

Case C-480/22

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:

18 July 2022

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

23 June 2022

Appellants on a point of law:

EVN Business Service GmbH

Elektra EOOD

Penon EOOD

Subject matter of the main proceedings

Procurement law – Central purchasing body located ‘in another Member State’ – Attribution of the control exercised over the contracting entity – Review procedure – Procedural law – Competence

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Must Article 57(3) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC be interpreted as meaning that the provision of centralised purchasing activities by a central purchasing body located in another Member State exists where the contracting entity – irrespective of the question as to the attribution of

the control exercised over that contracting entity – is located in a Member State other than that of the central purchasing body?

2. If Question 1 is answered in the affirmative:

Does the conflict-of-law rule of Article 57(3) of Directive 2014/25/EU, according to which the ‘provision of centralised purchasing activities’ by a central purchasing body located in another Member State is to be conducted in accordance with the national provisions of the Member State where the central purchasing body is located, also cover both the legislation applicable to review procedures and the competence of the review body for the purposes of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors?

3. If Question 1 or Question 2 is answered in the negative:

Must Directive 92/13/EEC, and in particular the fourth subparagraph of Article 1(1) thereof, be interpreted as meaning that the competence of a national review body to review decisions of contracting entities must cover all contracting entities located in the Member State of the review body, or must the competence be determined on the basis of whether the dominant influence over the contracting entity (for the purposes of Article 3(4)(c) and Article 4(2) of Directive 2014/25/EU) is exercised by a federal, regional or local authority or by a body governed by public law which is to be attributed to the Member State of the review body?

Provisions of Community law relied on

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

Provisions of national law relied on

Bundes-Verfassungsgesetz (Federal Constitutional Law, Austria; ‘the B-VG’)

Niederösterreichisches Vergabe-Nachprüfungsgesetz (Law of Lower Austria on the review of public procurement, Austria; ‘the NÖ VNG’)

Bundesvergabegesetz 2018 (2018 Federal Law on public procurement, Austria; ‘the BVergG 2018’)

Succinct presentation of the facts and procedure in the main proceedings

- 1 The main proceedings are based on a procurement procedure (framework agreement on the performance of electrical installation works and related construction and dismantling works) divided into 36 lots, the place of performance being located in Bulgaria.
- 2 Elektrorazpredelenie YUG EAD (‘EY EAD’) is a public limited company under Bulgarian law, having its registered office in Bulgaria, which acts as the sectoral contracting entity in the abovementioned procurement procedure.
- 3 EVN Business Service GmbH (‘EBS GmbH’) is a company under Austrian law, having its registered office in Austria. It acts as the central purchasing body of the contracting entity in that procurement procedure, and has the task of procuring services on behalf of and for the account of EY EAD (and therefore as its representative).
- 4 In the invitation to tender, the Landesverwaltungsgericht Niederösterreich (Regional Administrative Court, Lower Austria) is named as the competent body for appeal proceedings/review procedures. Austrian law is stated as the law applicable to the ‘procurement procedure and all claims arising therefrom’, and Bulgarian law as the law applicable to ‘the performance of the contract’.
- 5 EY EAD and EBS GmbH are indirectly wholly owned by EVN AG, which, in turn, is 51% owned by the *Land* of Lower Austria, an Austrian regional authority.
- 6 Elektra EOOD and Penon EOOD are Bulgarian undertakings which submitted tenders for various lots in the award procedure. By decisions of 28 and 30 July 2020, respectively, they were informed that they had not been awarded any lots. The undertakings each brought claims seeking the annulment of those decisions. However, those claims were dismissed on grounds of lack of competence by orders of the Regional Administrative Court, Lower Austria of 23 September 2020.
- 7 The Regional Administrative Court based the orders on the grounds that a decision on the question as to whether a Bulgarian undertaking may conclude a contract with a contracting entity located in Bulgaria, which is to be performed in Bulgaria and executed in accordance with Bulgarian law, would interfere massively with Bulgaria’s sovereignty, thereby giving rise to tension with the territoriality principle under international law. Moreover, it is not apparent from the Federal Law on public procurement which procedural law is to be applied to the review procedure, with the result that the Regional Administrative Court is not competent.

