

**Case C-927/19****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

18 December 2019

**Referring court:**

Lietuvos Aukščiausiasis Teismas (Lithuania)

**Date of the decision to refer:**

17 December 2019

**Applicant and respondent on a point of law:**

‘Ecoservice Klaipėda’ UAB

**Defendant and appellant on a point of law:**‘Klaipėdos regiono atliekų tvarkymo centras’ UAB**Subject matter of the main proceedings**

The main proceedings concern the interpretation and application of substantive rules governing: the protection of confidential information submitted by suppliers to contracting authorities during public procurement and review procedures; the establishment of tender conditions; and the classification of information submitted by suppliers as false.

**Subject matter and legal basis of the request for a preliminary ruling**

Interpretation of provisions of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (‘Directive 89/665’), 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 (‘Directive 2014/24’) and of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and

disclosure ('Directive 2016/943') that concern tender conditions and various aspects of the protection of confidential information in public procurement, as well as of the judgments of the Court of Justice of 4 May 2017, *Esaprojekt* (C-387/14), and of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93* (C-267/18); point (b) of the first paragraph and the third paragraph of Article 267 TFEU.

### Questions referred for a preliminary ruling

1. Does a tender condition under which suppliers are required to demonstrate a certain level of average annual operating income derived from carrying out activities relating only to specific services (mixed municipal waste management) fall within the scope of Article 58(3) or (4) of Directive 2014/24?
2. Does the method of assessment of the supplier's capacity, which is set out by the Court of Justice in its judgment of 4 May 2017, *Esaprojekt* (C-387/14), depend on the answer to the first question?
3. Does a tender condition under which suppliers are required to demonstrate that the vehicles necessary for the provision of [refuse management] services comply with the specific technical requirements, including polluting emissions (EURO 5), installation of a GPS transmitter, appropriate capacity and so forth, fall within the scope of (a) Article 58(4), (b) Article 42 in conjunction with the provisions of Annex VII, (c) Article 70 of Directive 2014/24?
4. Are the third subparagraph of Article 1(1) of Directive 89/665, which lays down the principle of the effectiveness of review procedures, Article 1(3) and (5) thereof, Article 21 of Directive 2014/24 and Directive 2016/943, in particular recital 18 and the third subparagraph of Article 9(2) thereof (together or separately, but without limitation thereto), to be interpreted as meaning that, where a binding pre-litigation dispute settlement procedure is laid down in the national legal rules governing public procurement:
  - (a) the contracting authority has to provide to the supplier who initiated the review procedure all details of another supplier's tender (regardless of their confidential nature), if the subject matter of that procedure is specifically the lawfulness of the evaluation of the other supplier's tender and the supplier which initiated the procedure had explicitly requested the contracting authority prior thereto to provide them;
  - (b) irrespective of the answer to the previous question, the contracting authority, when rejecting the claim submitted by the supplier regarding the lawfulness of the evaluation of his competitor's tender, must in any event give a clear, comprehensive and specific reply, regardless of the risk of disclosing confidential tender information entrusted to it?

5. Are the third subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) of Directive 89/665, Article 21 of Directive 2014/24 and Directive 2016/943, in particular recital 18 thereof (together or separately, but without limitation thereto), to be interpreted as meaning that the contracting authority's decision not to grant a supplier access to the confidential details of another participant's tender is a decision which may be challenged separately before the courts?
6. If the answer to the previous question is in the affirmative, is Article 1(5) of Directive 89/665 to be interpreted as meaning that the supplier must file a claim with the contracting authority in respect of such a decision by it and, if need be, bring an action before the court?
7. If the answer to the previous question is in the affirmative, are the third subparagraph of Article 1(1) and Article 2(1)(b) of Directive 89/665 to be interpreted as meaning that, depending on the extent of the information available on the content of the other supplier's tender, the supplier may bring an action before the courts concerning exclusively the refusal to provide information to him, without separately calling the lawfulness of other decisions of the contracting authority into question?
8. Irrespective of the answers to the previous questions, is the third subparagraph of Article 9(2) of Directive 2016/943 to be interpreted as meaning that the court, having received the applicant's request that the other party to the dispute be ordered to produce evidence and that the court make it available to the applicant, must grant such a request, regardless of the actions on the part of the contracting authority during the procurement or review procedures?
9. Is the third subparagraph of Article 9(2) of Directive 2016/943 to be interpreted as meaning that, after rejecting the applicant's claim for disclosure of confidential information of the other party to the dispute, the court should of its own motion assess the significance of the data whose loss of confidentiality is requested and the data's effects on the lawfulness of the public procurement procedure?
10. May the ground for exclusion of suppliers which is laid down in Article 57(4)(h) of Directive 2014/24, regard being had to the judgment of the Court of Justice of 3 October 2019, *Delta Antrepriză de Construcții și Montaj* 93, be applied in such a way that the court, when examining a dispute between a supplier and the contracting authority, may decide of its own motion, irrespective of the assessment of the contracting authority, that the tenderer concerned, acting intentionally or negligently, submitted misleading, factually inaccurate information to the contracting authority and therefore had to be excluded from public procurement procedures?

