

Case C-266/22

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:

20 April 2022

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

23 March 2022

Applicants:

CRRC Qingdao Sifang CO LTD

Astra Vagoane Călători SA

Defendants:

Autoritatea pentru Reformă Feroviară

Alstom Ferroviaria SpA

Subject matter of the main proceedings

Action by which the applicants CRRC Qingdao Sifang CO LTD and Astra Vagoane Călători SA are seeking, in adversarial proceedings with the defendants, the Autoritatea pentru Reformă Feroviară (Railway Reform Authority; ‘the ARF’) and Alstom Ferroviaria SpA, annulment of the decision of the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Complaints; ‘the CNSC’) of 31 January 2022, as well as the contract award procedure report by which the tender submitted by the association CRRC Qingdao Sifang CO LTD-Astra Vagoane Călători SA was excluded and that submitted by Alstom Ferroviaria SpA was declared successful

Subject matter and legal basis of the request

An interpretation of the principles of legal certainty, the protection of legitimate expectations, equal treatment, transparency and proportionality, as well as Article 25 of Directive 2014/24/EU, is sought pursuant to Article 267 TFEU

Questions referred for a preliminary ruling

Do the principles of certainty in legal relations and the protection of legitimate expectations preclude a piece of national legislation which transposed Article 25 of Directive 2014/24/EU on public procurement as from 5 April 2021, and which provided that economic operators who do not fall within the scope of those provisions of EU law may continue to participate in public procurement procedures only if they have submitted tenders before the date on which that legislative amendment entered into force?

Do the principles of equal treatment, transparency and proportionality laid down in Article 18(1) of Directive 2014/24/EU on public procurement, in conjunction with Article 2(1)(13) and Article 49 thereof, preclude the exclusion of a tenderer on the basis of a legislative act having the force of law adopted by the government of a Member State which lays down a new rule amending the definition of ‘economic operator’ after publication of the contract notice relating to a contract award procedure in which that person is participating?

Provisions of European Union 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: Article 2(1)(13), Article 18(1), Article 25, Article 27(1), and Article 49

Provisions of national law and case-law relied on

Ordonanța de urgență a Guvernului nr. 25/2021 privind modificarea și completarea unor acte normative în domeniul achizițiilor publice (Government Emergency Order No 25/2021 amending and supplementing certain legislative acts in the field of public procurement), published in the *Monitorul Oficial al României*, Part I, No 346, of 5 April 2021: Article V and final note

‘Article V

Contract award procedures in which economic operators have submitted tenders on the date on which this Emergency Order enters into force shall be subject to the legislation in force on the date on which those procedures were initiated.

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This Emergency Order shall transpose Article 25 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 [...]

Legea nr. 98/2016 privind achizițiile publice, forma în vigoare la 3 aprilie 2020, data inițierii procedurii de atribuire (Law No 98/2016 on public procurement, in the version in force on 3 April 2020, the date on which the contract award procedure was initiated)

Article 3(1)(jj)

‘For the purposes of this Law, the following definitions shall apply:

(jj) **economic operator** – any natural or legal person, whether governed by public or private law, or any group or association of such persons, which lawfully offers on the market the performance of works and/or construction, the supply of goods or the provision of services, including any temporary association between two or more such entities;’

Article 72

‘An open tendering procedure shall be initiated by the submission for publication of a contract notice in accordance with Article 144(2) and (3), by which the contracting authority shall invite economic operators to submit tenders.’

Article 154

‘The contracting authority shall be required to draw up procurement documents containing all the information necessary to ensure that economic operators are fully, correctly and precisely informed of the requirements of the contract, the subject matter of the contract, and the way in which the contract award procedure is to be conducted’.

Article 236

(1) This Law shall apply to contract award procedures initiated after the date on which it enters into force.

(2) The law in force on the date on which the contract award procedure is initiated shall apply to contract award procedures which are ongoing on the date on which this Law enters into force.

(3) This Law shall apply to public procurement contracts/framework agreements concluded after the date on which it enters into force.

(4) Public procurement contracts/framework agreements concluded before the date on which this Law enters into force shall be subject to the provisions of the law in force on the date on which they were concluded in all matters concerning

the conclusion, amendment, interpretation, effects, performance and termination of those contracts/framework agreements.’

Legea nr. 98/2016 privind achizițiile publice, forma în vigoare la 19 aprilie 2021 (data depunerii ofertelor) (Law No 98/2016 on public procurement, in the version in force on 19 April 2021 (the date on which the tenders were submitted)), as amended by Government Emergency Order No 25/2021, which entered into force on 5 April 2021

Article 3(1)(jj)

‘For the purposes of this Law, the following definitions shall apply: [...]

