of Article 63, economic operators may rely on any appropriate means to prove to the contracting authority that they will have the necessary resources at their disposal.

2. Contracting authorities shall accept the following as sufficient evidence that none of the cases specified in Article 57 apply to the economic operator:

(a) as regards paragraph 1 of that Article, the production of an extract from the relevant register, such as judicial records or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the Member State or country of origin or the country where the economic operator is established showing that those requirements have been met;

(b) as regards paragraph 2 and point (b) of paragraph 4 of that Article, a certificate issued by the competent authority in the Member State or country concerned.

…'

8 Article 63 of that directive, entitled 'Reliance on the capacities of other entities', is worded as follows:

'1. With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII, Part II, or to the relevant professional experience, economic operators may, however, only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have the resources necessary, for example, by producing a commitment by those entities to that effect.

The contracting authority shall, in accordance with Articles 59, 60 and 61, verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion pursuant to Article 57. The contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or which is subject to compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

Under the same conditions, a group of economic operators as referred to in Article 19(2) may rely on the capacities of participants in the group or of other entities.

2. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators as referred to in Article 19(2), by a participant in that group.'

Italian law

9 Under Article 32(7) of decreto legislativo n. 50 – Codice dei contratti pubblici (Legislative Decree No 50 establishing the Public Procurement Code) of 18 April 2016 (ordinary supplement to GURI No 91 of 19 April 2016) ('the Public Procurement Code'):

'The award shall become effective once it is verified that the criteria are met.'

10 Article 80(5)(f-a) of the Public Procurement Code provides:

'Contracting authorities shall exclude from the tendering procedure any economic operator which is in one of the following situations, including in the case where that situation involves one of its subcontractors in the cases covered by Article 105(6): … (f-a) the economic operator submits untruthful documents or declarations in an ongoing tendering procedure and in the context of recourse to the capacities of other entities'.

11 Article 89 of that code provides:

'1. … An economic operator intending to rely on the capacities of other entities shall attach … a signed declaration by [the ancillary undertaking] attesting that it meets both the general criteria laid down in Article 80 and the technical criteria and that it has the resources for which the economic operator intends to rely on it. An economic operator shall demonstrate to the contracting authority that it will have the necessary resources by submitting a declaration signed by the ancillary undertaking in which the latter makes a commitment to the tenderer and the contracting authority that, throughout the term of the contract, it shall make available the necessary resources which the tenderer is lacking. In the case of untruthful declarations, the contracting authority shall exclude the tenderer from the tendering procedure and shall enforce the guarantee, without prejudice to the application of Article 80(12), in respect of the parties which have signed those declarations. …

…

3. In accordance with Articles 85, 86 and 88, the contracting authority shall verify whether the entities on whose capacity the economic operator intends to rely meet the relevant selection criteria and whether there are grounds for exclusion under Article 80. The contracting authority shall require that the economic operator replace those entities that fail to meet one of the relevant selection criteria or that are subject to mandatory grounds for exclusion. The notice of invitation to tender may also indicate the cases in which the economic operator is required to replace an entity in respect of which there are non-compulsory grounds for exclusion, provided that these relate to technical criteria.'

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

12 By a notice of invitation to tender of 3 January 2018, the Local Health Authority of Central Tuscany initiated a tendering procedure for works involving the selective and mechanical demolition of the buildings of the former *Misericordia e Dolce* Hospital in Prato (Italy) for a basic amount of EUR 5 673 030.73.

13 In submitting its tender, the Del Debbio ad hoc consortium relied on the technical and professional capacities of an ancillary undertaking.

14 Despite occupying the top two positions in the provisional classification, both the DAF ad hoc consortium and the Del Debbio ad hoc consortium were excluded from the procedure by the contracting authority. As a result, the Rad Service ad hoc consortium rose to the first place in that classification.

15 The reason behind the exclusion of the Del Debbio ad hoc consortium was that the ancillary undertaking had submitted a declaration which did not mention a *patteggiamento*, that is to say, a judgment applying an agreement reached by parties on the enforcement of a negotiated penalty, which had been imposed on the undertaking's owner and legal representative on 14 June 2013 and had become final on 11 September 2013. Under Italian law, a *patteggiamento* is expressly placed on the same footing, in circumstances such as those at issue in the main proceedings, as a conviction for the tortious offence of causing injury through negligence, committed in contravention of the rules on health and safety in the workplace.

