Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 28 May 2020[1]

Case C-367/19

Tax-Fin-Lex d.o.o.
v
Ministrstvo za notranje zadeve,
in the presence of
LEXPERA d.o.o.

(Request for a preliminary ruling from the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal, Slovenia))

(Reference for a preliminary ruling – Public service contracts – Directive 2014/24/EU – Article 2(1)(5) – Characterisation as a 'public contract' – Notion of 'contract for pecuniary interest' – Bid submitted by a tenderer in the amount of EUR 0.00 – Assessment of the onerous nature of the transaction – Absence of pecuniary consideration to be supplied by the contracting authority – Rejection of the tender – Legal basis – Article 69 – Abnormally low tender)

I. Introduction

1. Is zero (an) abnormally low (number)?

2. Leaving to one side the spirited discussion to which the nature of the number zero has given rise in the field of mathematics,[2] such a question put to a layman from a legal perspective would in all likelihood cause him to regard the lawyers with the look of astonishment which lawyers are accustomed to receiving when they try to explain what they do. The layman will even observe, perhaps – not without sarcasm – that only a lawyer is capable of devoting page after page to discussing (literally) nothing.

3. The fact nonetheless remains that, in relation to public contracts as in mathematics, zero seems to be an unusual number, difficult to place in existing evaluation grids. Does a tenderer offering goods or services at the nominal price of EUR 0.00 submit an abnormally low tender? Or rather does that tenderer automatically exclude himself from the scope of the law relating to public procurement by placing the magic number '0' in his tender rather than another nominal figure far below the real cost of the contract (such as, for example, EUR 1.5 or EUR 101), the reasoning being that, unlike all other natural numbers, '0' cannot appear in a public contract?

[1] Original language: French.

[2] For an accessible introduction (short on calculations and long on cultural history), see, for example, Kaplan, R., *The Nothing that Is: A Natural History of Zero*, Oxford University Press, Oxford, 1999.

4. In a nutshell, that is the problem that arises in the present case. In the course of the procedure for the award of a public service contract initiated by the Ministrstvo za notranje zadeve (Ministry of the Interior, Slovenia), the undertaking Tax-Fin-Lex d.o.o. submitted a tender for the amount of EUR 0.00 to supply one of the relevant services. The Ministry of the Interior rejected that tender on the ground that it did not make it possible to conclude a 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24/EU [3] and therefore did not fall within the rules on public procurement. Conversely, Tax-Fin-Lex d.o.o. maintains that the transaction whereby it undertakes to supply the service for the sum of EUR 0.00 would be performed 'for pecuniary interest' within the meaning of that provision. In its submission, performing the contract would enable it to benefit from an economic advantage, owing to the references on which it would be able to rely afterwards for the purpose of the award of new public contracts.

II. Legal framework

5. Directive 2014/24 lays down rules that permit the coordination of national procedures for the award of public contracts above a certain amount so that they may be consistent with the principle of free movement of goods, freedom of establishment and freedom to provide services, as well as the ensuing principles, such as equal treatment, non-discrimination, proportionality and transparency. That directive is also intended to ensure effective competition in public procurement.

6. In particular, recitals 4 and 103 of Directive 2014/24 state:

'(4) The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC. [4] The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. It should be clarified that such acquisitions of works, supplies or services should be subject to this Directive whether they are implemented through purchase, leasing or other contractual form.

The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question …

…

(103) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. Where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions.'

[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), as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 (OJ 2017 L 337, p. 19) ('Directive 2014/24').

[4] Directive 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, and corrigendum OJ 2004 L 351, p. 44).

7. In the context of Title I of Directive 2014/24, entitled 'Scope, definitions and general principles', Article 1(1) and (2) provides:

'1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of … services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the … services are intended for a public purpose.'

8. Article 2(1)(5) of Directive 2014/24 defines 'public contracts' as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services'.

9. Article 18 of that directive sets out the 'principles of procurement'. It states the following:

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

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.'

10. Article 69 of Directive 2014/24 is dedicated to 'abnormally low tenders'. It is found in Title II, Chapter III, Section 3 of that directive, which is entitled 'Choice of participants and award of contracts'. Article 69 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.

2. The explanations referred to in paragraph 1 may in particular relate to:

(a) the economics of the manufacturing process, of the services provided or of the construction method;

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with obligations referred to in Article 18(2);

(e) compliance with obligations referred to in Article 71;

(f) the possibility of the tenderer obtaining State aid.

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, taking into account the elements referred to in paragraph 2.

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2).

…'

III. The main proceedings, the questions for a preliminary ruling and the procedure before the Court

11. On 7 June 2018, the Ministry of the Interior (the contracting authority) initiated a procedure for the award of a public service contract for access to a legal information system for a period of 24 months. That contract consists of two lots. The Ministry of the Interior estimated the value of the contract at EUR 39 959.01.

12. As regards the first lot, relating to access to a legal information system, only two economic operators, established in Ljubljana (Slovenia) and specialising in the field of legal information, submitted tenders within the prescribed time limits: Tax-Fin-Lex d.o.o. ('the applicant') and LEXPERA d.o.o. ('the intervener').