“economic operator” – any natural or legal person, whether governed by public or private law, or any group or association of such persons, including any temporary association between two or more such entities, which lawfully offers on the market the performance of works, the supply of goods or the provision of services, and which is established in:

- (i) a Member State of the European Union;
- (ii) a Member State of the European Economic Area (EEA);
- (iii) third countries which have ratified the World Trade Organization’s Agreement on Government Procurement (GPA), in so far as the public contract awarded falls within the scope of Annexes 1, 2, 4, 5, 6 and 7 to the European Union’s Appendix I to that agreement;
- (iv) third countries acceding to the European Union;
- (v) third countries which do not fall within the scope of point (iii) but which are signatories to other international agreements requiring the European Union to grant free access to the public procurement market;’

Article 49

‘(1) Contracting authorities shall be required to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner.

(2) In so far as they fall within the scope of Annexes 1, 2, 4, 5, 6 and 7 to the European Union’s Appendix I to the GPA and of other international agreements which impose obligations on the European Union, contracting authorities shall accord works, goods, services and economic operators of signatories to those agreements treatment equal to that accorded to works, goods, services and economic operators of the European Union.’

Article 53(l¹)

‘The contracting authority shall exclude from the contract award procedure any natural or legal person who is an individual tenderer/associate tenderer/candidate/third party supporter/subcontractor and who does not fall within the definition set out in Article 3(1)(jj), without it being necessary to verify compliance with Articles 164, 165 and 167.’

Paragraph 21 of Decizia Curtii Constituționale a României nr. 393/2020 (Decision No 393/2020 of the Constitutional Court of Romania), published in the *Monitorul Oficial al României*, Part I, No 773 of 25 August 2020, according to which the new law will not be applicable to acts which, prior to its entry into force, gave rise to or, as the case may be, altered or extinguished a legal situation; nor will it be applicable to effects which that legal situation produced prior to that date.

Decizia Curtii Constituționale a României nr. 1008/2009 (Decision No 1008/2009 of the Constitutional Court of Romania), published in the *Monitorul Oficial al României*, Part I, No 507 of 23 July 2009, concerning the assessment of the criterion relating to the urgency of the need for regulation and the extraordinary situations which justify it.

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 3 April 2020, the ARF initiated an open tendering procedure for the award of a public contract for ‘the purchase of 20 new interregional electric multiple units, known as IR-EMUs, and the purchase of the maintenance and repair services necessary for the operation of the trains in question’, by publishing a contract notice of 3 April 2020 in the SEAP (Sistem Electronic de Achiziții Publice) (electronic public procurement system), together with the relevant procurement documents.
- 2 On 19 April 2021, tenders were submitted by two economic operators, namely the association CRRC Qingdao Sifang CO LTD-SC Astra Vagoane Călători SA and Alstom Ferroviaria SpA.
- 3 By final contract award procedure report of 28 October 2021, the tender submitted by the association CRRC Qingdao Sifang CO LTD-SC Astra Vagoane Călători SA was excluded from the procedure and the tender submitted by Alstom Ferroviaria SpA was declared successful.
- 4 The ground for the exclusion was that the leader of the association, the company CRRC Qingdao Sifang CO LTD, with its registered office in the People’s Republic of China, did not fall within the definition set out in Article 3(1)(jj) of Law No 98/2016, as amended and supplemented by Government Emergency Order No 25/2021.
- 5 On 12 November 2021, the association CRRC Qingdao Sifang CO LTD-SC Astra Vagoane Călători SA lodged a complaint with the CNSC against that report, in adversarial proceedings with the contracting authority, the ARF, requesting that

the contract award procedure report be annulled and the contracting authority be ordered to re-examine the tenders submitted in the procedure and issue a new contract award procedure report.

- 6 The complainant claimed that on 3 April 2020, when the public procurement procedure was initiated, the provisions of Law No 98/2016, as amended by [Ordonanța de urgență a Guvernului nr. 23 din 4 februarie 2020 pentru modificarea și completarea unor acte normative cu impact asupra sistemului achizițiilor publice (Government Emergency Order No 23 of 4 February 2020 amending and supplementing certain legislative acts affecting the system of public procurement)] which entered into force on 12 February 2020, were applicable. Article 236 of Law No 98/2016 provided that that law was to apply to contract award procedures initiated after the date on which it entered into force.
- 7 Government Emergency Order No 25/2021, by which Law No 98/2016 was amended again, inter alia to the effect that contract award procedures in which economic operators had already submitted tenders on the date on which that emergency order entered into force are to be subject to the legislation in force on the date on which those procedures were initiated (Article V of Government Emergency Order No 25/2021), entered into force on 5 April 2021, approximately one year after the procedure was initiated.
- 8 In the complainant's view, the contracting authority retroactively applied a law to a procedure which had already been initiated, which is contrary to the Romanian Constitution and EU law.
- 9 The CNSC held that the association CRRC Qingdao Sifang CO LTD-SC Astra Vagoane Călători SA had submitted its tender on the date of expiry, namely 19 April 2021, after the entry into force, on 5 April 2021, of Government Emergency Order No 25/2021, which amended Article 3(1)(jj) of Law No 98/2016 on public procurement. That provision contains a new definition of 'economic operator' and, in points (iii) to (v) thereof, new categories of third countries in which an economic operator must be established. The list of countries which fulfil those criteria, which does not include the People's Republic of China, the country in which CRRC Qingdao Sifang CO LTD – the leader of the association CRRC Qingdao Sifang CO LTD-SC Astra Vagoane Călători SA – has its registered office, was approved on the basis of those categories by joint order of the Ministrul Economiei, Antreprenoriatului și Turismului (Minister for the Economy, Entrepreneurship and Tourism) and the president of the Agenția Națională pentru Achiziții Publice (National Agency for Public Procurement).
- 10 Therefore, the CNSC found that the company CRRC Qingdao Sifang CO LTD did not have the right to participate, on 19 April 2021, in a public procurement procedure in Romania.
- 11 The CNSC dismissed the complainant's claims regarding the retroactive application of the law, noting that the amendments and supplements to Law

