

Case C-195/21**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:**

26 March 2021

Referring court:

Rayonen sad Lukovit (Bulgaria)

Date of the decision to refer:

26 March 2021

Complainant:

LB

Respondent:

Smetna palata na Republika Bulgaria

Subject matter of the case in the main proceedings

The case concerns a complaint against an administrative order imposing a fine of the President of the Smetna palata na Republika Bulgaria (Chamber of Audit of the Republic of Bulgaria; ‘Chamber of Audit’) by which a pecuniary penalty was imposed on the complainant in accordance with Article 2(2) of the Zakon za obshtestvenite porachki (Law on public procurement, Bulgaria; ‘the ZOP’).

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

Pursuant to Article 267 TFEU, the referring court seeks an interpretation of Article 58(4) of Directive 2014/24/EU in order to clarify the consequences of the proportionality, provided for in that provision, of the requirements for participation in a public procurement procedure imposed by the contracting authority in relation to the subject matter of the contract. The request for a preliminary ruling also concerns the interpretation of the concept of ‘irregularity’ within the meaning of Regulation (EU) No 1303/2013, the difference between administrative measures and penalties under Articles 4 and 5 of Regulation (EC,

Euratom) No 2988/95, and whether the various authorities involved in monitoring the management of EU public funds must coordinate their activities.

Questions referred for a preliminary ruling

1. Must Article 58(4) of Directive 2014/24/EU be interpreted as meaning that the requirements imposed by the selection criteria on the professional ability of the staff of economic operators in respect of a specialised contract in the construction sector may be stricter than the minimum requirements for training and professional qualifications laid down by the specific national law (Article 163a(4) of the ZUT) without being a priori restrictive of competition, and, more specifically, does the prescribed condition of ‘proportionality’ of the participation requirements imposed in relation to the subject matter of the contract a) require the national court to carry out an assessment of proportionality on the basis of the evidence gathered and the specific parameters of the contract, even in cases where the national law defines a large number of professionals who are in principle qualified to carry out the activities under the contract, or b) permit judicial review to be limited only to an examination of whether the participation requirements are too restrictive in relation to those provided for in principle in the specific national law?
2. Must the provisions of Title II ‘Administrative measures and penalties’ of Regulation No 2988/95 be interpreted as meaning that the same infringement of the Zakon za obshtestvenite porachki (Law on public procurement) transposing Directive 2014/24/EU (including the infringement in the determination of the selection criteria for which the complainant was penalised) may give rise to different legal consequences depending on whether the infringement was committed without fault or intentionally or was caused by negligence?
3. Do the principles of legal certainty and effectiveness, having regard to the objective of Article 8(3) of Regulation No 2988/95 and recitals 43 and 122 to Regulation No 1303/13, permit the various national authorities called on to protect the financial interests of the European Union to assess the same facts differently in the procurement procedure, in that, more specifically, the managing authority of the operational programme finds no infringement in the determination of the selection criteria, whereas the Chamber of Audit, upon subsequent control and without there being any special or new circumstances, finds that those criteria are restrictive of competition and imposes an administrative penalty on the contracting authority on account of that finding?
4. Does the principle of proportionality preclude a provision of national law, such as that in Article 247(1) of the Law on public procurement, which provides that a contracting authority which formally infringes the

prohibition laid down in Article 2(2) of that law is to be punished by way of a pecuniary penalty of 2% of the value of the contract, including VAT, but not exceeding 10 000 leva (BGN), without it being necessary to establish the seriousness of the infringement and its actual or potential impact on the interests of the European Union?

EU legislation and case-law relied on

Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests: Articles 4, 5, 6, 7 and 8.

Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 – recitals 43 and 122, point 36 of Article 2, Article 4(10) and Article 16.

Regulation (EU) No 1293/2013 of the European Parliament and of the Council of 11 December 2013 on the establishment of a Programme for the Environment and Climate Action (LIFE) and repealing Regulation (EC) No 614/2007 – Article 28.

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 – Articles 18 and 58.

Judgments of the Court of Justice of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, paragraphs 8 and 18), of 2 April 2009, *Lodato Gennaro* (C-415/07, EU:C:2009:220), of 26 May 2016, *Județul Neamț and Județul Bacău* (C-260/14 and C-261/14, EU:C:2016:360, paragraph 50), and of 19 July 2012, *Rēdlihs* (C-263/11, EU:C:2012:497, paragraph 44).