13. The applicant proposed to provide the service for a sum of EUR 0.00.

14. By a decision of 11 January 2019, the Ministry of the Interior awarded the contract consisting of the first lot to the intervener and rejected the applicant's tender on the ground that it was contrary to the rules on public procurement.

15. The applicant lodged a request for a review of that decision. In the course of the procedure preceding the review, the Ministry of the Interior rejected that request on 5 February 2019. On 11 February 2019, the Ministry of the Interior referred the matter to the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal, Slovenia), the referring court in the present case, seeking a ruling on the legality of that decision.

16. The applicant maintains that a tender such as that at issue is admissible. It claims that, in the context of public procurement, the tenderer is entitled to determine freely the price proposed and, consequently, to offer a service free of charge. That does not mean, however, that the applicant would be deprived of consideration for performing the public contract in question. Indeed, as in its submission, it maintains that the conclusion of the contract would obtain an advantage for the applicant consisting in access to a new market and to new users.

17. The Ministry of the Interior contends, on the other hand, that the notion of 'public contract' referred to in Article 2(1)(5) of Directive 2014/24 cannot cover a contract whereby the economic operator proposed to provide the service to the contracting authority free of charge. It maintains that the advantage which the economic operator derives from winning the contract, namely

potential access to a new market and references, does not constitute consideration for the performance of a public contract. In its submission, such an advantage represents added value for all economic operators which cannot however be expressed as a monetary value and cannot therefore be invoiced to the contracting authority. Consequently, the Ministry of the Interior contends that a transaction in which the service is provided free of change cannot lead to the conclusion of a contract for pecuniary consideration.

18. In its request for a preliminary ruling, the referring court states that the Ministry of the Interior examined that tender in the light of the provisions relating to abnormally low tenders. Nonetheless, it rejected that tender not on the ground that it was abnormally low or contrary to the principles governing public procurement, but on the sole ground that it was for a sum of EUR 0.00.

19. The referring court expresses its doubts as to the interpretation of the notion of 'contract for pecuniary interest' referred to in Article 2(1)(5) of Directive 2014/24. It observes, first of all, that one of the essential elements of 'public contracts' in that provision is the pecuniary nature of the contract concluded between the contracting authority and the economic operator. It specifies, in that regard, that the notion of 'public contracts' is relevant not only before the conclusion of a contract, since the contracting authority is required to comply with the rules defined in the context of Directive 2014/24, but also after its conclusion, for the purpose of assessing whether the contract was in fact concluded in accordance with those rules.

20. The referring court then wonders whether and, if so, to what extent a contract whereby the economic operator undertakes to supply to the contracting authority, free of charge, the service referred to in the tender notice without any advantage other than gaining access to a new market and obtaining references may be characterised as a 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24. The referring court acknowledges that securing a public contract and obtaining references may in themselves represent an advantage for that operator. That advantage would not be capable of being quantified, from an economic point of view, at the time when the contract was awarded; nonetheless, it would be capable of constituting a future economic advantage linked with the performance of the contract.

21. However, the referring court also acknowledges that, in a situation in which the contracting authority does not pay the economic operator for the supply of the service, it is possible that the contract concluded is not a public contract, since it would be a contract concluded free of charge, taking, for example, the form of a gift. Last, the referring court wonders, in those circumstances, whether Article 2(1)(5) of Directive 2014/24 may constitute the legal basis of a decision rejecting the tender submitted by the economic operator.

22. In those circumstances, the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal, Slovenia) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is there a "contract for pecuniary interest" as part of a public contract within the meaning of Article 2(1)(5) of Directive 2014/24, where the contracting authority is not required to provide any consideration but, by performing the public contract, the economic operator obtains access to a new market and references?

(2) Is it possible or necessary to interpret Article 2(1)(5) of Directive 2014/24 in such a way that it constitutes a basis for rejecting a bid with a price of EUR 0.00?'

23. The applicant, the Ministry of the Interior, the Austrian Government and the European Commission have lodged written observations.

IV. Analysis

24. The present Opinion is structured as follows. I shall begin by dealing with the admissibility of the present reference for a preliminary ruling (A). Next, I shall examine the scope of the notion of 'contract for pecuniary interest' in Article 2(1)(5) of Directive 2014/24 and, in particular, the related notion of 'consideration' (B). Last, I shall address the question whether a tender for the amount of EUR 0.00 may always be characterised as an 'abnormally low tender' in order to be examined and, where appropriate, rejected under the provisions set out in Article 69 of that directive (C).

A. Admissibility

25. The admissibility of the request for a preliminary ruling does not, in my view, raise any problem.

26. As regards, in the first place, the competence of the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal, Slovenia) to submit a request for a preliminary ruling, I recall that the Court held, in the judgment of 8 June 2017, *Medisanus*,[5] that that tribunal met the criteria for being regarded as a 'national court or tribunal' for the purposes of Article 267 TFEU.[6]

27. As regards, in the second place, the amount of the contract at issue in the main proceedings, it is true that that contract is below the threshold of EUR 144 000 laid down in Article 4(b) of Directive 2014/24, applicable for public service contracts awarded by central government authorities.

