

Case C-416/21

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:

7 July 2021

Referring court:

Bayerisches Oberstes Landesgericht (Germany)

Date of the decision to refer:

24 June 2021

Defendant and appellant:

Landkreis A.-F.

Applicants and respondents:

J. Sch. Omnibusunternehmen

K. Reisen GmbH

Subject matter of the main proceedings

Appeal against the exclusion of two related tenderers from a public procurement procedure for breach of the requirement of confidentiality of tenders and for distortion of competition

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

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; Article 267 TFEU

Questions referred for a preliminary ruling

1. Is Article 57(4)(d) of Directive 2014/24/EU to be interpreted as meaning that the contracting authority must have sufficiently plausible indications to conclude that the economic operator has infringed Article 101 TFEU?
2. Is Article 57(4) of Directive 2014/24/EU to be interpreted as exhaustively regulating the optional grounds for exclusion in the sense that the principle of equal treatment (Article 18(1) of that directive) cannot preclude the award of a contract where tenders are submitted that are neither independent nor autonomous?
3. Is Article 18(1) of Directive 2014/24/EU to be interpreted as precluding the award of a contract to undertakings which constitute an economic unit and have each submitted a tender?

Questions 2 and 3 require an answer only if Question 1 is answered in the affirmative.

Provisions of EU law relied on

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65): Article 18(1) and Article 57(4)

Provisions of national law relied on

Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition; ‘the GWB’), Paragraphs 1, 97 and 124:

Paragraph 1 Prohibition of agreements restricting competition

All agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition are prohibited.

Paragraph 97 Principles of procurement

(1) Public contracts and concessions shall be awarded on a competitive basis by means of a transparent procedure. In that context, the principles of economic efficacy and proportionality shall be respected.

(2) Participants in a public procurement procedure shall be treated equally, unless unequal treatment is expressly required or permitted under this Law.

Paragraph 124 Optional grounds of exclusion

(1) Contracting authorities may, acting with due regard for the principle of proportionality, exclude an undertaking from participation in a public procurement procedure at any time during that procedure where:

...

2. ... insolvency proceedings or comparable proceedings have been applied for or opened in respect of the undertaking's assets, ...

3. the undertaking has, in the course of business, demonstrably engaged in serious misconduct calling into question the undertaking's integrity; ...

4. the contracting authority has sufficient indications to support the conclusion that the undertaking has concluded with other undertakings agreements or arrangements having the object or effect of impeding, restricting or distorting competition,

...

8. the undertaking has committed serious misrepresentation or withheld information with regard to the grounds for exclusion or the selection criteria ...

Succinct presentation of the facts and procedure in the main proceedings

- 1 The defendant, an administrative district (*Landkreis*), intends to award a contract for public bus transport services in an open procedure. The estimated value of the contract exceeds the threshold laid down in Article 4(c) of Directive 2014/24/EU. According to the contract notice, price is not the only award criterion, and variant/alternative tenders are not permissible.
- 2 Several tenders were submitted within the prescribed period, including those submitted by the two applicants. The first applicant is a trader operating under his company name entered in the commercial register, and the second applicant is a limited liability company of which the first applicant is the managing director and sole shareholder. Insolvency proceedings were opened in respect of the assets of the first applicant by order of 1 November 2019. By letter of 1 December 2019, the insolvency administrator released from the insolvency proceedings the operations of the self-employed activity of the first applicant. The tenders of the two applicants of 27 February 2020 were submitted by the same person, and the first applicant was named as the declarant in each case. In his tender, the first applicant indicated, inter alia, that insolvency proceedings had neither been applied for nor opened in respect of the undertaking's assets.
- 3 On 2 April 2020, the two applicants were each informed that their tenders had been excluded for breach of the requirement of confidentiality of tenders and for distortion of competition, as they had been prepared by the same person.

- 4 The two applicants appealed against that decision before the Vergabekammer (Public Procurement Board), which upheld their appeal. The defendant lodged an appeal against the decision of the Public Procurement Board with the referring court.