11. Is Article 57(4)(h) of Directive 2014/24, applied in conjunction with the principle of proportionality set out in Article 18(1) of that directive, to be interpreted and applied in such a way that, where national law provides for additional penalties (besides exclusion from procurement procedures) in respect of the submission of false information, those penalties may be applied only on the basis of personal responsibility, in particular where factually inaccurate information is submitted only by a proportion of the joint participants in the public procurement procedure (for example, one of several partners)?

### **Provisions of EU law cited**

Third subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) of Directive 89/665

Article 18(1), Article 21, Article 42 in conjunction with Annex VII, Article 57(4)(h), Article 58(3) and (4) and Article 70 of Directive 2014/24

Recital 18 and third subparagraph of Article 9(2) of Directive 2016/943

### **Provisions of national law cited**

Article 1.116 (Commercial and professional secrecy) of the Lietuvos Respublikos civilinis kodeksas (Civil Code of the Republic of Lithuania; ‘the Civil Code’)

Paragraphs 1 to 4 of Article 10 (Public access to the case file) and paragraphs 1 to 5 of Article 10<sup>1</sup> (Specific features of the protection of commercial secrets) of the Lietuvos Respublikos civilinio proceso kodeksas (Code of Civil Procedure of the Republic of Lithuania; ‘the Code of Civil Procedure’)

Paragraph 34 of Article 2 (Main terms used in this law), paragraph 1 of Article 17 (Key principles of procurement), paragraphs 1 to 5 of Article 20 (Confidentiality), paragraphs 1, 3 and 4 of Article 37 (Technical specification), paragraphs 1 and 3 of Article 45 (General principles of evaluation of a supplier and of a request for participation and tender submitted by him), paragraphs 4(4) and (5), 5, 7 and 8 of Article 46 (Grounds for exclusion of a supplier), paragraphs 1(1) to (3) and 6 of Article 47 (Verification of a supplier’s qualifications), paragraphs 1(1) and (2), 2 and 3 of Article 52 (Withholding of information or submission of false information or failure to submit documents), paragraph 9 of Article 55 (Evaluation and comparison of tenders), and paragraphs 3 and 5 of Article 58 (Informing of the results of the procurement procedure) of the Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on public procurement; ‘the Law on public procurement’)