28. However, the referring court notes that, when transposing the provisions of that directive into national law, the Slovenian legislature decided that the notion of 'public contract' in Article 2(1)(1) of the Zakon o javnem naročanju (Law on public procurement)[7] of 30 May 2015 applied directly and unconditionally to contracts whose value is below the threshold defined in Article 4 of Directive 2014/24, which in principle are excluded from its scope.

29. In accordance with the Court's settled case-law, known as the *Dzodzi* line of decisions, the interpretation of the provisions of an act of the Union in situations which do not fall within its scope is warranted in order to ensure that situations falling under national law and those governed by EU law are treated in the same way where those provisions have been made directly and unconditionally applicable to such situations by national law.[8]

5 C-296/15, EU:C:2017:431.

6 See paragraph 38 of that judgment.

7 Uradni list RS, No 91/15.

8 See judgments of 18 October 1990, *Dzodzi* (C-297/88 and C-197/89, EU:C:1990:360; 'the *Dzodzi* judgment'; paragraphs 36 to 42), and, more recently, of 14 February 2019, *CCC – Consorzio Cooperative Costruzioni* (C-710/17, not published, EU:C:2019:116, paragraph 22 and the case-law cited), and of 24 October 2019, *Belgische Staat* (C-469/18 and C-470/18, EU:C:2019:895, paragraphs 22 and 23 and the case-law cited).

30. In the present case, the information supplied by the referring court, which is not disputed by any of the parties which have lodged observations, confirms that the national legislature decided to extend the scope of the EU rules on public procurement to public contracts of low value specifically in order to ensure that situations falling under national law and those governed by EU law are subject to the same rules. Thus, the logic underlying the *Dzodzi* judgment appears to be fully applicable in the present case.

31. In those circumstances, the Court may answer the questions for a preliminary ruling referred to it.

B. A contract 'for pecuniary interest'?

32. The referring court requests the Court, in essence, to define the material scope of Directive 2014/24. The Court is called upon to determine whether and, if so, to what extent a transaction by which a tenderer undertakes to supply the service for an amount of EUR 0.00 is capable of giving rise to the conclusion of a contract 'for pecuniary interest' within the meaning of Article 2(1)(5) of that directive and of thus being characterised as a 'public service contract'. In that regard, it should be borne in mind that, according to the Court's settled case-law, 'only a contract concluded for pecuniary interest may constitute a public contract falling within the scope of Directive 2004/18'. [9]

33. In order to answer the first question referred, it is necessary to determine whether the notion of 'contract for pecuniary interest' is capable of covering a transaction whereby a tenderer submits a tender of EUR 0.00, following a literal, systematic and teleological interpretation. It is also necessary to examine whether, in that regard, the Court's case-law enables any light to be cast on the discussion by specifying the essential characteristics of such a contract.

1. 'Contract for pecuniary interest' for the purposes of the provisions of Directive 2014/24

34. The literal content of Article 2(1)(5) of Directive 2014/24 is not sufficient to provide a clear interpretation of the notion of 'contract for pecuniary interest'. The wording of that provision already shows, rather, that there are multiple possible readings and meanings of 'for pecuniary interest'.

35. On the one hand, certain language versions refer to the condition of onerousness. [10] The underlying reasoning is simply that something must be given in exchange. On the other hand, other language versions seem to be more restrictive: the 'something' that must be given in exchange by the contracting authority seems to assume a specifically pecuniary nature, [11] that is to say, it takes the form of money. Yet other language versions seem to occupy the middle ground. [12]

[9] See judgments of 25 March 2010, *Helmut Müller* (C-451/08, EU:C:2010:168, paragraph 47), and of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraph 43). It should be noted that Directive 2014/24 repealed Directive 2004/18.

[10] Like, for example, the Spanish ('oneroso'), French ('à titre onéreux'), Italian ('a titolo oneroso'), Portuguese ('a título oneroso') and Romanian ('cu titlu oneros') versions.

[11] Like, for example, the English ('for pecuniary interest') and Croatian ('financijski interes') versions.

[12] Like the Czech and Slovak versions (where the concept of 'úplatné smlouvy' or the words 'odplatné zmluvy' mean primarily payment as consideration, but may also be interpreted as including non-financial consideration) or again the Swedish version, which uses the expression 'kontrakt med ekonomiska villkor', referring to the economic value of the contract.

36. However, too much significance should perhaps not be attached here to the letter of Directive 2014/24, since certain language versions of that directive even use different terms to translate the notion of 'contract for pecuniary interest' depending on whether it appears in recitals 4 and 70 or indeed in Article 2(1)(5) of that directive.

37. Nor, unfortunately, are the *intra-systemic arguments* (with respect to Directive 2014/24) particularly helpful. In Article 1(2) of that directive, the EU legislature provided that 'procurement … is the *acquisition* by means of a public contract of … services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the … services are intended for a public purpose'. [13]

38. That provision must be read in the light of recital 4 of Directive 2014/24, where the EU legislature stated that 'the Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the *acquisition* of … services for consideration by means of a public contract'. [14] The legislature went on to state, moreover, that 'such acquisitions of … services should be subject to [Directive 2014/24] whether they are implemented through purchase, leasing or other contractual forms'. It is essential to point out here that the notion of 'acquisition' should, according to the EU legislature, 'be understood broadly in the sense of obtaining the benefit of the … services in question'.