16 The contracting authority took the view that the ancillary undertaking had made a false and untruthful declaration in response to the question appearing in the ESPD as to whether it had been found guilty of grave professional misconduct, as referred to in Article 80(5)(c) of the Public Procurement Code. Accordingly, the contracting authority maintained that the Del Debbio ad hoc consortium had to be automatically excluded from the procedure, in accordance with Article 80(5)(f-a) and Article 89(1) of that code.

17 After the Tribunale amministrativo regionale per la Toscana (Regional Administrative Court for Tuscany, Italy) had, by two judgments, overturned the exclusions of the Del Debbio ad hoc consortium and of the DAF ad hoc consortium, the Rad Service ad hoc consortium appealed against those judgments to the referring court, namely the Consiglio di Stato (Council of State, Italy).

18 That latter court takes the view that, under the fourth subparagraph of Article 89(1) of the Public Procurement Code, the false declaration submitted by the ancillary undertaking's legal representative in the context of the tendering procedure automatically triggers the contracting authority's obligation to exclude the tenderer which relied on that undertaking's capacities, without it being able to replace it. Consequently, the correction procedure laid down by Article 89(3) of that code does not apply, and the economic operator is therefore unable to replace the ancillary undertaking.

19 The referring court is, however, unsure whether that provision is compatible with the principles and rules referred to in Article 63 of Directive 2014/24 as well as with Articles 49 and 56 TFEU. The second subparagraph of Article 63(1) of Directive 2014/24 seeks, in particular, to ensure that the services are carried out by sufficiently skilled and ethical operators; it therefore requires that the contracting authority agree to the replacement of an ancillary undertaking which does not meet the criteria or in respect of which a ground for exclusion exists.

20 By requiring that a tenderer be automatically excluded as a result of untruthful declarations submitted by the undertaking on whose capacities it intends to rely, the fourth subparagraph of Article 89(1) of the Public Procurement Code prohibits the replacement of the ancillary undertaking and, consequently, prohibits the remedy nonetheless provided for by Article 89(3) in respect of all the other mandatory grounds for exclusion.

21 The referring court, however, finds that Article 63 of Directive 2014/24 does not set out any difference in rules and requires that the ancillary undertaking be replaced whenever it is the subject of mandatory grounds for exclusion, whatever they may be.

22 Moreover, it finds, a tenderer is unable to monitor the authenticity and honesty of the declarations made by the undertakings on whose capacities it intends to rely. It must therefore rely on the declarations or documentation provided by those undertakings. The Del Debbio ad hoc consortium also contends that, in the present case, it could not possibly have been aware of the criminal conviction of the owner of the ancillary undertaking, inasmuch as it did not appear in the extract from the judicial record which may be inspected by a private entity other than the person concerned.

23 Finally, according to the referring court, any potential national limitations on a tenderer's right to rely on the capacities of other entities must be considered strictly in the light of the principles of equal treatment and non-discrimination.

24 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 63 of Directive [2014/24/EU], in conjunction with the principles of freedom of establishment and freedom to provide services enshrined in Articles 49 and 56 [TFEU], preclude the application of the provisions of Italian law relating to reliance on the capacities of other entities and exclusion from award procedures set out in the fourth subparagraph of Article 89(1) of the Public Procurement Code … under which, if untruthful declarations are made by an ancillary undertaking regarding the existence of convictions in criminal proceedings that have become final, which may demonstrate serious professional misconduct, the contracting authority must in all cases exclude the economic operator taking part in the tendering procedure, without requiring or permitting that operator to indicate another suitable ancillary undertaking to replace the former undertaking, which is, conversely, permitted in other cases where the entities on whose capacities the economic operator intends to rely fail to meet a relevant selection criterion or are subject to mandatory grounds for exclusion?'

25 The referring court also requested the application of the expedited procedure under Article 105(1) of the Rules of Procedure of the Court, on the ground that the present case raises a question of principle, that it concerns the performance of urgent works of significant value to be carried out on hospital buildings which can neither be deferred nor suspended, and that the national provision at issue in the main proceedings is the subject of extensive litigation.

26 That request for an expedited procedure was refused by decision of the President of the Court of 7 July 2020.

Consideration of the question referred

27 At the outset, it must be noted that the question referred suggests that national legislation which prescribes that a tenderer must be automatically excluded in the case where an entity on whose capacities it intends to rely has submitted false information may run counter to the principle of non-discrimination, since the replacement of such an entity is permitted in the case where the latter does not satisfy a relevant selection criterion or where it is subject to mandatory grounds for exclusion.

28 Member States enjoy some discretion in determining the conditions for application of the facultative grounds for exclusion laid down in Article 57(4) of Directive 2014/24 (see, to that effect, judgments of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paragraph 36; of 28 March 2019, *Idi*, C-101/18, EU:C:2019:267, paragraph 45; and of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 34). 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.