Essential arguments of the parties in the main proceedings

- 5 The applicants submit that there has been no breach of the requirement of confidentiality of tenders and no distortion of competition. They argue that, due to the absolute management power of the first applicant and his control of all of the share capital of the second applicant, they constitute a single undertaking in which there is no internal competition. Non-existent competition cannot be restricted or distorted. The competition rules under Paragraph 97(1) of the GWB are not applicable to undertakings which constitute an economic unit. The applicants' tenders are to be regarded as several (main) tenders by one and the same tenderer. In the present case, that possibility had not been precluded in the tender documents. The risk of a distortion of competition does not exist in such a case and is in any event unproblematic if the tenders differ not only in price but also in factual and technical terms. That requirement is met in the present case, since their tenders contain different combinations of vehicles.
- 6 The applicants rely, in particular, on the judgment of the Court of 17 May 2018, *Specializuotas transportas* (C-531/16, EU:C:2018:324). They submit that, in that case, the Court made a clear distinction between two groups of cases. It was only in respect of the second case, where the companies concerned do not constitute an economic unit, that the Court stated (paragraph 29) that the principle of equal treatment under Article 2 of Directive 2004/18 would be infringed if related tenderers were allowed to submit coordinated or concerted tenders, that is to say, tenders that are neither autonomous nor independent, which would be likely to give them unjustified advantages in relation to the other tenderers. The subsequent additional statement that there is no need to examine whether the submission of such tenders constitutes conduct in breach of Article 101 TFEU expressly underlines the fact that all the statements in paragraph 29 apply only to the case where no economic unit exists.
- 7 In the present case, the applicants constitute an economic unit and they were not given an unjustified advantage. It follows from the principle of equal treatment, in accordance with which unlike cases are not to be treated alike, that tenderers may not be excluded where they coordinate with one another in a permissible manner.
- 8 The defendant submits, in particular, that it is the task of public procurement law to ensure genuine competition between the tenderers participating in the public procurement procedure, who are entitled to have tenderers submit their tenders without being aware of the tenders of competitors. To infringe that principle in cases where two tenderers constitute an economic unit would fail to take into account the interests of the other tenderers. The tenderers constituting an

economic unit would be favoured over the other tenderers without a legally sound basis, thereby leading to an infringement of the principle of equal treatment and an impediment or distortion of competition. The reason for this is that, since such companies which form an economic unit formally constitute two different legal entities, they could gain an advantage by, for example, participating in the tender procedure by means of coordinated tenders in which they provide evidence in respect of different suitability requirements. If one of the tenderers of the economic unit is excluded owing to a lack of suitability, the other tenderer of the economic unit remains in the competition with the tender coordinated between those tenderers. The agreements and concerted practices referred to in point 4 of Article 124(1) of the GWB are not intended solely to protect competition between the undertakings participating in such agreements and concerted practices.

- 9 The view taken by the applicants is also not supported by the judgment in *Specializuotas transportas*, in accordance with which an infringement of the principles of equal treatment and transparency precludes the award of the contract to the applicants. In any event, there has been an impermissible submission of a ‘double tender’.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 10 According to Article 57(4)(d) of Directive 2014/24/EU, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition. In accordance with the first sentence of recital 101, contracting authorities should be given the possibility to exclude economic operators which have proven unreliable because of grave professional misconduct, such as violations of competition rules.
- 11 In transposing the abovementioned provision, the German legislature used, in point 4 of Paragraph 124(1) of the GWB, the wording of the prohibition of agreements restricting competition in Paragraph 1 of the GWB, which largely corresponds to that in Article 101 TFEU.
- 12 Article 101 TFEU does not apply where the agreements or practices it prohibits are carried out by undertakings which constitute an economic unit (judgments of the Court of 17 May 2018, C-531/16, *Specializuotas transportas*, EU:C:2018:324, paragraph 28 and the case-law cited, and of 12 July 1984, *Hydrotherm*, C-170/83, EU:C:1984:271, paragraph 11).
- 13 The present Chamber takes the view that the applicants constitute an economic unit in that sense. Two economic operators are to be regarded as an economic unit, that is to say, as an undertaking within the meaning of Article 101 TFEU, where, although having a separate legal personality, the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material

respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (see judgments of the Court of 27 January 2021, *Goldman Sachs*, C-595/18, EU:C:2021:73, paragraph 31, and of 24 June 2015, *Fresh Del Monte Produce v Commission* and *Commission v Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 75 with further references). The fact that the ‘parent’ in the present case is not a company but a registered sole trader does not lead to a different assessment.