**Succinct presentation of the facts and procedure in the main proceedings**

- 1 On 27 September 2018, the defendant (also ‘the contracting authority’) announced an international open procurement procedure for services relating to the collection of municipal waste of Neringa municipality and its transport to the treatment facilities of the Klaipėda regional landfill (‘the tendering procedure’).
- 2 Tenders were submitted by three suppliers: the applicant ‘Ecoservice Klaipėda’ UAB (also ‘the applicant’, ‘tenderer A’); ‘Ekonovus’ UAB; and the group of economic operators ‘Klaipėdos autobusų parkas’ UAB, ‘Parsekas’ UAB and ‘Klaipėdos transportas’ UAB operating under a joint-activity agreement (also ‘tenderer B’).
- 3 On 29 November 2018, the contracting authority informed the participants of the evaluation of their tenders and the final results of the tendering procedure: tenderer B was the successful tenderer, and the applicant was ranked second.
- 4 On 10 December 2018, the applicant filed a claim with the contracting authority, challenging the results of the tendering procedure by stating that the qualifications of tenderer B did not fulfil the requirements. According to the information available to the applicant, ‘Parsekas’ UAB could not have performed contracts relating to the collection and transport of mixed municipal waste with a total value of EUR 200 000 (excluding VAT) over the last three years (as required in the part of the tender conditions entitled ‘Financial and economic capacity’), since, in the context of other procurement procedures, that company often participates in joint activities as the lead partner which receives money for the provision of services, but *de facto* does not carry out mixed municipal waste management activities. Moreover, the applicant asserted that tenderer B also does not satisfy the requirements regarding technical ability because the vehicle referred to in the documents submitted by ‘Parsekas’ UAB in the tendering procedure does not meet various mandatory technical parameters set out in the tender conditions (technical specifications).
- 5 On 17 December 2018, having examined the applicant’s claim, the contracting authority rejected it on the ground that tenderer B, confirming compliance with the requirement regarding contracts performed, provided, in accordance with the tender conditions, evidence of contracts entered into relating to mixed municipal waste management, the value of which corresponds to the required amount, as well as technical information concerning the declared vehicle.
- 6 On 27 December 2018, the applicant brought proceedings before the Klaipėdos apygardos teismas (Regional Court, Klaipėda, Lithuania).
- 7 By judgment of 15 March 2019, dismissing the applicant’s action, that court of first instance found that tenderer B fulfilled the qualification requirements for suppliers.

- 8 Following the appeal lodged by the applicant, the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania), by judgment of 30 May 2019, set aside the judgment of the court of first instance, upheld the applicant's action, annulled the defendant's decision establishing the ranking of the tenders and ordered the contracting authority to repeat the evaluation of the tenders. The court held that tenderer B had fulfilled the requirement regarding contracts performed, but had failed to demonstrate its technical ability, since not all the vehicles declared at a later date had been initially included in the tender.
- 9 The defendant brought an appeal on a point of law, and the applicant responded to it.
- 10 Furthermore, , in the main proceedings, the applicant and the defendant disagree as to which details of the successful tender may be made public and which constitute confidential information that the applicant cannot be granted access to.
- 11 On 4 December 2018, the applicant applied to the contracting authority requesting access to the tender of tenderer B and, on 6 December 2018, it consulted the non-confidential details of that tender.
- 12 In the course of the proceedings before the court of first instance, the applicant requested the court to order the defendant to produce additional documents and to grant access to all the information contained in the tender of tenderer B (excluding only commercially sensitive information), as well as to order 'Parsekas' UAB to provide data about the waste management contracts classified as confidential that it had concluded.
- 13 Following the submission by it of additional documents to the court, the defendant, in turn, requested the court not to grant the applicant access to the confidential details submitted of the tender of tenderer B and to classify them as non-public material in the case file.
- 14 By order of 30 January 2019, the court of first instance granted this application of the defendant and, on 14 February and 21 February 2019, it dismissed the abovementioned requests submitted by the applicant.
- 15 On 26 July 2019, the applicant, prior to lodging its response to the appeal on a point of law, requested the court of cassation, the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania), to grant access to the confidential documents submitted by the defendant to the court of first instance, with genuinely commercially sensitive information redacted.

### **Succinct presentation of the reasons for the request for a preliminary ruling**

- 16 In the present case, the dispute between the parties has arisen as to whether the qualifications of the group of economic operators which has been declared the successful tenderer comply with the requirements set by the contracting authority.

- 17 The court of cassation should in principle have to rule only on the issues raised by the defendant in its appeal on a point of law, namely the compliance of tenderer B's technical ability. However, in the present case, the court of cassation contemplates going of its own motion beyond the ambit of the appeal and ruling on other aspects of the dispute between the parties, not only in reliance upon the ground of protection of the public interest, but also in the light of the specific situation that has arisen in the present case, where the applicant, at the pre-litigation stage and in the proceedings, was in essence denied all the information to which it requested access.
- 18 Irrespective of the fact that the need for the interpretation of EU law has been raised by the national court of its own motion, going beyond the ambit of the dispute between the parties, the Court of Justice has jurisdiction to give the court the interpretation sought (see, for example, judgments of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, and of 25 October 2018, *Roche Lietuva*, C-413/17, EU:C:2018:865).
- 19 In these proceedings, the chamber refers to the Court of Justice questions concerning (a) the lawfulness of certain tender conditions; (b) various aspects of the protection of confidential information in public procurement procedures, and (c) the assessment of possibly false statements of the successful tenderer and the consequences of such acts.