29 In those circumstances, the question referred must be rephrased such that the referring court is deemed to be asking, in essence, whether Article 63 of Directive 2014/24, read in conjunction with Article 57(4)(h) and (6) of that directive and in the light of the principle of proportionality, must be interpreted as precluding national legislation under which the contracting authority must automatically exclude a tenderer from a public procurement procedure in the case where an ancillary undertaking, on whose capacities that tenderer intends to rely, made an untruthful declaration as to the existence of convictions in criminal proceedings that have become final, without being able to require or, at the very least, permit, in such a case, that tenderer to replace that entity, unlike in other cases where the entities on whose capacities the tenderer intends to rely fail to meet a relevant selection criterion or are subject to mandatory grounds for exclusion.

30 In that regard, it must be noted that Article 63(1) of Directive 2014/24 provides for the right of an economic operator to rely, for a particular contract, on the capacities of other entities, regardless of the legal nature of the links which it has with them, with a view to satisfying both the criteria relating to economic and financial standing as enshrined in Article 58(3) of that directive and the criteria relating to technical and professional capacities referred to in Article 58(4) of that directive (see, to that effect, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 29 and 33; of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraphs 33, 35, 39, 49 and 51; and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 25).

31 An economic operator who intends to invoke that right must, pursuant to the second and third subparagraphs of Article 59(1) of Directive 2014/24, read in the light of the third paragraph of recital 84 thereof, send an ESPD to the contracting authority when submitting its request to participate or its tender, stating that both itself and the entities on whose capacities it intends to rely are not in one of the situations referred to in Article 57 of that directive, which must or may lead to an economic operator's exclusion.

32 It is then for the contracting authority, pursuant to the second subparagraph of Article 63(1) of Directive 2014/24, to determine, first, whether, in accordance with Articles 59 to 61 of that directive, the entities on whose capacities the economic operator intends to rely fulfil the relevant selection criteria and, secondly, whether there are grounds for exclusion, as referred to in Article 57 of that directive, in respect of both that economic operator itself and those entities.

33 Under the third sentence of the second subparagraph of Article 63(1) of Directive 2014/24, the contracting authority may require, or may be obliged by its Member State to require, that the economic operator concerned replace the entity on whose capacities it intends to rely, but in respect of which there are non-compulsory grounds for exclusion. It is thus clear from the wording of that last sentence that, in such a case, while Member States may lay down an obligation for the contracting authority to require that economic operator to make such a

replacement, they cannot, by contrast, deprive that contracting authority of the option to require such a replacement on its own initiative. Member States may only replace that option with an obligation for the contracting authority to make such a replacement.

34 Such an interpretation of the third sentence of the second subparagraph of Article 63(1) of Directive 2014/24 also helps to ensure that contracting authorities comply with the principle of proportionality, in accordance with Article 18(1) of that directive. It follows from that principle, which is a general principle of EU law, that the rules laid down by the Member States or the contracting authorities in implementing the provisions of that directive must not go beyond what is necessary to achieve the objectives of that directive (see, to that effect, judgments of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 48, and of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 45).

35 First, the objective of Article 57 of Directive 2014/24, which is also the objective pursued by Article 63 thereof, is to enable the contracting authority to satisfy itself that each of the tenderers has integrity and is reliable and, consequently, that the relationship of trust with the economic operator concerned will not be broken (see, to that effect, judgments of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraph 29, and of 3 October 2019, *Delta Antrepriză de Construcții şi Montaj 93*, C-267/18, EU:C:2019:826, paragraph 26). It is from that point of view that Article 57(6) of Directive 2014/24, read in conjunction with recital 102 thereof, ensures, as a matter of principle, the right of any economic operator in one of the situations referred to in paragraphs 1 and 4 of Article 57 to provide evidence that the measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion.

36 In those circumstances, even before requiring a tenderer to replace an entity whose capacities it intends to use, on the ground that it is in one of the situations referred to in Article 57(1) and (4) of Directive 2014/24, Article 63 of that directive presupposes that the contracting authority will give that tenderer and/or that entity the opportunity to submit to it corrective measures which it may have adopted in order to remedy the irregularity found and, consequently, to demonstrate that it may once again be considered a reliable entity (see, to that effect, judgment of 3 October 2019, *Delta Antrepriză de Construcții şi Montaj 93*, C-267/18, EU:C:2019:826, paragraph 37).

37 It is therefore only in the alternative, and if the entity against which there is a ground for exclusion as referred to Article 57(1) and (4) of Directive 2014/24 has failed to take corrective action or if the corrective action which it has taken has been deemed inadequate by the contracting authority, that the latter may or, if required by national law, must require the tenderer to replace that entity.