Provisions of national law relied on

Zakon za obshtestvenite porachki (Law on public procurement, Bulgaria; ‘the ZOP’) – Articles 1, 5, 18, 59 and 70, Chapter 31, Article 260 and Paragraph 3 of the Supplementary Provisions, and:

Article 2(2): ‘In the award of public contracts, contracting authorities shall not be empowered to restrict competition by imposing conditions or requirements which result in an undue advantage or which unduly restrict the access of economic

operators to public contracts and which are not based on the subject matter, value, complexity, quantity or scope of the public contract.’

Article 247(1): ‘A contracting authority which infringes the prohibition in Article 2(2) ... shall be punished by a pecuniary penalty of 2 per cent of the value of the contract, including VAT, but not exceeding 10 000 leva (BGN).’

Pravilnik za prilagane na ZOP (Implementing provisions for the ZOP; ‘the PPZOP’) – Articles 33 and 54.

Zakon za upravljenie na sredstvata ot Evropeiskite strukturni i investitsionni fondove (Law on the management of resources from the European Structural and Investment Funds; the ‘ZUSESIF’) – Articles 45, 49, 70 and 72.

Zakon za ustroistvo na teritoriata (Law on spatial planning; ‘the ZUT’) – Article 137 and Article 163a, which reads as follows:

Paragraph 1: ‘The contractor shall be obliged to employ technically qualified persons by means of contracts of employment to carry out the technical management of the works.’

Paragraph 2: ‘Technically qualified persons are persons who hold a diploma from an accredited institution of higher education with the qualification “civil engineer”, “engineer” or “architect”, as well as persons who have completed secondary education and four years of vocational training leading to a professional qualification in the fields of “architecture and construction” or “engineering”.’

Paragraph 4 (in the version of 9 March 2018): ‘The technical supervisor shall be a civil engineer, architect or construction technician who supervises the works Other technically qualified persons pursuant to paragraph 2 may carry out the specialised technical supervision of individual construction and installation works in accordance with their acquired specialisation and professional qualification.’

Zakon za smetnata palata (Law on the Chamber of Audit, Bulgaria) – Article 6.

Zakon za administrativnite narushenia i nakazania (Law on administrative offences and penalties, Bulgaria; ‘the ZANN’) – Article 28 (in the version of 14 February 2020).

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 21 March 2018, in accordance with Article 45(2) of the ZUSESIF, a management contract was concluded for the award of a **grant** co-financed by the European Regional Development Fund and the Cohesion Fund of the European Union from the Operational Programme ‘Environment 2014 – 2020’. Under that contract, the Head of the Managing Authority (the Minister for the Environment and Water) is to award the beneficiary (municipality of Lukovit) a grant up to the

amount of BGN 649 732.14 for ISUN project No BG16M1OP-4.003-0002 ‘Slope stabilisation LOV19.44327.02 – Slope on the road to the regional landfill site – ul. “Sinchetz” – town of Lukovit’. The management contract lays down the conditions for imposing **financial corrections**, expressly providing that the imposition of a financial correction and the amount thereof are to be based on national laws and the guidelines, as set out in Commission Decision C(2013)9527, for determining financial corrections to be made to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement.

- 2 By decision of 5 April 2018, the Mayor of the municipality of Lukovit initiated an open **‘public tender’ procedure** for the award of a public contract having as its subject matter ‘Slope stabilisation LOV19.44327.02 – Slope on the road to the regional landfill site – ul. “Sinchetz” – town of Lukovit’ in accordance with point 12 of Article 18(1) of the ZOP. The estimated value of the contract was BGN 482 668, excluding VAT.
- 3 The decision established the notice of initiation of the procedure and the contract documentation. According to the **contract notice**, the objective of the construction project was to restore and improve the operational characteristics of the road section concerned for the purpose of transport use. ‘Quality’ and ‘price’ were established as the award criteria in equal proportions of 50% each.
- 4 With regard to the participation conditions, suitability to pursue the professional activity was subject to the requirement that the participants (hereinafter also: ‘tenderers’) be registered in the Central Professional Register of Builders and, in respect of foreign tenderers, in the corresponding registers under the law of the country concerned. The requirements for the technical staff of the tenderers were also specified: they had to have the required professional qualifications and experience in accordance with the specification of the contract. Accordingly, the staff concerned had to include, as a minimum, a *technical director* of works holding the professional qualification of **‘structural engineer’ and/or ‘civil engineer’** (or an equivalent qualification if it was obtained in another country) and other specialists having the specialisations of ‘engineering geology and hydrogeology’, ‘geodesy’, ‘road/transport engineering’ (with the requirement for the technical director and the other specialists to have at least 3 years of professional experience in the field concerned), a specialist health and safety coordinator and a quality control expert to monitor the execution of the works, whereby the tenderers were permitted to specify that the technical director would also play a role in the performance of the functions of the latter two specialists.
- 5 Three tenders were received by the submission deadline (5 p.m. on 21 May 2018). All three tenderers each proposed an engineer as the technical director of works: tenderer No 1 proposed an ‘engineer’ specialising in ‘transport engineering’ with 14 years of professional experience in that field; tenderer No 2 a ‘civil engineer’ specialising in ‘hydrogeology and engineering geology’ with 33 years of