*Lawfulness of the actions on the part of the contracting authority in assessing the fulfilment of the qualification requirements by tenderer B*

- 20 According to the court of cassation's case-law, when deciding disputes between contracting authorities and suppliers what matters is, in essence, the content of a condition, not the designation given to it by the contracting authority. The proper classification of the conditions of procurement documents will result in the proper application of the provisions of the Law on public procurement, which cover various procurement procedures, and thus in appropriate dispute settlement.

*(a) content and application of the financial and economic capacity requirement*

- 21 The financial and economic capacity condition concerning the average annual income of suppliers derived from carrying out activities relating to mixed municipal waste management, as laid down in the tender conditions, corresponds, in essence, to Article 58(3) of Directive 2014/24, which provides for the possibility of requiring that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. However, the chamber considers that it could also correspond to the professional ability requirements laid down in Article 58(4) of that directive.
- 22 It should be pointed out that it follows from the wording of Article 58(3) of Directive 2014/24 (namely, from the word 'including') that the required yearly turnover in the area covered by the contract is not applicable entirely as an alternative in the sense that, where a turnover requirement is imposed, first, the

overall turnover should be assessed and, second, turnover in a specific area is established at the choice of the contracting authority. In other words, such an interpretation of the wording of Article 58(3) of Directive 2014/24 leads to the conclusion that turnover in a specific area cannot be established independently, without, at the same time, setting the overall turnover requirement.

- 23 Moreover, the scope of the term ‘area covered by the contract’ is not entirely clear. In fact, according to the tender condition at issue, suppliers had to demonstrate their capacity specifically with regard to services relating to the collection and transport of mixed municipal waste, in respect of which the tendering procedure had been announced, and not in the area of waste management in general. The chamber is inclined to give a broader (more abstract) interpretation to that term: in the dispute before it, the term would mean that under Article 58(3) of Directive 2014/24 the defendant, in seeking to impose specifically a requirement concerning financial capacity, had to set, first, the overall yearly turnover and, secondly, at the same time the proportion of that turnover in the area of unspecified waste management services.
- 24 The above questions concerning the proper classification of the tender condition, which are raised by the court of cassation of its own motion, relate not only to the possible lawfulness of this tendering requirement, but also to its proper application. It should be noted that the applicant took the view consistently throughout the proceedings that ‘Parsekas’ UAB, a member of tenderer B, is not permitted to submit to the contracting authority for evaluation contracts, first, a share of which was not performed by it alone but together with other partners, including the applicant itself, and, second, the subject matter of all of which is not limited to mixed municipal waste management.
- 25 Contrary to what the courts held, the chamber considers that the mere fact that, according to the tender conditions, the financial and economic capacity of suppliers had to be demonstrated by free-form declarations of participants does not mean that other suppliers cannot call them or the reliability of data declared into question.
- 26 It should be recalled that the defendant, tenderer B and the courts interpreted the qualification requirement for suppliers that is in question as meaning that the tender conditions did not require an economic operator demonstrating its fulfilment of the qualification requirement to receive income solely in its own name and/or on its own behalf (that is to say, not as the lead partner) and only in respect of mixed municipal waste management in the case of the performance of a complex contract (a variety of waste). The court of cassation is not entirely clear as to the method of proving the qualification in question according to the Court of Justice’s case-law.
- 27 In its judgment of 4 May 2017, *Esaprojekt* (C-387/14, EU:C:2017:338), the Court of Justice stated inter alia that, where an economic operator relies on the experience of a group of undertakings in which it has participated, that experience

must be assessed in relation to the effective participation of that operator and, therefore, to its actual contribution to the performance of an activity required of that group in the context of a specific public contract; it follows that an economic operator cannot rely on the supplies of goods or services by other members of a group of undertakings in which it has not actually and directly participated as experience required by the contracting authority.