39. While the principle *objective* of the law relating to public procurement should be to regulate the acquisition of goods or services by the public authorities, the scheme and purpose of Directive 2014/24 do not really make it possible to determine the characteristics of the condition of onerousness to which Article 2(1)(5) of that directive makes reference. The notion of 'acquisition' is sufficiently broad to be agnostic about the details of that acquisition: what matters is that the goods or services are ultimately obtained by the contracting authorities. However, the goods and services may be lawfully acquired in various ways.

40. Thus, a simple literal and systemic reading is not sufficient to enable us to comprehend the meaning of 'contract for pecuniary interest' and in particular the crucial notion of 'consideration' concealed behind the very concept of contract: what precisely is the nature of the consideration that must be supplied by the contracting authority in order for the public contract to be considered valid?

2. The interpretation in the case-law of the notion of 'contract for pecuniary interest'

41. The Court has held that, in accordance with the usual legal meaning of the concept of 'contract for pecuniary interest' used in the definition of public contracts, those words designate a contract by which each of the parties undertakes to provide a service in exchange for another. [15] The existence of 'consideration' or 'compensation' to be supplied by the contracting authority, and therefore of a synallagmatic relationship (involving reciprocal obligations), constitute, for the Court, decisive elements for the purpose of assessing the existence of a contract for pecuniary interest. [16]

[13] Emphasis added.

[14] Emphasis added.

[15] See, in particular, judgments of 18 January 2007, *Auroux and Others* (C-220/05, EU:C:2007:31, paragraph 45), and of 18 October 2018, *IBA Molecular Italy* (C-606/17, EU:C:2018:843, paragraph 28).

[16] See, to that effect, judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraph 43 and the case-law cited), concerning the interpretation of the notion of 'public contract' referred to in Article 1(2)(a) of Directive 2004/18.

42. That case-law is consistent with the line taken by the Court in other areas of law, in particular in relation to transactions subject to value added tax (VAT). Thus, in the judgment of 18 January 2017, *SAWP*,[17] the Court observed that a supply of services is made for consideration, within the meaning of Directive 2006/112/EC,[18] only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is a reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.[19] The Court held that 'that is the case if there is a direct link between the service supplied and the consideration received, the sums paid constituting actual consideration for an identifiable service supplied in the context of such a legal relationship'.[20]

43. Nonetheless, it must be recognised that there are two coexisting lines of case-law as regards the nature of the consideration required in order to satisfy the condition of onerousness. Those two lines reflect, to a certain degree, the divergences in the wording of Article 2(1)(5) of Directive 2014/24.[21]

44. The first line favours a strict interpretation of the 'onerous' criterion of the contract, requiring payment of remuneration or a price in money by the contracting authority.

45. Thus, in the judgment of 13 July 2017, *Malpensa Logistica Europa*,[22] the Court rejected the characterisation as a 'service contract' within the meaning of Article 1(1)(a) of Directive 2004/17 and the application of the rules relating thereto of a contract whereby the managing body of Milan Malpensa Airport (Italy) had not acquired the service provided by the supplier in return for remuneration.[23] In that judgment, the Court expressly referred to the approach defended by the Commission, according to which the onerous nature of the contractual relationship arising under a contract for services clearly meant that the contract must entail remuneration paid directly by the contracting authority in order to 'acquire' a service directly from a supplier.

46. The second line of case-law tends, conversely, to defend a broader interpretation of the condition of onerousness in the form of consideration, whether '*contrepartie*'[24] or '*contre-prestation*'.[25] This represents the majority view, also shared by the Commission in its Green Paper of 30 April 2004 on public-private partnerships and Community law on public contracts and concessions.[26]

17 C-37/16, EU:C:2017:22.

18 Council Directive of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

19 See judgment of 18 January 2017, *SAWP* (C-37/16, EU:C:2017:22, paragraph 25 and the case-law cited).

20 Judgment of 18 January 2017, *SAWP* (C-37/16, EU:C:2017:22, paragraph 26 and the case-law cited).

21 See point 35 of this Opinion.

22 C-701/15, EU:C:2017:545. That judgment concerns the interpretation of Article 1(2)(a) of 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). Under that article, 'supply, works and service contracts' are 'contracts for pecuniary interest concluded in writing'.

23 See paragraph 29 of that judgment.

24 See, in that regard, judgments of 25 March 2010, *Helmut Müller* (C-451/08, EU:C:2010:168, paragraphs 47 to 52), and of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraph 43).

25 Judgment of 12 July 2001, *Ordine degli Architetti and Others* (C-399/98, EU:C:2001:401, paragraphs 77 to 86).

26 COM(2004) 327 final. In point 10 of that green paper, the Commission states that 'the pecuniary nature of the contract in question does not necessarily imply the direct payment of a price by the public partner, but may derive from any other form of economic consideration received by the private partner'.

