

Case C-669/20

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:

8 December 2020

Referring court or tribunal:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

10 November 2020

Appellant in the appeal on a point of law:

Veridos GmbH

Respondent in the appeal on a point of law:

Minister for the Interior of the Republic of Bulgaria

Mühlbauer ID Services GmbH – S&T

Subject matter of the main proceedings

Appeal on a point of law against a decision on the ranking of tenderers and on the award of a public contract for the planning, establishment, and management of a system for the issue of Bulgarian identity documents.

Subject matter and legal basis of the request

Interpretation of Article 56 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, ‘Directive 2014/24’) in conjunction with Article 69 thereof, Article 38 of Directive 2009/81/EC [of the European Parliament and of the Council of 13 July 2009] on the coordination of procedures for the award of certain [works contracts, supply contracts and service] contracts by contracting authorities or entities in the fields of defence and security, [and amending Directives 2004/17/EC and 2004/18/EC] (OJ 2009 L 216, p. 76, ‘Directive 2009/81’) in conjunction with Article 49 thereof, and Article 47 of the

Charter of Fundamental Rights of the European Union (‘the Charter’), in the light of the scope of judicial review with regard to whether an abnormally low tender has been submitted in a procedure to award a public contract.

Questions referred for a preliminary ruling

The referring court hereby refers the following questions for a preliminary ruling:

‘1. Is Article 56 of Directive [2014/24] in conjunction with Article 69 thereof, or, respectively, Article 38 of Directive [2009/81] in conjunction with Article 49 thereof, to be interpreted as meaning that a contracting authority, where it is objectively impossible to apply the criterion laid down in national law for the evaluation of an abnormally low tender and in the absence of a different criterion selected by the contracting authority and announced in advance, is not required to verify whether an abnormally low tender exists?’

2. Is Article 56 of Directive 2014/24 in conjunction with Article 69 thereof, or, respectively, Article 38 of Directive 2009/81 in conjunction with Article 49 thereof, to be interpreted as meaning that the contracting authority is required to verify whether abnormally low tenders exist only if there is a suspicion regarding any tender; or, conversely, is the contracting authority required to always ensure that the received tenders are genuine, and state the relevant reasons?’

3. Does such a requirement apply to the contracting authority if only two tenders have been received during the procedure for the award of a public contract?’

4. Is Article 47 of the [Charter] to be interpreted as meaning that the contracting authority’s assessment as regards a lack of suspicion that an abnormally low tender exists, or, respectively, that contracting authority’s conviction that the first-ranked tenderer has submitted a genuine tender, is subject to judicial review?’

5. Should the previous question be answered in the affirmative: Is Article 47 of the [Charter] to be interpreted as meaning that a contracting authority in a procedure for the award of a public contract which has not verified whether an abnormally low tender exists is required to provide justification and reasons as to why there is no suspicion that an abnormally low tender has been submitted, in other words, that the first-ranked tender is genuine?’

Legal provisions and case-law of the European Union relied on

The referring court refers to the following provisions: extracts from recitals 90 and 92, Article 56(1) and Article 69(1) of Directive 2014/24;

extracts from recitals 15 and 64, Article 38(1), and the first sentence of Article 49(1) of Directive 2009/81.

The referring court makes reference to:

- judgment of 29 March 2012, *SAG ELV Slovensko and Others* [v *Úrad pre verejné obstarávanie*], C-599/10, EU:C:2012:191, paragraphs 25 and 27 to 34;
- judgment of 4 July 2017, *European Dynamics Luxembourg and Others* [v *Agence*], T-392/15, EU:T:2017:462, paragraphs 72 to 75, 80, 81, 83 to 85 and 87 to 90;
- judgment of 28 January 2016, *Agriconsulting Europe* [v *Commission*], T-570/13, EU:T:2016:40 (confirmed by judgment of 19 October 2017, *Agriconsulting Europe* [v *Commission*], C-198/16 P, EU:C:2017:784, paragraphs 55 and 71);
- judgment of 18 December 2014, [*Azienda Ospedaliero-Universitaria di Careggi-Firenze* v] *Data Medical Service*, C-568/13, EU:C:2014:2466, paragraphs 47 to 50;
- judgment of 4 May 2017, *Esaprojekt* [v *Województwo Łódzkie*], C-387/14, EU:C:2017:338, paragraph 36;
- judgment of 4 June 2013, *ZZ* [v *Secretary of State for the Home Department*], C-300/11, EU:C:2013:363, paragraph 53; and
- judgment of 20 September 2011, *Evropaiki Dynamiki* [v *EIB*], T-461/08, EU:T:2011:494, paragraph 100.

The referring court cites an extract from p. [14] of a Communication from the Commission entitled ‘Guidance on the participation of third-country bidders and goods in the EU procurement market’ (OJ 2019 C 271, p. 43), which is dedicated to abnormally low tenders.