- 28 It should be noted that in that judgment the question and the answer to it were related to Article 48(2)(a) of Directive 2004/18 which provides specifically for the method of the assessment of the requirement concerning professional ability.
- 29 Should the abovementioned tender condition continue to be classified as a financial and economic capacity requirement to which the above interpretations given by the Court of Justice with regard to the assessment of the fulfilment of the professional ability conditions would be relevant, the question would arise as to the separation and proper application of these qualification requirements.

*(b) content and application of the technical and professional ability requirement*

- 30 The court of cassation also expresses doubts as to the classification of the requirement relating to the technical ability of suppliers laid down in the tender conditions, under which suppliers had to demonstrate their compliance by providing vehicles (refuse collection vehicles) having appropriate technical characteristics.
- 31 According to the case-law of the court of cassation, tenderers have much more freedom in adjusting data concerning the qualifications of suppliers than information related to the subject matter of the contract, its technical characteristics, the price offered, contractual obligations and so forth. The reason for such separation of the rights of suppliers to adjust data is the fact that, in the view of the court of cassation, the qualifications of suppliers constitute an objective category referring to past and present circumstances, and the qualifications either exist or do not exist. Under the national rules currently in force governing public procurement, the right of suppliers to adjust data concerning qualifications and details of a tender varies in extent.
- 32 A similar position also follows from the case-law of the Court of Justice. In the view of the court of cassation, the strict rules, to be interpreted narrowly, for adjusting details of a tender, set out in the judgment of the Court of Justice of 29 March 2012, *SAG ELV Slovensko and Others* (C-599/10, EU:C:2012:191), are subject to a certain exception with regard to the assessment of data concerning qualifications. The Court of Justice stated, in paragraph 39 of its judgment of 10 October 2013, *Manova* (C-336/12, EU:C:2013:647), that a contracting authority may request the correction or amplification of details of an application, on a limited and specific basis, so long as that request relates to particulars or information, such as a published balance sheet, which can be objectively shown to

pre-date the deadline for applying to take part in the tendering procedure concerned.

- 33 The court of cassation also has doubts as to the lawfulness of the requirement relating to the technical ability of suppliers. Even though in its judgment of 10 May 2012, *Commission v Netherlands* (C-368/10, EU:C:2012:284), the Court of Justice held that certain requirements may be set both as a technical specification and as a contract award criterion or a condition for performance of a contract, it is not entirely clear to the court of cassation whether that is also the situation in the present case.
- 34 It should be recalled that for a long time the Court of Justice took the view that the evaluation of the qualifications of suppliers and of their tender were governed by different requirements (see judgment of 24 January 2008, *Lianakis*, C-532/06, EU:C:2008:40). According to that case-law, the qualifications of suppliers could not be regarded as a contract award criterion.
- 35 However, in its interpretation of the relevant provisions of Directive 2004/18, the Court of Justice has subsequently tempered that position somewhat by stating that the skills and experience of the members of the team assigned to performing the public contract may be included as award criteria in the contract notice or in the tender specifications, because the quality of the performance of a public contract may depend decisively on the ‘professional merit’ of the people entrusted with its performance, which is made up of their professional experience and background (judgment of 26 March 2015, *Ambisig*, C-601/13, EU:C:2015:204).
- 36 The *ratio decidendi* in that case, as subsequently explained by the Court of Justice, is that the contracting authority in that instance made a real comparison of the admissible tenders in order to identify the most economically advantageous tender; the experience of the proposed technical team was an intrinsic feature of the tender and not merely a criterion for assessing the tenderers’ suitability (judgment of 1 March 2018, *Tirkkonen*, C-9/17, EU:C:2018:142). Ultimately, this rule of legal interpretation was also laid down in Article 67(2)(b) of Directive 2014/24. In any event, besides the exceptional provision in question, the regulatory framework still provides for a model of separation of qualification and tender (award) criteria.
- 37 The view is to be taken that, if the qualifications of suppliers cannot normally be used for the purpose of comparing tenders with each other, then the technical provisions of the subject matter of the contract should not be set as requirements relating to the capacities of suppliers.
- 38 According to the tender conditions, the contracting authority required suppliers to prove that their vehicles to be used for the provision of services would meet specific technical parameters. These provisions are inter alia correlated with the relevant condition set in the technical specifications. The view should be taken

that such requirements go beyond what should be sought in verifying the technical ability of suppliers.