47. According to that line of case-law, the notion of onerousness does not necessarily entail payment of a sum of money by the contracting authority. The Court thus considers that contracts in which the service is paid for by providing other forms of compensation, such as reimbursement of the fees incurred in providing the agreed service or exemption from charges, may be concluded for pecuniary interest and be characterised as 'public contracts'. That is also the case, even where the consideration paid is not sufficient to offset the costs borne by the tenderer. [27]

48. In that regard, two judgments are particularly illustrative.

49. Thus, in the judgment of 12 July 2001, *Ordine degli Architetti and Others*, [28] the Court held that the assessment of the elements making up the definition of 'public works contracts' within the meaning of Directive 93/37/EEC [29] must be carried out in such a way as to ensure that that measure was given full effect and, in particular, to promote genuine competition by means of the publication of contract notices. [30] It thus recognised the onerous nature of the contract and the characterisation as 'public works contract' in a situation in which the economic operator, the holder of a building permit, carries out the works in return for being *relieved of the infrastructure contribution* imposed on him by the national legislation. In that instance, the Court held that the requirement that the contract be of a pecuniary nature must be held to be satisfied since, in carrying out the works in question, the economic operator settled a debt of the same value which arose towards the municipality. [31]

50. In the judgment of 18 October 2018, *IBA Molecular Italy*, [32] the Court also held that 'a contract providing for the exchange of services is covered by the concept of public contract, even if the remuneration provided for is limited to the *partial reimbursement of costs incurred in order to supply the services agreed*'. [33] In that judgment, the Court made clear that a contract whereby an economic operator undertakes to manufacture a product and supply it to various authorities in exchange for specific-purpose funding granted for the achievement of that objective fell within the definition of 'contract for pecuniary interest' within the meaning of Article 1(2)(a) of Directive 2004/18, '*even though the costs of production and distribution of that product are not fully covered* by that grant or by the transport costs which may be charged to those authorities'. [34]

51. It should be noted that the same approach was defended by Advocate General Campos Sánchez-Bordona in his Opinion in *Informatikgesellschaft für Software-Entwicklung*. [35] That case raises the question, in particular, whether the making available of software agreed in writing between two contracting authorities has a pecuniary interest within the meaning of

[27] See the considerations set out by the Court in the judgment of 25 March 2010, *Helmut Müller* (C-451/08, EU:C:2010:168), according to which a contract for the sale of land may constitute a public works contract even though, apart from the sale of the land, the contracting authority provides no consideration to the other contracting party.

[28] C-399/98, EU:C:2001:401.

[29] Council Directive of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

[30] Paragraph 52 of that judgment.

[31] It should be noted that the Court did not take the approach defended by Advocate General Léger in his Opinion in *Ordine degli Architetti and Others* (C-399/98, EU:C:2000:671), where he considered that the criterion of onerousness was not satisfied.

[32] C-606/17, EU:C:2018:843.

[33] Paragraph 29 of that judgment and the case-law cited. Emphasis added. See also judgments of 19 December 2012, *Ordine degli Ingegneri della Provincia di Lecce and Others* (C-159/11, EU:C:2012:817, paragraph 29); of 13 June 2013, *Piepenbrock* (C-386/11, EU:C:2013:385, paragraph 31); and of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others* (C-113/13, EU:C:2014:2440, paragraph 37).

[34] Paragraph 31 of that judgment. Emphasis added.

[35] C-796/18, EU:C:2020:47.

Article 2(1)(5) of Directive 2014/24 where the entity receiving the software does not have to pay a price or reimbursement costs for the software, but is required, in principle, to make available to the other the future adaptations and developments of that software.

52. In his Opinion, the Advocate General considered that the condition of onerousness was satisfied. First, he observed that the consideration, namely the subsequent adaptations and development of the software, had an economic value. Second, he considered that that consideration was an enforceable undertaking, since it was essential to the supply of the public service for which those entities were responsible. [36]

3. The extensive notion of 'consideration' and its limits

53. What I understand to be the dominant view in the case-law (and one which I fully support) may be summarised as follows.

54. First, the nature of the consideration, inherent in the condition of onerousness, which is supplied by the contracting authority may take forms other than a price paid in money. There is thus not necessarily a need for a transfer of a sum of money. Other types of payment, including those of a non-monetary nature, are possible.

55. Second, the consideration must have a certain economic value, without being required to correspond precisely to the value of the goods or services supplied. Thus, the contracting authority and the tenderer may agree on the option of making payment in different forms, provided that such forms of payment have a clear economic value.

56. Third, the nature and the content of the consideration which the contracting authority must pay must be apparent from the contract as a direct and enforceable legal obligation arising under the contract. It is in that context that I understand the reference made by the Court, and also that made by Advocate General Mengozzi, to the *synallagmatic nature* of the public contract which is reflected in the *creation of legally binding obligations* for both parties to the contract. [37]

57. Thus, in order to determine whether the contract includes consideration (and, accordingly, whether the condition of onerousness laid down in Article 2(1)(5) of Directive 2014/24 is satisfied), I am of the view that the focal point of the analysis is not the precise sum of money stated in the contract. The question is, rather, whether, on the basis of that contract, the two contracting parties are locked inside a relationship of reciprocal legal obligations which each party may enforce against the other and in the context of which the contracting authority provides at least clear and precise consideration of an economic nature.