professional experience; and tenderer No 3 a ‘civil engineer’ specialising in ‘building and plant construction’ with 10 years of professional experience.

- 6 The minutes of the Selection, Evaluation and Ranking Committee – appointed by order of the Mayor – of 28 May 2018 established deviations from the selection requirements in the case of all three tenderers and gave each an opportunity to rectify them within a period of five days. By way of its minutes of 22 June 2018, the Committee proposed that tenderers No 1 and No 3 be excluded on the ground that they did not meet the selection criteria.
- 7 By decision of 24 July 2018, the Mayor of the municipality of Lukovit announced the following: 1. The contract is awarded to tenderer No 2; 2. The other two tenderers are excluded for the reasons set out by the Committee. On 29 August 2018, the municipality of Lukovit and tenderer No 2, designated as the executing company, concluded a contract worth BGN 481 293.72 excluding VAT (BGN 577 552.46 including VAT). No complaints were received at any stage of the procurement procedure.
- 8 By decision of 9 November 2018, taken on the basis of a subsequent review of the legality of the ‘open tender’ procedure carried out, **the managing authority** of the operational programme ‘Environment 2014 – 2020’ **imposed a general financial correction of 5%** of the value of the relevant costs eligible for financing under the contract concluded on 29 August 2018. The decision identified two groups of infringements of the public procurement rules, which were assessed as being irregularities: a) infringement of point 1 of Article 70(7) of the ZOP due to the evaluation of a tender that did not comply with the contracting authority’s technical specifications, and b) infringement of Article 54(8) and (9) of the PPZOP due to the provision of unclear and misleading instructions to one of the tenderers, which led to its unlawful exclusion (it was assumed that the financial impact of the infringement resided in the fact that the excluded tenderer could have submitted a tender that would have offered a more favourable price than the tender of the selected tenderer).
- 9 In determining the correction for each of the two irregularities, the following circumstances mitigating the negative effects were taken into account: three tenders were submitted, indicating in itself a satisfactory level of competition; the estimated value of the contract was below the threshold requiring publication of a contract notice in the Official Journal of the European Union; the award criterion was ‘best value for money’, which did not guarantee that the tender awarded first place would necessarily be the one with the lowest price.
- 10 By order of 2 October 2019, the Deputy Chairman of the **Chamber of Audit of the Republic of Bulgaria** assigned an audit team to audit the management of public funds and the activities of the municipality of Lukovit in the period from 1 January 2018 to 30 June 2019. On 18 June 2020, one of the team’s auditors issued an administrative notice against LB, by which it was established that, by virtue of his decision on the call for tender in respect of the public contract at

issue, LB had committed **an administrative infringement of Article 2(2) of the ZOP by restricting competition by imposing a condition that unduly restricted the participation of economic operators in the public contract.** According to the auditor, the requirement imposed on the tenderers to have, in particular, a technical director of works holding the professional qualification of ‘structural engineer’ and/or ‘civil engineer’ does not comply with the specific law (Article 163a(2) and (4) of the ZUT), which provides for less stringent requirements for the training and professional qualification of the technical director. It was assumed that the infringement had been **committed culpably**, since the Mayor of the municipality of Lukovit, as the contracting authority pursuant to Article 5(2)(9) of the ZOP, was required to make the necessary efforts to ensure that its actions complied with the mandatory provisions of the ZOP.