No 98/2016 introduced by Government Emergency Order No 25/2021 had entered into force on 5 April 2021 and that Article V of Government Emergency Order No 25/2021 provides that only contract award procedures in which economic operators have already submitted tenders on that date are to be subject to the legislation in force on the date on which those procedures were initiated.

- 12 Therefore, by decision of 31 January 2022, the CNSC dismissed the complaint as unfounded.
- 13 On 14 February 2022, CRRC Qingdao Sifang CO LTD and SC Astra Vagoane Călători SA brought an action before the referring court against that decision.
- 14 In the grounds for their action, the applicants noted that they had participated in a public procurement procedure initiated by the publication of a contract notice on 3 April 2020, at the end of which their tender, submitted on 19 April 2021, was excluded from the procedure pursuant to Government Emergency Order No 25/2021.
- 15 They noted that Government Emergency Order No 25/2021 is a new law which appeared one year after the public procurement procedure was initiated. Article V of that emergency order provides that procedures in respect of which tenders have been submitted are to be subject to the old law already in force, but does not provide that the new law is to apply retroactively to other procedures which have already been initiated but in respect of which no tenders have been submitted.
- 16 The applicants also stated that the publication of a contract notice in respect of a public procurement procedure gives rise to a settled legal situation which fully defines the conditions for participation in the tendering procedure and that it is clear that a law enacted after that legal situation has become defined cannot alter it retroactively.
- 17 They argued that amending the rules of a public procurement procedure after it has been initiated constitutes conduct which manifestly infringes the principles of EU law, namely the principle of the protection of legitimate expectations, the principle of legal certainty, the principle of non-retroactivity, the principle of transparency, and the principle of equal treatment.
- 18 In addition, the applicants relied on the case-law of the Court of Justice, namely the judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, paragraphs 50 and 51, and the judgment of 24 March 2011, *ISD Polska sp. z o.o.*, C-369/09, paragraph 98, according to which a national rule of a Member State cannot be used to amend rules already established in respect of a person.
- 19 The principle of non-retroactivity of the law – also enshrined as a fundamental right by the Court of Justice of the European Union – prevents a national court from assessing a legal situation which has already arisen on the basis of a law which came into force much later and, according to settled case-law, an amendment of the rules on participation at the time of the evaluation of tenders

constitutes an essential infringement of the basic principles referred to above, as it constitutes an amendment to the rules of a tendering procedure at the end of that procedure.

- 20 The defendant ARF contended that the action brought by the applicants should be dismissed as unfounded, arguing that the tender submitted by the association between CRRC Qingdao Sifang and Astra Vagoane Călători failed to satisfy the conditions for eligibility laid down in Government Emergency Order No 25/2021, which amend and supplement, inter alia, Article 3(1)(jj) of Law No 98/2016, that is to say, the definition of ‘economic operator’. CRRC Qingdao Sifang is a company registered in the People’s Republic of China, a State which does not fall within the categories set out in Government Emergency Order No 25/2021.
- 21 The ARF also argues that the legal relationship cannot be considered to have arisen at the time of publication of the procurement documents, as an economic operator’s expression of willingness to commit itself legally cannot occur prior to the submission of the tender. Law No 98/2016, as amended and supplemented on 5 April 2021 by Government Emergency Order No 25/2021, became applicable only to tenders submitted after the amendment, and potential participants were required to take into account when submitting a tender, on 19 April 2021, the legislative amendments in force.
- 22 Furthermore, the transitional provisions of Government Emergency Order No 25/2021 expressly provide that that emergency order is not applicable to contract award procedures in which economic operators have already submitted tenders prior to its entry into force.
- 23 The defendant Alstom Ferroviaria SpA, with its registered office in Italy, contended that the action brought by the applicants should be dismissed and the decision of the CNSC be upheld, as the tender submitted by the association CRRC-Astra Vagoane was correctly excluded from the contract award procedure, having been submitted after the date on which Government Emergency Order No 25/2021 entered into force by an operator which does not fall within the categories covered by that emergency order.
- 24 It considered that the tender alone is the legal act which initiates the legal relationship between an economic operator and the contracting authority and that there can be no question of retroactivity in relation to the period prior to the submission of the tender, as there was not yet any legal relationship between the tenderer and the contracting authority and the economic operator had not become a legal person in relation to the contract award procedure.

