

Case C-376/21

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:

17 June 2021

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

28 May 2021

Appellant in cassation:

Zamestnik-ministar na regionalното razvitie i blagoustroystvoto and rakovoditel na Upravliavashtia organ na Operativna programa ‘Regioni v rastezh’ 2014-2020 (Deputy Minister for Regional Development and Public Works and Head of the Managing Authority of the Operational Programme ‘Regions in Growth’ 2014-2020).

Respondent in the appeal in cassation:

Obshtina Razlog (municipality of Razlog)

Subject matter of the main proceedings

Appeal in cassation against a judgment of the administrative court of first instance upholding an action brought against a decision imposing a financial correction taken by the managing authority of an operational programme financed by European Union funds

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

Interpretation of EU law; point (b) of the first paragraph and the third paragraph of Article 267 TFEU

Questions referred for a preliminary ruling

1. Are Article 160(1) and Article 2 of Regulation 2018/1046 and Article 102(1) and (2) of Regulation No 966/2012 to be interpreted as also applying to contracting authorities of Member States of the European Union where the public contracts that they award are financed by resources from the European Structural and Investment Funds?

2. If the first question is answered in the affirmative, are the principles of transparency, proportionality, equal treatment and non-discrimination enshrined in Article 160(1) of Regulation 2018/1046 and Article 102(1) of Regulation No 966/2012 to be interpreted as precluding a total restriction of competition in the award of a public contract by way of a negotiated procedure without prior publication where the subject matter of the public contract does not have special characteristics which objectively require it to be performed only by the economic operator invited to negotiate? In particular, are Article 160(1) and (2) of Regulation 2018/1046, read in conjunction with Article 164(1)(d) thereof, and Article 102(1) and (2) of Regulation No 966/2012, read in conjunction with Article 104(1)(d) thereof, to be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, following the discontinuation of a public procurement procedure on the ground that the sole tender submitted is unsuitable, the contracting authority may invite only one economic operator to participate in a negotiated procedure without prior publication where the subject matter of the public contract does not have special characteristics which objectively require it to be performed only by the economic operator invited to negotiate?

Provisions of European Union law and case-law relied on

Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1):

Article 160(1) and (2), Article 164(1)(d)

Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1): Article 102(1) and (2), Article 104(1)(d)

Provisions of national law relied on

Zakon za obshtestvenite porachki (Law on public procurement; ‘the ZOP’): Article 2(1), points 1 and 2, Article 2(2), Article 5(1) and (2), point 9, Article 18(1), (2) and (7), Article 79(1), point 1, Article 110(1), points 1 and 2, Article 182(1), point 2, Article 191(1), point 1

Zakon za upravlenie na sredstvata ot Evropeyskite strukturni i investitsionni fondove (Law on the management of resources from the European Structural and Investment Funds; ‘the ZUSESIF’), Article 70(1), point 9

Pravilnik za prilagane na Zakona za obshtestvenite porachki (Implementing provisions for the ZOP; ‘the PPZOP’): Article 64(1) and (3)

Succinct presentation of the facts and procedure in the main proceedings

- 1 By agreement of 9 December 2016 between the municipality of Razlog and the managing authority of the operational programme ‘Regions in Growth 2014-2020’ (‘the Operational Programme’), financial assistance was granted to that municipality for the implementation of project proposal BG16RFOP001-3.002-0025 (‘Making investments to improve educational infrastructure for the overall improvement of the learning process at the Vocational School of Agricultural Mechanisation of the Town of Razlog’).
- 2 In order to carry out the project, the municipality of Razlog, in its capacity as contracting authority, conducted a public procurement procedure – a public invitation to tender with the subject matter: ‘Provision of technology, equipment and furniture for the needs of the Vocational School of Agricultural Mechanisation of the Town of Razlog’ – consisting of four separate lots.
- 3 By decision of 1 November 2017, the procedure for lot No 2 was discontinued as only one tender that did not comply with the terms of the contract as previously announced had been submitted.
- 4 By decision of 1 December 2017, the contracting authority initiated a new procedure having the same subject matter, but this time as a ‘negotiated procedure without prior publication’ pursuant to Article 79(1), point 1, of the ZOP. The decision to conduct that type of procurement procedure was justified on the grounds that no suitable tenders had been submitted in the previous procurement procedure and that there had been no change in the terms of the contract as originally announced for the discontinued lot under the invitation to tender.
- 5 In the negotiated procedure without prior publication, the contracting authority invited only one economic operator to negotiate, with which it concluded public procurement contract No 681 of 29 December 2017 for the ‘Supply of metal equipment for the needs of the Vocational School of Agricultural Mechanisation of the Town of Razlog’, with a contract value of BGN 33 907, excluding VAT.