58. Such an approach deliberately shifts the terms of the discussion from the precise nature of the requisite 'consideration' to the broader question of the definition of the precise content of the reciprocal obligations borne by each of the parties. Although it is possible that the notion of

[36] See, in that regard, the developments set out in points 52 to 63 of this Opinion.

[37] See judgment of 21 December 2016, *Remondis* (C-51/15, EU:C:2016:985, paragraph 43), which itself followed the Opinion of Advocate General Mengozzi in *Remondis* (C-51/15, EU:C:2016:504, point 36). See footnote 16 of the present Opinion.

'consideration' varies considerably from one country to another in Europe, [38] the broad consensus seems to be that the formation of the contract requires that the parties agree in a sufficiently precise manner on the terms of the contract, which assumes that the mutual rights and obligations of each of the parties are clear so that the contract can be performed. [39] From a certain aspect, that discussion goes back to Roman law in its original form and to the fundamental distinction, still in force in civil-law legal systems, between synallagmatic legal relationships (for example contracts) and unilateral legal relationships (for example donations and gifts).

59. A contract for pecuniary interest is therefore, above all, a synallagmatic contract which means that the parties undertake to provide to each other services which are precise and reciprocal. The nature of those services must be determined at the time when the contract is formed. The services must be enforceable on the basis of that contract. On the other hand, the consideration that can be required is more flexible. It need not necessarily consist in compensation of a monetary nature. What matters is that that consideration is clear, precise and enforceable on the basis of the contract which the parties have entered into.

4. Application to the present case

60. It should be noted, as a preliminary point, that, in the present case, unlike the cases referred to in the case-law cited earlier in this Opinion, there is no contract concluded between the contracting authority and the tenderer, since the case was brought before the national court at the stage at which the bid submitted by the tenderer was rejected. At that stage of the procedure, there is thus no contractual provision that might show the existence of consideration to be supplied by the contracting authority, in any form whatsoever.

61. The question for the Court is therefore whether, in a situation in which the tenderer's bid entails the absence of any direct remuneration for the service by the contracting authority, the advantage on which the tenderer may rely as a consequence of actually being awarded the contract may constitute 'consideration' capable of permitting the conclusion of a contract for pecuniary interest within the meaning of Article 2(1)(5) of Directive 2014/24.

62. In the light of the factual circumstances of the present case, as presented by the referring court, I am unable to see what such consideration might indeed consist of, even on the very broad definition of that notion as set out in the preceding section. There are three potential advantages which might be considered in the context of the present case: first, developing relevant experience; next, obtaining references for future contracts; and, last, establishing a reputation for future calls for tenders that might be launched by the same contracting authority for other lots.

[38] Showing that the legal regimes of contracts are characterised by considerable diversity, see, for example, Kötz, H., 'Comparative Contract Law' in Reimann, M. and Zimmermann, R., *The Oxford Handbook of Comparative Law*, 2nd ed., Oxford University Press, Oxford, 2019, pp. 902-932, in particular pp. 910-912; or Chloros, A.G., 'The Doctrine of Consideration and the Reform of the Law of Contract: A Comparative Analysis', *International and Comparative Law Quarterly*, British Institute of International and Comparative Law, London, 1968, vol. 17, No 1, pp. 137-166.

[39] See, for example, Articles 2:101 (Conditions for the Conclusion of a Contract) and 2:103 (Sufficient Agreement) of 'Principles of European Contract Law' (see Lando, O. and Beale, H., *Principles of European contract law, Parts I and II*, Kluwer Law International, The Hague, 2000); or Articles II.–I:101(I) (definition of the contract) and III.–I:102(4) (on the reciprocal nature of the obligations) of the *Draft Common Frame of Reference* (see von Bar, C. et al., *Principles, Definitions and Model Rules of European Private Law, draft Common Frame of Reference: outline edition*, Sellier European Law Publishers, Munich, 2009). See also, to that effect, *Projet de cadre commun de référence. Terminologie contractuelle commune*, Société de législation comparée, collection 'Droit comparé et européen', Paris, 2008, vol. 6, p. 25, published by the Association Henry Capitant des amis de la culture juridique française et la Société de législation comparée.

63. First, obtaining relevant experience is certainly important for new entrants or small and medium-sized enterprises wishing to grow. However, it clearly does not constitute consideration which the contracting authority supplies in exchange for the services received. It is simply a legal fact that follows from the award of the contract.

64. Second, it is also undeniable that obtaining references may constitute an advantage. Those references may play a strategic role in the future award of public contracts. However, it must be stated that the giving of references is not sufficient to establish the synallagmatic nature of the contract envisaged. It does not constitute an obligation placed on the contracting authority, and cannot therefore constitute consideration enforceable against that authority. That advantage is a condition, the satisfaction of which is aleatory and uncertain, since the references on which the undertaking may rely in the future depend in reality on factual circumstances linked with the proper performance of the contract. There is thus no guarantee as to the references on which the tenderer may rely. There is merely speculation about the contract.

65. Third, the order for reference states that in the present case the contract consisted of two lots.[40] The call for tenders at issue here related only to the first lot. No further information was provided as to any connection between the first and the second lots. However, it is difficult to imagine that such a situation plays a role in the definition of the consideration in the sense of the legal obligation which the contracting authority would have to the tenderer with respect to the two lots. It is certainly not desirable either to accept or to promote a policy, whether explicit or implicit, whereby an undertaking would submit a tender significantly below the costs, including for the sum of EUR 0.00, in the context of one lot while hoping to recover those costs subsequently when a second lot in the contract was awarded.