- 39 Article 58(4) of Directive 2014/24 provides inter alia that contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources to perform the contract to an appropriate quality standard. In the present case, specific and precise technical requirements for vehicles suggest that what was important for the contracting authority was not to ascertain in general the ability of suppliers to perform the contract relating to refuse management services properly, but to establish a specific way of performing the contract which inter alia seeks environmental objectives (EURO 5 standard), traceability of the fulfilment of contractual obligations (GPS equipment) and so forth.
- 40 In this area, the case-law of the court of cassation is of a case-by-case nature; it does not set out clear rules of law as to when a requirement is to be regarded as a technical ability condition and when it is already a provision of technical specifications. In the chamber's view, there should, in principle, be a correlation between the comprehensiveness of a tendering condition and the classification of its content, that is to say, the more specific technical (formal) criteria need to be demonstrated, the more the content of such a requirement moves away from technical ability towards technical specifications or contract performance conditions. This is also clear from the scope and comprehensiveness of 58(4) of, and Annex VII to, Directive 2014/24.

*Balance between the protection of confidential information of one supplier and the effectiveness of the defence of the rights of the other supplier*

- 41 The applicant sought unsuccessfully, both at the pre-litigation stage and in the proceedings, to have access to the tender of tenderer B. That is a common situation, characteristic of Lithuanian public procurement practice, which the court of cassation consistently attempts to limit by the case-law developed by it.
- 42 In the context of the present dispute, however, it should be pointed out that the contracting authority itself was very active in defending the right of tenderer B to the protection of confidential information.
- 43 In the chamber's view, the main negative consequence of this prevailing practice in Lithuania is that the defence of rights of applicants is partly not ensured because they, as in the case at issue, have at their disposal less information than the other parties to the dispute. Moreover, the effectiveness of the defence of rights of applicants essentially turns on the court's decision to recognise the relevant information requested by them as confidential (non-public case file). If the court does not grant provide the applicant the information requested, the possibilities of the satisfaction of its claims are reduced to a minimum, since courts usually, as also was the situation in the present case, do not enlarge of their own motion upon the compliance of confidential data with the requirements of the

public procurement procedure or with legal rules or assess the reliability of that data, and so forth.

- 44 In this regard, the court of cassation has stated *inter alia* that, first, the supplier's right, laid down in Article 20 of the Law on public procurement, to protect information specified separately in his tender that is not to be disclosed covers only such data which is to be classified as a commercial (industrial) secret within the meaning of Article 1.116(1) of the Civil Code; the mere fact that in other cases certain information related to the supplier and his activities is not freely accessible to other economic operators does not mean that it is to be protected in public procurement procedures, if it does not qualify as a commercial secret. It should be noted that the provisions of Article 1.116 of the Civil Code correspond, in essence, to the provisions of Directive 2016/943 on the matter.
- 45 Second, a supplier's right of access to another supplier's tender is essentially to be regarded as an integral part of protection of the infringed rights. Under the national rules governing public procurement, the supplier's right of access to another supplier's tender constitutes an autonomous individual right which is enforced separately by judicial remedies, without the applicant being formally required, without all the necessary data, to initiate a dispute concerning the results of the tendering procedure accompanied by a procedural request to the court that evidence be ordered to be produced by the contracting authority and that the court make the evidence available to the applicant, and subsequently possibly to supplement or clarify the claims in the action.
- 46 Nevertheless, in this area, the court of cassation is uncertain as to the specific content of the duties of contracting authorities to protect the confidentiality of the information entrusted to them by suppliers and the relationship of those duties with the duty of contracting authorities to ensure the effectiveness of the defence of rights of economic operators which have initiated the review procedure. Even though, in its judgment of 14 February 2008, *Varec* (C-450/06, EU:C:2008:91) — almost the only judgment on the subject — the Court of Justice emphasised the nature of the fiduciary relationships (relationships of trust) between suppliers and the contracting authority, it is, however, clear from the third subparagraph of Article 9(2) of Directive 2016/943 (Article 10<sup>1</sup>(3) of the Code of Civil Procedure), which was subsequently adopted, that in any event the parties to the proceedings cannot have at their disposal different amounts of information, since otherwise the principles of an effective remedy and of a fair trial would be infringed.
- 47 If under that legal rule the court has to ensure the applicant the right of access to the commercial secret of a party to the dispute, it is not clear why this right should not be granted to the applicant before judicial proceedings begin, especially as this might help him to decide whether to initiate a review procedure.
- 48 Apart from recital 18, Directive 2016/943 essentially contains no specific wording devoted to public procurement procedures in particular. On the other hand, it is questionable whether the protection of information constituting the commercial