- 6 The Ministry of Regional Development and Public Works received a complaint of irregularity in the procedure thus conducted due to the fact that only one economic operator had been invited to negotiate. The Deputy Minister for Regional Development and Public Works, who is also the Head of the Managing Authority of the Operational Programme, informed the beneficiary (the municipality of Razlog) that a complaint had been received and a financial correction procedure initiated.
- 7 In its written observations submitted to that authority, the beneficiary stated that the procurement procedure in question is not subject to any statutory prohibition on negotiating with only one economic operator, but, rather, provision is made for the possibility for the contracting authority to negotiate with one or more precisely identified persons, within the scope of the discretion conferred on it (Article 18(7) of the ZOP, read in conjunction with point 8 of Article 18(1) thereof). It takes the view that the purpose of that law (Article 2 of the ZOP), which is in line with the principle established in Article 160 of Regulation 2018/1046, is to ensure competition on the broadest possible basis in the award of public contracts, but only where it is possible to do so. It stated that it did everything possible to select at least one contractor to submit a tender that complies with the terms of the contract in order that the works intended for the realisation of the project financed by the ESIF are carried out.
- 8 By decision of 15 April 2020, the Head of the Managing Authority imposed a financial correction on the municipality of Razlog in the amount of 10% of the eligible costs under contract No 681 of 29 December 2017 concluded between that municipality and the economic operator invited to negotiate. In the statement of reasons for his decision, the Head of the Managing Authority does not raise any objection to the type of procedure conducted by the contracting authority – negotiated procedure without prior publication – in so far as the legal requirements under the ZPO for the conduct of such a procedure were met. However, referring to Article 160 of Regulation 2018/1046 and Article 2(1), points 1 and 2, and Article 2(2) of the ZOP, the Head of the Managing Authority emphasises that compliance with the principle of free competition in the award of public contracts is mandatory. He stated that the exception to that principle in the negotiated procedure without prior publication resides in the fact that it is impossible to ensure ‘competition on the broadest possible basis’, that is to say, a restriction of competition is permissible and justified, but not to the extent of excluding it completely, as is the case here. He submitted that, in the absence of objective circumstances necessitating negotiations with a single, specific economic operator, the contracting authority should have ensured that the procedure was conducted under competitive conditions by inviting more than one person to negotiate. According to the Head of the Managing Authority, by inviting only one economic operator to negotiate, the contracting authority gave that economic operator an unjustified advantage without there being a legal or factual basis for doing so. Moreover, the decision to invite that specific company to negotiate in its capacity as contractor failed to state reasons and it is not clear why the invitation was addressed specifically to that company.

- 9 The municipality of Razlog brought an action against that decision before the Administrativen sad Blagoevgrad (Administrative Court, Blagoevgrad). The latter annulled the decision on the ground that it infringed substantive law.
- 10 Specifically, the Administrative Court, Blagoevgrad took the view that the beneficiary's decision to award the public contract by way of the 'negotiated procedure without prior publication' after a previous public tendering procedure with the same subject matter had been discontinued, and without changing the terms of the contract as originally published, was in compliance with the law (Article 79(1), point 1 of the ZOP). Therefore, the resolution of the dispute hinges on whether the contracting authority has the possibility to invite only one person to negotiate in that subsequent procedure or whether this constitutes an infringement of the principles of equal treatment, non-discrimination and free competition under the ZPO and under Article 160(1) and (2) of Regulation 2018/1046. The court of first instance takes the view that an exception to the principle of free competition in the award of public contracts is permissible in certain cases, which include the present one. It stated that the exception to the principle of ensuring competition on the broadest possible basis is manifested in the negotiated procedure without prior publication, the conditions for which generally presuppose that it is factually impossible for that principle to be applied, either because of the specific subject matter of the contract or because of the lack of suitable tenders (point 11.1 of the section entitled 'Procurement procedures' of Annex I to Regulation 2018/1046). The Administrative Court, Blagoevgrad takes the view that the ZOP confers on contracting authorities the discretion to assess, in each individual case, the number of persons with whom they will negotiate the deadline for the performance of the contract and other circumstances relevant to the successful completion of the procedure, on the basis of the specific requirements of the subject matter of the contract. In that context, it concluded that the choice of one or other of the equally lawful options does not constitute an infringement of the rules on the designation of a contractor under the ZOP, with the result that there is no irregularity within the meaning of Article 70(1), point 9, of the ZUSESEIF.
- 11 The Varhoven administrativen sad (Supreme Administrative Court) is now seised of an appeal in cassation brought by the Head of the Managing Authority against the judgment of the Administrative Court, Blagoevgrad.