- 14 Against that background, the question that arises for the Chamber is whether Article 57(4)(d) of Directive 2014/24/EU is to be interpreted as meaning that the contracting authority must have sufficiently plausible indications to conclude that Article 101 TFEU has been infringed.
- 15 The Chamber takes the view that Question 1 is to be answered in the affirmative, since recital 101 refers to violations of competition rules.
- 16 In the opinion of the Chamber, Article 57(4)(d) of Directive 2014/24/EU cannot be interpreted as meaning that related tenderers which constitute an economic unit and submit coordinated tenders can also be excluded under that provision. Rather, a breach of the requirement of confidentiality of tenders can justify an exclusion under that rule only if it infringes a rule of antitrust law; this does not enter into consideration if the relevant undertakings fall within the scope of the ‘group privilege’ under antitrust law.
- 17 The Chamber takes the view that, in the circumstances of the present case, exclusion on the grounds of grave professional misconduct (Article 57(4)(c) of Directive 2014/24/EU), which is referred to as a catch-all rule in the legal literature, does not enter into consideration either.
- 18 It is true that tenderers which constitute an economic unit and each submit a tender may thereby obtain unjustified advantages in relation to the other tenderers. This is because, in comparison with a tenderer which submits several main tenders, tenderers which constitute an economic unit and each submit a tender have a better chance of winning the tender with regard to the – tenderer-related – grounds for exclusion and selection criteria. For example, in the present case, with regard to the opening of insolvency proceedings, an exclusion of the first applicant under point 2 or point 8 of Paragraph 124(4) of the GWB is conceivable, whereas the tender of the second applicant, which was coordinated with the first applicant, would remain in the assessment – subject to an exclusion under another rule. The Chamber takes the view, however, that that aspect must be taken into account in the context of Question 2.
- 19 Questions 2 and 3 arise from the Chamber’s doubts as to whether the list of optional grounds for exclusion in Article 57(4) of Directive 2014/24/EU precludes recourse to the principle of equal treatment in order to justify the argument that tenders submitted by two tenderers constituting an economic unit cannot be taken

into consideration on the grounds of a breach of the requirement of confidentiality of tenders.