secret of tenderers should be of a different (higher) level, compared to economic entities operating in other legal relationships. Article 21 of Directive 2014/24 and the relevant provisions of Directive 89/665 do not bring greater clarity on the subject either.

- 49 It is constantly noted by the court of cassation that, even though contracting authorities are not review bodies, due to a binding pre-litigation dispute settlement system they have broad powers to cooperate with suppliers (the requesting and the requested suppliers) and in some cases also the duty — arising from the objective of the effective protection of the rights of suppliers — to take, in accordance with their competence and the measures available to them, the necessary actions ensuring that suppliers have the genuine ability to protect any interests that may have been infringed. This case-law correlates with Article 1(5) of Directive 89/665 which provides that Member States may require that the person concerned first seek review with the contracting authority.
- 50 As the Lithuanian legislature laid down a mandatory procedure for filing and examining claims, and the supplier's right of access to tenders of other tenderers is regarded by courts as an integral part of defence of their rights, an interpretation of the aforementioned provisions of EU law to the effect that suppliers could have access to such information only in the course of judicial proceedings would be inconsistent.
- 51 On the other hand, the court of cassation is uncertain as to how, in the judicial proceedings, the informing of the parties to the proceedings that is provided for in the third subparagraph of Article 9(2) of Directive 2016/943 should be implemented: whether the applicant's right of access to the successful tender is unconditional; whether, in view of the pre-litigation stage, the applicant should not first apply to the contracting authority with that request; whether the nature of the dispute arising out of the results of the tendering procedure is relevant for the granting of that request; whether disagreement between the parties regarding the results of the tendering procedure is necessary at all, or whether it would be sufficient simply for one supplier to exercise his right of access to information and, in the event of an infringement of that right, he would be able to apply to the court separately, as stated in the case-law of the court of cassation.
- 52 It should be noted that in the present case the applicant initially applied to the contracting authority requesting access to the tender of tenderer B. Having received only a small part of the documents, it did not rely on that fact and did not contest the contracting authority's decision separately, but submitted a procedural request to the court for an order that the defendant produce evidence and the court make it available to the applicant. Having regard to the course of the dispute at the pre-litigation stage, it is not fully clear whether the court of first instance should have decided at all on the classification of the data of tenderer B as confidential information. On the other hand, the court of first instance and the appellate court, after not disclosing the data requested to the applicant, clearly did not themselves express a view on its content and significance either.

*Submission of possibly false information and powers of the court in that regard*