38 In that regard, it must be made clear that, in accordance with the fourth subparagraph of Article 57(6) of Directive 2014//24, an economic operator which has been excluded by final judgment from participating in procurement or concession award procedures is, admittedly, not entitled, during the period of exclusion resulting from that judgment in the Member States where the judgment is effective, to rely on corrective action taken following that judgment and, consequently, to avoid exclusion if that evidence is deemed sufficient. However, where a final judgment excludes an entity on whose capacities the tenderer intends to rely from participating in the procurement or concession award procedures, the tenderer must, in that case, be authorised by the contracting authority to replace that entity.

39 Secondly, the relevance, in the light of the principle of proportionality, of the interpretation of the third sentence of the second subparagraph of Article 63(1) of Directive 2014/24, referred to in paragraph 33 of the present judgment, is also apparent from the third paragraph of recital 101 of that directive, according to which, when applying facultative grounds for exclusion, contracting authorities must pay particular attention to that principle. That attention must be even greater in the case where the exclusion provided for by national legislation is imposed on the tenderer not for a failure attributable to it, but for a failure committed by an entity on whose capacities the tenderer intends to rely and over which it has no power of review (see, to that effect, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 48).

40 The principle of proportionality requires the contracting authority to carry out a specific and individual assessment of the conduct of the entity concerned on the basis of all the relevant factors (see, by analogy, judgments of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 31, and of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93*, C-267/18, EU:C:2019:826, paragraph 29). On that basis, the contracting authority must have regard to the means available to the tenderer for establishing whether there was a failure on the part of the entity on whose capacities it intended to rely (see, to that effect, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 52).

41 In the present case, while the referring court corroborates the Del Debbio ad hoc consortium's claim that the criminal conviction of the owner of the ancillary undertaking on whose capacities it intended to rely did not appear in the extract from the judicial record which may be inspected by private entities, with the result that, since Italian legislation did not allow the Del Debbio ad hoc consortium to become aware of that conviction, the latter cannot be accused of having failed to exercise due care and attention. Accordingly, in such circumstances, it would be contrary to the principle of proportionality, as enshrined in Article 18(1) of Directive 2014/24, to prevent the replacement of the entity covered by a ground for exclusion.

42 It must also be pointed out that, where it is obliged under national law to require a tenderer to replace an entity whose capacities it intends to use, the contracting authority must ensure, in accordance with the principles of transparency and of equal treatment set out in Article 18(1) of Directive 2014/24, that the replacement of the entity concerned does not materially amend the tenderer's bid.

43 The obligation on the contracting authority to comply with the principle of equal treatment of tenderers, which seeks to encourage the development of healthy and effective competition between undertakings participating in a public procurement procedure, and which lies at the very heart of the EU rules on public procurement procedures, implies, in particular, that tenderers must be on an equal footing both when they formulate their tenders and when those tenders are assessed by that contracting authority. The principle of equal treatment and the obligation of transparency thus preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer (see, to that effect, judgment of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraphs 25 and 27 and the case-law cited).

44 It follows that, as in the case of a request for clarification of a tender, a request by a contracting authority for the replacement of an entity on whose capacities a tenderer intends to rely must not result in the tenderer submitting what would in reality appear to be a new tender, since this would materially amend the initial tender (see to that effect, judgments of 29 March 2012, *SAG ELV*

Slovensko and Others, C-599/10, EU:C:2012:191, paragraph 40; of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 64; and of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraphs 31 and 37).

45 In the light of the foregoing considerations, the answer to the question referred is that Article 63 of Directive 2014/24, read in conjunction with Article 57(4)(h) of that directive and in the light of the principle of proportionality, must be interpreted as precluding national legislation under which the contracting authority must automatically exclude a tenderer from a public procurement procedure in the case where an ancillary undertaking on whose capacities that tenderer intends to rely made an untruthful declaration as to the existence of criminal convictions that have become final, without being able to require or, at the very least, in such a case, permit that tenderer to replace that entity.

Costs

46 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 (Ninth Chamber) hereby rules:

Article 63 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, read in conjunction with Article 57(4)(h) of that directive and in the light of the principle of proportionality, must be interpreted as precluding national legislation under which the contracting authority must automatically exclude a tenderer from a public procurement procedure in the case where an ancillary undertaking on whose capacities that tenderer intends to rely made an untruthful declaration as to the existence of criminal convictions that have become final, without being able to require or, at the very least, in such a case, permit that tenderer to replace that entity.

[Signatures]