The essential arguments of the parties in the main proceedings

- 12 In the main proceedings, the appellant in cassation reiterates the position that it expressed in its statement of reasons for the administrative act issued by it, and adds that the exercise of the contracting authority's discretion must not run counter to the purpose of the law and the fundamental principles of national and EU law. It states that, where there are two or more lawful options, the contracting authority is obliged to choose the one which is the most economical to implement and the most favourable to the State and society.

- 13 The respondent in the appeal in cassation – the beneficiary municipality – argues that that appeal in cassation is unfounded. Aside from the arguments that it had already put forward before the managing authority and the court of first instance, it cites a number of decisions of the Supreme Administrative Court in similar cases in which it was held that, in the cases examined [by the Supreme Administrative Court], the contracting authority could invite only one economic operator to negotiate and that Regulation 2018/1046 is not applicable, since it does not govern procurement procedures carried out by national contracting authorities.
- 14 The public prosecutor at the Varhovna administrativna prokuratura (Supreme Administrative Public Prosecutor’s Office) who is handling the case concluded that the decision of the court of first instance is correct, but stated that it is necessary to make a request for a preliminary ruling on the interpretation of Article 160(2) and Article 164(1)(d) of Regulation 2018/1046 and Article 32(2) to (5) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

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

- 15 The case-law of the Supreme Administrative Court to date has expressed two opposing views on the interpretation of the abovementioned provisions of domestic and EU law.
- 16 According to one of those views, negotiating with only one specific economic operator in the case referred to in Article 79(1), point 1, of the ZOP constitutes an infringement of the rules on the award of contracts, since it is contrary to Article 2(1), point 2, and Article 2(2) of the ZOP, leading to an unjustified elimination of competition and precluding the possibility of selecting an economic operator which will achieve the highest quality of performance at the most favourable price. In support of that viewpoint, it is stated that the principle of free competition is relevant to all public procurement procedures. The provision in Article 18(7) of the ZOP emphasises the general possibility for the contracting authority to conduct negotiations with one or more precisely specified persons within the framework of negotiated procedures without prior publication. However, negotiations with a single economic operator are treated as permissible in the exception under Article 79(1), point 3, of the ZOP only where the purpose of the contract is the creation or acquisition of a unique work of art or piece of creative work, where there is no competition for technical reasons, or where exclusive rights exist, including intellectual property rights. Save in cases of emergency, exceptional circumstances, a specific purpose, unique subject matter of the contract or other special features of the contract that justify inviting a single contractor to negotiate, it is unlawful to negotiate with only one person. Inviting only one economic operator runs counter to the provision of Article 160(2) of Regulation 2018/1046, according to which all contracts are to be put out to

competition on the broadest possible basis, whereby the exception provided for (Article 164(1)(d) of that regulation) is not applicable in the case referred to in Article 79(1), point 1, of the ZOP. If the possibility to negotiate the terms of performance of a contract with a single economic operator is used when the activities to be awarded do not have special characteristics, this creates the conditions for abuse of power on the part of the contracting authority and for abuse on the part of the economic operators and, consequently, may lead to serious anti-competitive consequences and undermine the objective of the law of allocating public financial resources in a cost-effective manner (Article 1 of the ZOP).