- 11 On the basis of the notice establishing an administrative offence, the Chairman of the Chamber of Audit of the Republic of Bulgaria issued, on 16 December 2020, the administrative order imposing a fine contested in the main proceedings, in which he accepted all the findings and conclusions regarding the infringement of Article 2(2) of the ZOP in conjunction with Article 59(2) thereof and imposed on LB a pecuniary penalty of BGN 10 000 (equivalent to slightly more than 16 times the monthly minimum wage in Bulgaria in 2020) in accordance with Article 260(2) of the ZOP. LB contested that administrative order imposing a fine on the grounds that Article 59 of the ZOP does not restrict the independent action of contracting authorities in such a way that they have to apply strictly the minimum requirements regarding competence under the specific law (ZUT). In addition, he took the view that the requirement at issue is necessary due to the specific subject matter of the public contract, namely slope stabilisation works, which are characterised by a high degree of technical complexity.
- 12 At the trial stage, information was requested from the Bulgarian Construction Chamber in Bulgaria, according to which, at the time of the contract notice (5 April 2018), there were 391 construction contractors listed in the Central Professional Register of Builders with a licence to carry out construction work in the first category of the fourth group. The information specified the requirements for the professional qualifications of the employees of such construction contractors: they must include at least one person holding the professional qualification of ‘civil engineer’ (specialisation in ‘hydrotechnical construction’ or ‘water supply and sewer construction’) or holding the professional qualification of ‘architect’ (specialisation in ‘landscape architecture’).

Essential arguments of the parties in the main proceedings

- 13 The arguments of the parties are set out below in the presentation of the reasoning in the request for a preliminary ruling.

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

- 14 The referring court takes the view that the dispute between the complainant and the Chamber of Audit of the Republic of Bulgaria falls within the scope of EU law, since the administrative penalty was imposed because of the infringement of public procurement rules committed by a contracting authority which had been awarded a grant under the operational programme ‘Environment 2014 – 2020’.
- 15 *By the first question referred*, the referring court seeks to ascertain whether Article 58(4) of Directive 2014/24 and the proportionality, provided for in that provision, of the participation requirements imposed by the contracting authority in relation to the subject matter of the contract allow **requirements** as to the professional ability of the staff of economic operators in respect of the performance of a specific works contract to be **more stringent than the minimum training and professional qualification requirements under the national law (ZUT)** or whether such more stringent requirements must be regarded as being a priori restrictive of competition. The referring court takes the view that the answer to that question depends on whether it must limit its assessment to the criteria set by the contracting authority and whether those criteria are more restrictive than the requirements of the ZUT or whether the court must furthermore assess, including by taking new evidence, whether those more restrictive and more stringent requirements for staff correspond to the subject matter, scope and degree of complexity of the contract – *in casu*, works with a specific subject matter (slope stabilisation), which constitute an activity with the highest degree of complexity under the ZUT.
- 16 The parties have opposing views on this issue. The complainant takes the view that conditions that protect the interests of the contracting authority are permissible in public procurement procedures, whereby the selection criteria may be limited only under two cumulative conditions: 1) the criteria must be proportionate to the subject matter of the contract; and 2) this must not lead to unequal treatment or an unjustified restriction of potential tenderers. He takes the view that Article 163a(4) of the ZUT lays down the requirements for the ‘technical director’ in a general manner for all categories of works – from those with the lowest degree of complexity through to those in the category of the work at issue, which have the highest degree of technical complexity and which justify the application of requirements more stringent than the minimum training and professional qualification requirements, without those requirements being restrictive of competition. The Chamber of Audit takes the view that, since the specific law already determines the persons who may perform the role of technical director, the narrowing of that group of persons by means of an additional requirement imposed by the contracting authority leads to a restriction of the possibility for economic operators to meet the conditions of the contract and, consequently, to a restriction of competition.
- 17 Next, the referring court points out that, at national level, the process of shared management of resources from the ESI Funds involves the participation of, inter

alia, a managing authority (MA), a certifying authority (CA), an audit authority (AA), the European Commission, the European Court of Auditors, as well as the bodies exercising financial control and audit: the Smetna Palata (Chamber of Audit, Bulgaria), the Agentsia za darzhavna finansova ispeksia (Public Finance Inspection Agency, Bulgaria – ADFI), the Direktsia ‘Zashtita na finansovite interesi na Evropeyskia sayuz’ (Directorate for the Protection of the Financial Interests of the European Union – AFKOS) within the Ministry of Interior. Given that this constitutes a single system of public finances, **these authorities must coordinate their activities**. In the present case, however, different national authorities competent to monitor compliance with the rules of the ZOP (the managing authority of the operational programme ‘Environment 2014-2020’ and the Chamber of Audit) make different assessments of the legality of the same circumstances, namely the selection criteria imposed by the complainant in the tender. Therefore, the referring court takes the view that the question as to the extent to which the various supervisory authorities must coordinate their assessment of the legality of procurement procedures with each other and as to the legal consequence of a lack of coordination is of importance (*third question referred*). According to the referring court, the lack of coordination in the monitoring of compliance with the principle of free competition by the various authorities could harm the interests of the Union in another way, namely by creating legal uncertainty for the beneficiaries, which has a deterrent effect on their economic activities.