- 20 Question 2 seeks clarification as to whether the case-law of the Court of Justice (judgment of 16 December 2008, *Michaniki*, C-213/07, paragraphs 44 and 45) can be transferred to Article 57(4) of Directive 2014/24/EU.
- 21 In accordance with the Court's case-law on Directive 2004/18/EC, Article 2 of that directive must be interpreted as precluding the award of a contract to tenderers whose links with each other had a bearing on the content of the tenders they submitted during the same procedure. Tenders by related undertakings must be submitted completely autonomously and independently (judgment in *Specializuotas transportas*, paragraphs 38 and 39). The Chamber understands this to mean that, in accordance with that case-law, the contracting authority has no discretion – unlike under Article 57(4) of Directive 2014/24/EU ('may').
- 22 However, exclusion – based on the general principles under Paragraph 97(1) and (2) of the GWB – can be considered in cases such as that at issue in the present proceedings only if the list of optional grounds for exclusion set out in Article 57(4) of Directive 2014/24/EU is not of an exhaustive nature that would preclude such exclusion.
- 23 It is true that the Court of Justice has ruled that the exhaustive list of grounds for exclusion based on a lack of professional quality set out in Article 24(1) of Directive 93/[3]7/EEC concerning the coordination of procedures for the award of public works contracts does not preclude the option for Member States to maintain or adopt substantive rules designed, in particular, to ensure, in the field of public procurement, observance of the principle of equal treatment and of the principle of transparency entailed by the latter, principles which are binding on contracting authorities in any procedure for the award of a public contract (judgment in *Michaniki*, paragraphs 44 and 45). It also ruled that the principle of equal treatment under Article 2 of Directive 2004/18/EC would be infringed if related tenderers were allowed to submit coordinated or concerted tenders, that is to say, tenders that are neither autonomous nor independent, which would be likely to give them unjustified advantages in relation to the other tenderers, (judgment in *Specializuotas transportas*, paragraph 29), even though Article 45(2) of that directive also contained a list of optional grounds for exclusion. Lastly, the Court relied on that case-law in a request for a preliminary ruling concerning Directive 2014/24/EU (judgment of 11 July 2019, *Telecom Italia*, C-697/17, EU:C:2019:599, paragraphs 51 and 52).
- 24 However, the Chamber's doubts underlying the question referred arise from the scheme of the provisions. This is because neither Article 24(1) of Directive 93/[3]7/EEC nor Article 45(2) of Directive 2004/18/EC provided for the grounds for exclusion which correspond to points (e) and (f) of Article 57(4) of Directive 2014/24/EU, which are not linked to a breach of duty by the undertaking but to a conflict of interest and a distortion of competition from the prior involvement of

the undertaking. It is therefore argued in the legal literature that, with Directive 2014/24/EU, the EU legislature also conclusively regulated exclusion on grounds of equal treatment and transparency. It is true that the Court of Justice has derived from the principles of equal treatment and transparency that contracting authorities are required to determine whether any conflicts of interests exist and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them (judgment of 12 March 2015, *eVigilo*, C-538/13, EU:C:2015:166, paragraph 43). In Article 57(4)(f) and Article 41 of Directive 2014/24/EU, the EU legislature has incorporated the Court's case-law – likewise based on the principle of equal treatment – concerning persons who were already involved in the preparation of the procurement procedure (judgment of 3 March 2005, *Fabricom*, C-21/03 and C-34/03, EU:C:2005:127, paragraph 26 et seq.). However, in view of the importance of the principle of equal treatment, as emphasised by the Court, and the ensuing obligations for the contracting authority, the Chamber is inclined to take the view that, irrespective of the extension of the list of optional grounds for exclusion in Article 57(4) of Directive 2014/24/EU, the principle of equal treatment continues to preclude the taking into consideration of tenders which are submitted by related undertakings and are neither autonomous nor independent. Even if it should be taken into account that, in accordance with recital 101 of Directive 2014/24/EU, contracting authorities should pay particular attention to the principle of proportionality in applying those (merely) facultative grounds for exclusion, the Chamber is inclined to take the view that Question 2 should be answered in the negative.

- 25 The Chamber takes the view that the fact that the national case-law proceeds on the assumption that, in accordance with the legislative scheme, the national provisions on mandatory and optional grounds for exclusion are exhaustive is in line with the case-law of the Court (judgment in *Michaniki*, paragraph 43) and does not preclude recourse to the principle of equal treatment to justify the exclusion of tenders submitted by two tenderers whose tenders are concerted or coordinated.
- 26 Question 3 concerns the question of whether the judgment in *Specializuotas transportas*, which expressly refers to related tenderers that do not constitute an economic unit and according to which tenders must be submitted autonomously and independently, is applicable to tenders submitted by tenderers that constitute an economic unit.
- 27 The Chamber takes the view that the principle of equal treatment precludes, a fortiori, the award of a contract to tenderers which constitute an economic unit and are unable to submit autonomous or independent tenders. It would not be logical if related undertakings which do not constitute an economic unit could be awarded a contract only on the condition that their tenders are in fact autonomous and independent, whereas, by contrast, undertakings which constitute an economic unit and therefore cannot fulfil that condition can be awarded a contract automatically.

28 The Chamber therefore proposes that Question 3 be answered in the affirmative.

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