- 53 In the present case, the chamber *inter alia* raises of its own motion the question of the assessment under Article 57(4)(h) of Directive 2014/24 of the actions of tenderer B, that is to say, whether tenderer B (some of its members) has not in fact supplied false information to the contracting authority about the compliance of its capacities with the requirements imposed. Moreover, there is uncertainty as to the effect of the possibly unlawful behaviour of some partners on the other participants in joint activities.
- 54 It was noted in the judgment of the Court of Justice in *Esaprojekt* (C-387/14), which concerned the interpretation of a similar provision contained in Article 45(2)(g) of Directive 2004/18, that, *first*, the establishment of intentional behaviour by the economic operator cannot be regarded as being an element necessary for its exclusion from participating in a public contract, it being sufficient if it is guilty of some degree of negligence which may have a decisive effect on decisions concerning exclusion, selection or award of a public contract; *secondly*, where the information provided by the economic operator did affect the outcome of the contract award procedure, the operator which has negligently submitted the relevant information may be regarded as being guilty of serious misrepresentation within the meaning of Article 45(2)(g) of Directive 2004/18, and such conduct on its part, therefore, is able to justify the decision of the contracting authority to exclude that operator from the public contract concerned.
- 55 In its latest judgment in that regard (judgment of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93*, C-267/18, EU:C:2019:826), the Court of Justice pointed out that Article 57(4)(h) of Directive 2014/24 indeed encompasses both active conduct, such as falsification, and an omission, since the communication of false information is, in the same way as the concealment of true information, likely to have a bearing on the decision adopted by the contracting authority.
- 56 On the basis of those explanations, the information submitted by ‘Parsekas’ UAB on the income obtained from the contracts — which either were concluded and executed together with other economic operators that performed specifically the part of mixed waste management services that was required to be proven, or were concluded and executed without partners, but here, in addition to mixed waste, other waste was also handled (in both cases mixed waste accounting for a smaller proportion of all waste handled) — could in principle, on the basis of the circumstances considered by the Court of Justice in *Esaprojekt*, correspond to the situation of negligent information provision, which affected the results of the tendering procedure.
- 57 It is not a matter for the court of cassation to examine the facts. However, it has jurisdiction to raise of its own motion points of law, including as to the classification of information as false, as well as to the assessment of evidence carried out by the courts.

- 58 On the other hand, the Court of Justice has begun in its case-law, in respect of the provisions of Article 57(4) of Directive 2014/24 laying down exclusion grounds, to emphasise the special relationship based on mutual trust between the contracting authority and the supplier in question (see judgment of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93*, C-267/18, EU:C:2019:826, paragraphs 25 to 27 and 37). The court of cassation therefore has doubts as to whether, in cases where the contracting authority makes a different assessment, the court may decide for it that it was provided with false, misleading information. In that context, it should be noted that the applicant clearly expressed the view both in the claim and in the action that ‘Parsekas’ UAB submitted misleading information to the defendant; however, the defendant took a different position and considered that the information submitted to it substantiates that tenderer B fulfils the qualification requirements.
- 59 As regards the points at issue, the chamber *inter alia* is uncertain as to the consequences that the actions of economic operators which have submitted possibly false information potentially have for their partners which together submitted a joint tender. Under the national rules governing public procurement (Articles 46(4)(4) and 52 of the Law on public procurement), economic operators that have submitted false information must be entered in the list of suppliers who have submitted false information, resulting in restrictions on taking part in calls for tenders of other contracting authorities for a specified period (one year). The court of cassation’s doubts as to the reliability of the information submitted do not concern all members (partners) of tenderer B.
- 60 Under Article 52(1) of the Law on public procurement, the list of suppliers who have submitted false information must include suppliers within the meaning of Article 2(36) of the Law on public procurement (a supplier is defined as an economic operator being a natural person, a private or public legal person, another organisation and divisions thereof or a group of such persons, including any temporary association of economic entities, which offers the execution of works or the supply of goods or services on the market). The view is to be taken, however, that the negative measure (consequence) at issue in respect of unlawful actions prohibited by law in principle entails the personal responsibility of the entity (sanction). It should therefore be applied without exception only to those entities which participate in any manner in public procurement procedures and submitted information to the contracting authority about themselves, in their own name.
- 61 Against this background, it is not clear whether unlawful actions on the part of some partners of a joint supplier in providing false information about themselves entail negative consequences only for them or for all partners together. The latter position could be supported by the commonality (joint nature) of interests and responsibility of all partners. On the other hand, it is questionable whether such a model of joint responsibility is disproportionate bearing in mind that economic operators entered in the list of suppliers who have submitted false information are excluded from participation in subsequent procurement procedures for one year.

- 62 It is common ground that additional risks arise for economic operators participating jointly in a public procurement procedure, including risks related to the need to exclude some partners or to their inability to continue to participate in procedures (for instance, due to insolvency) (see judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347); however, such a risk and its possible negative consequences relate only to a specific public procurement procedure, and not to a prohibition on taking part in other procurement procedures for a specified period.

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