- 18 In relation to this issue, the complainant takes the view that assessments of the same facts by different supervisory authorities, which lead to different findings as to whether or not infringements have been committed in procurement procedures, without taking into account the facts and circumstances established in the other administrative procedures, are impermissible in the light of the objective of Article 8(3) of Regulation No 2988/95 and taking into account the principle of legal certainty. By contrast, the Chamber of Audit takes the view that it itself and the managing authority of the operational programme ‘Environment’ are two independent supervisory authorities and exercise their supervisory tasks under the ZOP independently of each other. According to the Chamber of Audit, the managing authority and the bodies of the Chamber of Audit have different powers: in the case of established infringements of the ZOP that constitute an irregularity, the managing authority alone imposes financial corrections on beneficiary legal persons, whereas the Chamber of Audit is empowered to impose administrative penalties on the natural persons responsible.
- 19 In that context, the referring court raises the following (*second*) question referred in relation to Title II of Regulation No 2988/95 (‘Administrative measures and penalties’). If the imposition of a financial correction requires a finding of an irregularity in accordance with its legal definition under EU law and in the settled case-law of the Court of Justice of the European Union, must **the cumulative objective elements of an ‘irregularity’ then also be established, together with the additional subjective element** – namely that the infringement was

‘intentional ... or caused by negligence’ – in the assessment of the administrative liability of a natural person for an infringement of EU law?

- 20 The parties have opposing views on this issue. The complainant takes the view that financial corrections constitute administrative measures within the meaning of Article 4 of Regulation No 2988/95. Therefore, in the procedure for the imposition of a financial correction, the managing authority must prove the existence of each individual element constituting an irregularity, specifically: 1) an infringement of a provision of EU law; 2) actual or potential prejudice to the general budget of the Union; 3) a causal link between the alleged infringement and the prejudice. The complainant adds that, in contrast to Article 4 of Regulation No 2988/95, which concerns the irregularities for which financial corrections are to be imposed, Article 5 of that regulation governs the cases in which a certain irregularity (*having the effect of ‘prejudicing the budget of the European Union’*) is to be additionally punished by way of an administrative penalty where it was ‘intentional’ or ‘caused by negligence’.
- 21 The Chamber of Audit takes the view that, according to the legal definition of ‘irregularity’, an irregularity exists even where prejudice to the budget of the Union appears possible, and there is no requirement to prove the existence of a specific financial impact and the conditions that could actually affect the budget. That view is based on the assumption that such irregularities consist in the mere commission of formal infringements, for which reason the materialisation of a prejudicial effect is not a constituent element. The legislature presumed that the fact of establishing such irregularities entails the occurrence of legal consequences adverse to the established order which are sufficiently significant according to the statutory presumption to be penalised.
- 22 The referring court considers that the above view taken by the Chamber of Audit and the abovementioned provision on penalties (Article 247(1) of the ZOP) lead to the *fourth question referred*, namely whether the manner in which the pecuniary penalty was determined complies with the requirements of proportionality, since no circumstances other than **the formal infringement** are taken into account, whereas, when imposing an administrative measure (financial correction, which is supposed to be a less severe consequence of an infringement of EU law), a number of other circumstances must be taken into account (in the present case, the managing authority took into account, in respect of other infringements in the procedure at issue, the number of participants, amongst other things, on the basis of which it found that the level of competition was satisfactory).
- 23 Lastly, the referring court points out that Directive 2014/24 does not provide for the harmonisation of penalties for infringements of the public procurement rules, with the result that the Member States are empowered to choose the penalties which seem to them to be appropriate. In accordance with the case-law of the Court of Justice of the European Union, they must exercise that power in accordance with European Union law and its general principles, and consequently

with the principle of proportionality (see judgment of 19 July 2012, *Rēdlihs*, C-263/11, EU:C:2012:497, paragraph 44).

WORKING DOCUMENT