- 17 That position is opposed by the contrary view, according to which negotiations with a single economic operator under the conditions of Article 79(1), point 1, of the ZOP are lawful. It is argued in that regard that, in the case referred to in Article 79(1), point 1, of the ZOP, the legislature considered it permissible to restrict the principles according to which public contracts should be performed, because facts and circumstances beyond the control of the contracting authority (lack of interest of economic operators or unsuitable tenders) created an objective situation in which the contracting authority could not carry out the procurement and satisfy the relevant public interest. The restriction is permissible if the principles were duly respected when the public tender was originally announced, but no contractor could be selected due to the lack of a participating person meeting the requirements. If the legislature had considered it necessary for the contracting authority to invite more than one economic operator to negotiate in order to guarantee legal principles in such a case, the legislature would have made express provision to that effect. In the case of Article 79(1), point 1, of the ZOP, the subject matter of the public contract has no legal significance as such, nor does the question of whether that subject matter could objectively be performed by another economic operator that was not invited to negotiate. Otherwise, an infringement of the principle of free competition could always be established, for example if the contracting authority has invited only two of a potential two hundred economic operators that could perform the contract. Moreover, Regulation 2018/1046 is not applicable, as it does not concern legal relations relating to the execution of public contracts in the Member States, but rather legal relations relating to the establishment and implementation of the budget of the Union. The provisions of Article 160 et seq. of Regulation 2018/1046, which contain requirements in the area of public procurement, are not requirements for national contracting authorities. National contracting authorities are subject to the provisions of Directive 2014/24, which were implemented in the ZOP.
- 18 In view of the lack of uniformity in the national case-law, the referring court wishes to state the following in relation to the present case.
- 19 It is true that, since it is expressly provided for, the exception to the principle of competition on the broadest possible basis must be observed. Nevertheless, that exception must be interpreted narrowly, as it is an exception to a fundamental principle.

- 20 In that context, questions arise as to the limits and content of the exception provided for in Article 160(2) of Regulation No 2018/1046, read in conjunction with Article 164(1)(d) thereof (does it preclude only one economic operator from being invited to negotiate and, if so, does it apply to all cases of negotiated procedure without prior publication and, in particular, to a case such as that provided for in Article 79(1), point 1, of the ZOP? Are the subject matter of the public contract and the fact that it can objectively be performed by more than one economic operator also relevant? Must justification be provided for the decision to invite a specific candidate to negotiate?), and the question arises as to the criteria according to which the contracting authority has invited a very specific economic operator, in so far as there are other economic operators with the capacity and capability to perform the contract.
- 21 The examination of the question as to how the exception provided for in Article 160(2) of Regulation 2018/1046 manifests itself – a total elimination of competition or only a level of competition lower than the highest possible level – is also relevant in the present case. In other words, where the subject matter of the contract is not special in nature, does a total restriction of competition in a procedure such as that at issue in the present case constitute a permissible exception to the principle of awarding public contracts on the broadest possible competitive basis within the meaning of the regulation?
- 22 It should also be taken into account that the provision of Article 160(2) of Regulation 2018/1046 exceptionally allows for a derogation from the principle of awarding public contracts on the broadest possible competitive basis, but does not provide for a derogation from the principles of equal treatment and non-discrimination (Article 160(1) of the regulation, Article 2, point 1, of the ZOP), which are considered to have been infringed according to the decision of the Head of the Managing Authority imposing a financial correction. Therefore, the question as to whether it is justified under EU law to invite only one specific person to conclude a contract in the present case must be assessed not only from the point of view of the principle of free competition, but also from the point of view of the principles of equal treatment and non-discrimination.
- 23 In the national law, Article 18(7) of the ZOP, provision is made, in principle, for the possibility of the contracting authority to conduct negotiations in negotiated procedures in order to determine the terms of the contract with one or more precisely specified persons, without that general rule distinguishing between the individual conditions under which an award is permissible under that procedure conducted on an exceptional basis. The specific cases which fall within the scope of the exception are regulated in the relevant place within the scheme of that law – in Article 79 (‘Negotiated procedure without prior publication’), in Article 182 (‘Direct negotiation with certain persons’) and in Article 191 (‘Invitation of certain persons [to negotiate]’).
- 24 In order to answer the question raised in the main proceedings, it is necessary to compare the various conditions justifying the use of a negotiated procedure,

including without prior publication. The first sentence of Article 164(4) of Regulation 2018/1046 reads as follows: ‘In all procedures involving negotiation, the contracting authority shall negotiate with tenderers the initial and any subsequent tenders or parts thereof, except their final tenders, in order to improve their content.’ In the wording of the cited provision, it is noticeable that the word ‘tenderer’ is used only in the plural – ‘tenderers’. The national legislature also opted for a similar approach in Article 64(1) and (3) of the PPZOP, in Article 182(1) of the ZOP and partly in Article 191(1) of the ZOP. Therefore, the assessment of whether negotiations with a single tenderer are permissible in the present case requires a comparative analysis of all the negotiation scenarios.