66. In sum, none of the three scenarios corresponding to the potential 'advantages' likely to be put forward as the consideration received by a tenderer proposing to supply certain services free of charge falls within the notion of 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24. None of those hypotheses involve consideration enforcement of which could be legally demanded of the contracting authority in the context of the contract. The common denominator of those advantages is that they are all a bet on the future.

67. In conclusion, it might be added that the latter factual element makes it possible to clearly distinguish the present case from the even more flexible approach to consideration and 'onerousness' taken, for example, by Advocate General Campos Sánchez-Bordona in his Opinion in *Informatikgesellschaft für Software-Entwicklung*.[41] Especially in a rather dynamic sector such as software development, it is possible to conceive of a number of somewhat atypical forms of consideration. Thus, the first software may be supplied free of charge, unlike future developments of that software; the contracting authority may make payment in kind by supplying its own data in exchange, so that the programmer can use those data in subsequent applications; the contracting authority may promise to provide feedback at regular intervals, thus enabling the developer to improve his product and increase its sales, etc. All of those situations might lead to the conclusion of contracts for pecuniary interest, since those obligations clearly emerge from the agreement entered into with the contracting authority and define a legally enforceable consideration, even though it is not always easy to put a price on each specific form of consideration.

[40] See point 11 of this Opinion.

[41] C-796/18, EU:C:2020:47. See points 51 and 52 of this Opinion.

68. In the present case, on the other hand, no distinct consideration incumbent on the contracting authority results from a clear and enforceable obligation arising from the contract whose conclusion is envisaged. The first 'advantage' is simply an automatic legal fact. The second is purely speculative and uncertain. As for the third, if it should even be envisaged, it would be highly problematic. Therefore, in the absence of consideration to be supplied by the contracting authority, the future contract cannot be characterised as a 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24.

C. Is a tender in the amount of EUR 0.00 an abnormally low tender?

69. The second question requires a determination of the legal basis on which a tender, such as that at issue, of an amount of EUR 0.00, may be rejected.

70. Although the referring court focuses its question on the provisions set out in Article 2(1)(5) of Directive 2014/24, I nonetheless recall that, according to the information which the referring court supplies, the Ministry of the Interior examined the tender at issue by reference to the provisions dedicated to 'abnormally low tenders' in Article 69 of that directive. However, the Ministry of the Interior rejected the applicant's tender not because it was abnormally low or because it did not satisfy the requirements and obligations set out in the contract notice, but because the tender was for an amount of EUR 0.00.

71. Thus, the second question submitted by the referring court is of a procedural nature: if a contracting authority receives a tender proposing EUR 0.00 in the box marked 'price', (i) must the contracting authority automatically reject the tender directly on the basis of Article 2(1)(5) of Directive 2014/24 since no tender of that type can ever lead to the conclusion of a valid public contract; or (ii) must such a tender also be examined in accordance with the procedure relating to abnormally low tenders provided for in Article 69 of Directive 2014/24?

72. In view of the answer which I propose be given to the referring court's first question (the consideration that can be demanded in the context of a public contract does not necessarily entail a direct transfer of money, but may be consideration in kind provided that it has a certain economic value), the logical answer to the second question is that suggested by (ii): a tender offering a nominal prince of EUR 0.00 must also be treated as an abnormally low tender.

73. In the first place, the procedure laid down in Article 69 of Directive 2014/24 concerns the stages of the tender and negotiation. In that article, the EU legislature requires that the contracting authority give the tenderer the opportunity to explain the amount of its tender and to show that the tender is genuine. Next, the contracting authority is required to take account not only of the explanations given, in particular those relating to the economics of the service, the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the service agreed,[42] but also all the relevant matters concerning the service in question and the obligations associated with its supply.[43]

[42] Those justifications are set out in Article 69(2) of Directive 2014/24.

[43] See judgment of 16 May 2019, *Transtec* v *Commission* (T-228/18, EU:T:2019:336, paragraph 69 and the case-law cited).

74. Thus, unless the nature of the contract or the tender itself indicates unambiguously that there can be no other conceivable consideration and that there is thus no point in allowing the tenderer to provide explanations about his tender, it cannot be ruled out that the future contract may ultimately be a contract 'for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24.

75. All of this is reminiscent of the paradox of Schrödinger's cat. As long as the box is not opened and its contents examined, it cannot be ruled out that the cat inside the box is alive. Likewise, as long as the contracting authority does not give the tenderer, on the basis of Article 69 of Directive 2014/24, the opportunity to explain the logic and the structure of the costs underpinning its tender, it cannot be ruled out that the tender in question may lead to the conclusion of a public contract, without prejudice, ultimately, to the tender being rejected by the contracting authority. However, the tender cannot be rejected purely because a nominal tender of EUR 0.00 does not satisfy the condition of onerousness set out in Article 2(1)(5) of that directive.