- 8 EBS GmbH lodged an appeal on a point of law against both of those orders, and Elektra EOOD and Penon EOOD each lodged an appeal on a point of law against the order concerning them. A decision of the Supreme Administrative Court of the Republic of Bulgaria confirming the lack of competence of the Bulgarian procurement supervisory authority was submitted in the proceedings relating to those appeals on a point of law.
- 9 The appeals on a point of law were based on the grounds that Article 57(3) of Directive 2014/25 must be interpreted as covering not only the procurement procedure itself, but also the rules governing the review procedure. If the central purchasing body is required to apply Austrian law from a substantive point of view, the appeal proceedings before the Austrian review bodies must also be conducted in accordance with Austrian procedural law; the place where the central purchasing body is located is decisive.
- 10 P EOOD also submits that EY EAD is subject to control by the Austrian Rechnungshof (Court of Audit) and that there are no concerns based on international law as regards the fact that the lawfulness of the procurement activities of an undertaking controlled by an Austrian regional or local authority is subject to review by Austrian review bodies under Austrian procedural law even if that undertaking is located in another Member State.

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

- 11 In the present case, the question arises as to the applicable procedural rules as well as the competence of an Austrian review body in a situation where a sectoral contracting entity which is indirectly controlled by an Austrian regional or local authority and is established in Bulgaria carries out purchasing activities through a central purchasing body located in Austria. In that regard, it is first necessary to examine the scope (Question 1) and reach (Question 2) of the conflict-of-laws rule of Article 57(3) of Directive 2014/25. If Article 57(3) of Directive 2014/25 says nothing about the situation described above, the question arises as to the parameters according to which competence and the applicable procedural rules must then be determined (Question 3).
- 12 EY EAD is a sectoral contracting entity located in Bulgaria, the majority of whose capital is indirectly held by an Austrian regional authority. That criterion is prescribed as the constituent element of one of the possible situations of control with regard both to contracting authorities and to public undertakings within the meaning of Directive 2014/25.

Question 1

- 13 The applicability of Article 57(3) of Directive 2014/25 requires that centralised purchasing activities – which are present in this case – are conducted by a central purchasing body located ‘in another Member State’. Since the contracting entity,

EY EAD, is located in Bulgaria but is financially controlled by an Austrian regional authority, there are connecting factors allowing for attribution to two Member States in the present case.

- 14 It cannot be inferred from the basic rule for the joint award of contracts under Article 57(1) of Directive 2014/25, which refers to contracting entities ‘from different Member States’, what is to be taken as the basis for attribution to a specific Member State. However, the fact that Article 57(2) refers to the location of the central purchasing body for the purposes of the attribution of that body militates in favour of taking the same approach for the attribution of the contracting entity.
- 15 Against that, it could be countered that the definition of ‘contracting entity’ (or ‘contracting authority’) is not based on its location, but on the control exercised by a regional or local authority. On that basis, it could be argued that a central purchasing body located ‘in another Member State’ exists where that Member State is not the one which exercises control over the contracting entity (by way of a local or regional authority).
- 16 It is therefore not clear to the referring court what criteria are to be used to determine the existence of a central purchasing body located ‘in another Member State’.
- 17 If the location of the contracting entity is not to be taken as the basis, Article 57(3) of Directive 2014/25 would not apply. If the location is to be taken as the basis, and Question 1 is answered in the affirmative, an answer to Question 2 would be required.

Question 2

- 18 According to Article 57(3) of Directive 2014/25, ‘the provision of centralised purchasing activities’ is to be conducted in accordance with the national provisions of the Member State where the central purchasing body is located. In the view of the referring court, it clearly follows that the substantive law of the State where the purchasing body is located applies. However, the question arises as to whether that also applies to the review procedure or to the competence of the review bodies.
- 19 Recital 82 of Directive 2014/25 makes clear, inter alia, that the ‘applicable public procurement legislation, including the applicable legislation on remedies’ is to be designated by virtue of that directive. Against that background, an interpretation of Article 57(3) of Directive 2014/25 would lead to the conclusion that that provision also encompasses the provisions relevant to a review procedure. The fact that the substantive rules and the rules governing reviews are interconnected also militates in favour of applying in the review procedure the procedural law of the State whose substantive law is applicable. However, the answer to that question is not obvious to the referring court.

- 20 Should Question 2 be answered in the affirmative, Austrian procedural law would apply in the review procedure in the present case. Should it be answered in the negative, however, the question still arises as to which procedural law should be applied in the present case.

Question 3

- 21 Under Directive 92/13, it must be ensured that decisions taken by contracting entities can be reviewed; in that regard, it refers, inter alia, to the scope of Directive 2014/25. The definition of ‘contracting entity’ in Directive 2014/25 does not contain an express reference to the location of the undertaking. The Regional Administrative Court considered that its competence to review the purchasing activities of a contracting entity located in another Member State is problematic due to considerations linked with international law. Against that, however, it might be countered that, in a case where the location of a contracting entity and the control exercised over it are attributable to different Member States, each of the conceivable solutions presupposes that a national review body is required to assess transactions with a link to another Member State (either by virtue of the location of the contracting entity to be reviewed or by virtue of the fact that the contracting entity is controlled by a regional or local authority of another Member State).