- 25 The answer to these questions is relevant for the purposes of definitively clarifying the question under consideration, as to whether there has been an infringement of the principles of equal treatment, non-discrimination and free competition, or of the rules governing the award of public contracts, where, in a negotiated procedure without prior publication, the invitation to conclude the contract is addressed to only one person, in so far as the previous procedure, in which all interested parties were able to submit a tender, was discontinued owing to the lack of a suitable tender and there has been no change to the terms of the contract, the subject matter of which, however, does not have a special feature by virtue of which it is predestined to be performed exclusively by the economic operator invited to the negotiations.
- 26 In the light of the conflicting positions of the parties as to the applicability of Article 160(1) and (2) of Regulation 2018/1046 to national contracting authorities, the referring court takes the view that it is possible to interpret the provisions of that regulation in two ways, thereby necessitating clarification as to their precise meaning by way of the preliminary ruling procedure. On the one hand, it is logical to assume that the applicability of the provision cited depends not on the type of contracting authority (EU institution or national contracting authority), but on the specific nature of the public financial resources spent, the budget of the European Union, that is to say, the rules of the regulation apply whenever funds from the budget of the Union are spent. The regulation is binding in its entirety and directly applicable in all Member States. Since the Member States implement the budget jointly and indirectly, they are also subject to the procurement rules provided for in the regulation. On the other hand, that assumption is precluded by the definition of a public contract in Article 2, point 51, of the regulation, which covers only contracting authorities within the meaning of Articles 174 and 178 of the regulation, that is to say only EU institutions. The described ambiguity regarding the scope of Article 160(1) and (2) of the regulation with regard to procurement procedures conducted by beneficiaries of ESIF funds in their capacity as national contracting authorities can be removed by an interpretation of that provision by the Court of Justice of the European Union.
- 27 In consideration of the temporal application of the rules, the referring court takes into account the fact that the relevant legal facts in the present case materialised before the entry into force of Regulation 2018/1046, that is to say, during the

period of application of Regulation No 966/2012. It should be noted that the decision imposing a financial correction was issued after the entry into force of Regulation 2018/1046, that is to say, after the repeal of Regulation No 966/2012. However, in so far as the provision of Article 160 of Regulation 2018/1046, which the head of the administrative authority considered to have been infringed, is identical in content to that of Article 102(1) and (2) of Regulation No 966/2012, read in conjunction with Article 104(1)(d) thereof, which is in fact applicable to the facts established, an interpretation by the Court of Justice of the European Union of the cited provisions of the repealed regulation in the light of the present case would be relevant to the resolution of the dispute for reasons analogous to those set out above.

- 28 The questions raised above in relation to the limits, content and manifestation of the exception in question also relate to the interpretation of Article 102(1) and (2) of Regulation No 966/2012, read in conjunction with Article 104(1)(d) thereof. In that respect, it should be emphasised that Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (repealed) expressly establishes a minimum number of three participants (Article 128) in order to guarantee the lawful conduct of the procedure governed by Article 134(1)(a) of the Delegated Regulation, which corresponds to the case referred to in Article 79(1), point 1, of the ZOP. According to Article 128 of the Delegated Regulation, the number of candidates invited to tender must be sufficient to ensure genuine competition.
- 29 An argument militating in favour of the permissibility of the requested interpretation of Article 160(1) and (2) of Regulation 2018/1046, read in conjunction with Article 164(1)(d) thereof, and of Article 102(1) and (2) of Regulation No 966/2012, read in conjunction with Article 104(1)(d) thereof, can be drawn from the rule in Article 281(3) of Regulation 2018/1046, according to which references to the repealed Regulation are to be construed as references to this Regulation and are to be read in accordance with the correlation table in Annex II. The correlation table in Annex II shows that Article 160 corresponds to Article 102 of the repealed regulation, and Article 164 corresponds to the repealed Article 104. The two regulations regulate, at different times, the same subject matter, namely the financial rules applicable to the general budget of the Union. Article 281(3) of Regulation 2018/1046 bears out the legal-logical and historical relationship that exists between the repealed and the current rules in terms of the periods of validity established and the similarity of the decisions taken by virtue of those rules in relation to the legal relationships covered by their identical regulatory subject matter.
- 30 The need for an interpretation of the relevant provisions of repealed Regulation No 966/2012 and Regulation No 2018/1046 is also brought about by the fact that the entities covered as ‘contracting authorities’ within the meaning of each regulation are delineated differently. In the present case, the contract, for the

financing of which ESIF resources were made available, was awarded by the Mayor of the municipality of Razlog, which has the status of contracting authority within the meaning of Article 5(2), point 9, of the ZOP, in the procedure under the ZOP.

- 31 With regard to Directive 2014/24/EU, the referring court's assessment is that it is not applicable to the proceedings before the national court, since the value of the public contract at issue is below the thresholds of that directive.

WORKING DOCUMENT