The essential arguments of the parties in the main proceedings

- 25 The applicants CRRC Qingdao Sifang CO LTD and Astra Vagoane Călători SA have requested that a reference be made to the Court of Justice for a preliminary ruling; the defendants have opposed that request.

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

- 26 The referring court sets out the context of the legislative amendments made by Government Emergency Order No 25/2021.
- 27 Government Emergency Order No 25/2021 redefined certain general rules on participation in contract award procedures in accordance with Article 25 of Directive 2014/24/EU, which requires Member States to ensure treatment equal to that accorded to economic operators in States of the European Union only in respect of economic operators in States signatory to the agreements to which that provision refers.
- 28 In the preamble to Government Emergency Order No 25/2021, the Romanian Government referred to the situation in recent years where an increase has been observed in the number of non-EU tenderers in public procurement procedures. Those tenderers offer reduced guarantees regarding compliance with certain requirements such as certified quality standards, environmental and sustainable development standards, requirements related to working conditions and social protection, and competition policies. At the same time, it noted that the participation of third-country operators in public procurement procedures, particularly in the transport sector and other strategic sectors which affect the sustainable economic and social development of the country, could seriously jeopardise major public investments in Romania.
- 29 Account has been taken of the fact that, in the rail and road transport sector, contract award procedures will soon be initiated in connection with a number of major investment projects financed by structural and investment funds relating to the 2014-2020 and 2021-2027 programming periods of the Planul Național de Redresare și Reziliență (National Recovery and Resilience Plan) and the State budget, in respect of which it is not possible to ensure a level playing field between companies in Member States of the European Union and those outside the European area; nor is it possible to ensure uniform compliance with environmental, labour, social protection and sustainable development standards. This is a situation which is likely to create bottlenecks and delays in conducting contract award procedures.
- 30 Investments in the transport sector were estimated at around EUR 20 billion, which could be seriously affected by the delay in this legislative act entering into force. Therefore, the Romanian Government stated that it was necessary to take immediate measures by means of that emergency order.
- 31 The referring court therefore notes that the applicants are contesting the applicability, in the contract award procedure concerned, of the provisions of Government Emergency Order No 25/2021, by which Article 25 of Directive 2014/24/EU was transposed into national law.
- 32 It notes that the wording of Article 25 of Directive 2014/24/EU makes no distinction as regards the treatment of economic operators according to the time at

which they submitted their tenders in the public procurement procedures in which they are participating.

- 33 However, Article V of Government Emergency Order No 25/2021, which transposed that provision into national law, provided that contract award procedures in which economic operators have submitted tenders on the date on which that emergency order entered into force are to be subject to the legislation in force on the date on which those procedures were initiated.
- 34 The association CRRC Qingdao Sifang CO LTD-SC Astra Vagoane Călători SA was excluded from the open tendering procedure for the award of the public contract at issue, initiated on 3 April 2020, on the ground that, on 19 April 2021, when it submitted its tender, the company CRRC Qingdao Sifang CO LTD, the leader of the association, could no longer be considered an economic operator that could have participated in a public procurement procedure, pursuant to Article 3(1)(jj) of Law No 98/2016, as amended by Government Emergency Order No 25/2021, as it had its registered office in the People's Republic of China.
- 35 In conclusion, the question arises as to the extent to which compliance with the principles of legal certainty, the protection of legitimate expectations, equal treatment, transparency and proportionality enshrined in EU law is ensured where a tenderer is excluded on the basis of a legislative act having the force of law adopted by the government of a Member State which amends the definition of 'economic operator' after publication of a contract notice in connection with a contract award procedure in which that person is participating.
- 36 The referring court considers it necessary to apply the provisions relating to the expedited procedure laid down in Article 23a of the Statute of the Court of Justice of the European Union and Article 133 of the Rules of Procedure of the Court of Justice, because the dispute concerns a challenge to a public procurement procedure and thus the period necessary to conduct the preliminary ruling procedure laid down in Article 267 TFEU should not be regarded by the parties, on the face of it, as a cause of uncertainty as to the efficiency or effectiveness of the judicial remedy which they are seeking.