76. In the second place, it must be stated that Directive 2014/24 does not define the concept of 'abnormally low tender' or specify the numerical amount which that concept covers. [44] The words used by the EU legislature are general and the Court also employs the notion of the 'low price proposed in [the] tender'. [45]

77. It is apparent from the Court's case-law, however, that the Court is opposed to the establishment of a mathematical criterion for exclusion. It tends to favour effective competition in accordance with the rules on public procurement. In the judgment of 22 June 1989, *Costanzo*, [46] the Court held that a mathematical criterion for exclusion deprived tenderers who had submitted exceptionally low tenders of the opportunity of demonstrating that those tenders were genuine and was thus contrary to the objective of Directive 71/305/EEC, [47] namely to promote the development of effective competition in the field of public procurement.

78. In the light of those factors, it thus seems that there is nothing to preclude the notion of 'abnormally low tender' from including a tender in the amount of EUR 0.00. Admittedly, an amount of 'EUR 0.00' resembles a sort of psychological barrier. Nonetheless, in economic terms there is no reason why it should be distinguished from a tender of EUR 10 or EUR 100, provided that those tenders are all below the costs of the contract.

79. In the third and last place, there can be no doubt that a number of additional arguments might be made in favour of a refusal to examine tenders of EUR 0.00. To allow such tenders might run counter to the objective of *transparency* in connection with public funds and the fight against corruption: the actual costs and subsequent payments would simply be shifted and concealed in other parallel transactions. Likewise, although such a step would at first sight appear beneficial for *public budgets*, a public contract concluded for a nominal price of EUR 0.00 could ultimately prove more expensive and difficult to enforce for the contracting authority and thus lead to increased costs rather than simply paying the appropriate price at the outset. In addition, a practice of predatory pricing sponsored by the contracting authorities could give rise to concerns from the perspective of *competition law*.

44 In the judgment of 18 December 2014, *Data Medical Service* (C-568/13, EU:C:2014:2466), the Court thus pointed out 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' (paragraph 49 and the case-law cited).

45 See, in that regard, judgment of 18 December 2014, *Data Medical Service* (C-568/13, EU:C:2014:2466, paragraph 46).

46 103/88, EU:C:1989:256, paragraph 18.

47 Council Directive of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition, 1971(II), p. 682).

80. In any event, regardless of the legitimacy of those concerns, the same arguments might be used in the opposite sense, that is to say, in favour of examining such tenders.[48] Above all, however, all of those arguments could be used directly against any examination of abnormally low tenders. The same considerations as those outlined in the preceding point of this Opinion would apply without distinction to every abnormally low tender: that would be the case, for example, for a contract evaluated at EUR 150 000, of a tender of EUR 1 000, of EUR 101 or of a symbolic EUR 1. Even though all of those tenders would be far below the real costs, the contracting authority could not automatically reject them, but would have to examine them in accordance with the procedure specifically laid down for that purpose in Article 69 of Directive 2014/24.

81. If such a legislative choice was made by the EU legislature in the context of the law relating to public procurement after it had weighed up all the advantages and disadvantages inherent in abnormally low tenders, I find no logical argument that would allow tenders of EUR 0.00 to be excluded from such an arrangement. Such tenders should therefore be treated in the same way. Thus, if the Court should accept my proposal with regard to the first question (a 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of Directive 2014/24 does not necessarily require payment of a sum of money, but may entail consideration in kind to be supplied by the contracting authority), then the amount of the nominal sum stated on the tender for the contract is not decisive.

82. Consequently, I consider that it is indeed through the prism of the conditions set out in Article 69 of Directive 2014/24 that the contracting authority must examine a tender of an amount of EUR 0.00 in order, where appropriate, to reject that tender on the ground, in particular, that it cannot lead to the conclusion of a contract for pecuniary interest within the meaning of Article 2(1)(5) of that directive, owing to the fact that no consideration of an economic nature would be supplied by the contracting authority in the context of a tendering procedure.

V. Conclusion

83. I propose that the Court should answer the questions submitted for a preliminary ruling by the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (State Public Procurement Tribunal, Slovenia) as follows:

(1) The notion of 'contract for pecuniary interest' referred to in Article 2(1)(5) 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, as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017, must be interpreted as not permitting a transaction whereby the tenderer proposes to the contracting authority to supply the service for an amount of EUR 0.00 cannot be characterised as a 'public service contract' in so far as the parties to the contract do not agree on consideration of economic value to be supplied by the contracting authority.

[48] For example, as regards competition, it might be argued that those rules are in reality favourable for competition: it is likely that small and medium-sized enterprises and start-ups have lower fixed costs and may include zero margins for a specific contract. In such circumstances, bids of EUR 0 may be competitive by allowing those small undertakings to enter the market.

(2) A tender at a price of EUR 0.00 must be examined in accordance with the provisions set out in Article 69 of Directive 2014/24, as amended by Delegated Regulation 2017/2365, on abnormally low tenders, where appropriate after having obtained additional information from the tenderer on the precise nature of the consideration of economic value to be supplied by the contracting authority. Such a tender must be rejected where it cannot lead, in the specific context of a call for tenders, to the conclusion of a 'contract for pecuniary interest' within the meaning of Article 2(1)(5) of that directive.