Provisions of national law relied on

Zakon za obshtstvenite porachki (Law on public procurement)

‘Article 72

Abnormally advantageous tenders

Article 72. (1) If the price or costs in a tenderer’s tender that is subject to evaluation is more than 20% lower than the mean value of the tenders submitted by the other tenderers in respect of the same evaluation factor, the contracting authority shall request a detailed written justification of how the tender was prepared, to be submitted within five days of receiving that request.’

Succinct presentation of the facts and procedure in the main proceedings

- 1 With Decision No 5785mpr-58/15.08.2019, the Deputy Minister for the Interior of the Republic of Bulgaria initiated a ‘restricted’ procedure for the award of a public contract, the subject of which was the ‘planning, establishment, and management of a Generation 2019 system for the issue of Bulgarian identity documents’. The contract notice no 158-363493 was published in the Official Journal of the European Union (2018/S).
- 2 Ordinance No 5785mpz-106/16.10.2018 appointed an auxiliary commission whose task was to pre-select candidates and to examine, evaluate, and rank the tenders.
- 3 With Decision No 5785mpr-40/03.07.2019, following this pre-selection, the names of the candidates to be asked to submit a tender were published, namely Veridos GmbH and the consortium Mühlbauer ID Services GmbH – S&T.
- 4 Following an evaluation of the submitted tenders and with Decision No 5785-mpr-35/29.04.2020 of the Deputy Minister for the Interior of the Republic of Bulgaria, the consortium Mühlbauer ID Services GmbH – S&T was awarded the public contract, and Veridos GmbH was ranked in second place.
- 5 Veridos GmbH filed a complaint regarding the abovementioned Decision No 5785-mpr-35/29.04.2020 of the Deputy Minister for the Interior of the Republic of Bulgaria with the Komisiya za zashtita na konkurentsiyata (the Bulgarian Commission for Protection of Competition), as a result of which proceedings with reference number KZK-308/2020 were opened.
- 6 With Decision No 510 of 25 June 2020, the Bulgarian Commission for Protection of Competition dismissed the complaint of Veridos GmbH with reference number KZK-308/2020.
- 7 On 13 July 2020, Veridos GmbH filed an appeal on a point of law against the abovementioned decision of the Bulgarian Commission for Protection of Competition; legal proceedings were opened before the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) while observing the requirements to protect classified information.

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

- 8 The necessity for a reference for a preliminary ruling in this case emerges within the scope of assessing whether the contracting authority is required, in the light of the principles of EU law (transparency, non-discrimination and equal treatment), to carry out an evaluation of whether an abnormally low tender exists, in order to ensure an objective comparison of the tenders and to determine, under genuine competitive conditions, which tender is the most economically advantageous, without it being abnormally advantageous such as to distort competition.

- 9 In determining the legal framework that applies to the legal dispute, the referring court notes that the contract includes elements that fall under the scope of application of Directive 2014/24; however, the contracting authority took the decision and gave notice of a single contract in accordance with Directive 2009/81. The identical content and analogous function of the relevant provisions of the two directives imply an analogous interpretation, in the referring court's view.
- 10 The legal dispute concerns the powers of the national legislature to regulate the criterion for evaluating an abnormally advantageous tender that it has exercised by means of enacting Article 72(1) of the *Zakon za obshtestvenite porachki* (Law on public procurement). That article provides for a criterion for the evaluation of an abnormally advantageous tender, namely the requirement that it is '20% lower than the mean value of the tenders submitted by the other tenderers in respect of the same evaluation factor'. In this way, the legislature implicitly requires that there are at least three tenders, whereby one tender is assessed against the mean value of the other two tenders.
- 11 The decision at first instance in this legal dispute, namely that of the Bulgarian Commission for Protection of Competition, that the provision in Article 72(1) of the national *Zakon za obshtestvenite porachki* (Law on public procurement) cannot be applied, must be considered in this very context, since, in the present case, only two tenders were submitted and the mean value provided for by the legislature to ascertain whether abnormally advantageous tenders exist cannot be calculated.
- 12 The contracting authority in the case at hand – the Ministry of the Interior – did not work out details for nor announce in advance any algorithm for assessing and analysing whether an abnormally advantageous tender exists, so as to allow the *Varhoven administrativen sad* (Supreme Administrative Court, Bulgaria) to assess that algorithm in the light of EU law, if there are grounds to assume that Articles 56 and 69 of Directive 2014/14, or, respectively, Articles 38 and 49 of Directive 2009/81, contain a sufficiently clear and unconditional standard of conduct – an obligation to carry out an evaluation.
- 13 In this respect and in the light of the specific circumstances of this legal dispute, an assessment is a priori impossible, and the abovementioned provisions of EU law remain disappplied.
- 14 The case-law of the Court of Justice of the European Union and of the General Court of which the referring court is aware, including proceedings concerning challenges of legal acts of institutions of the European Union in the latter's capacity of contracting authority, is presented in the above list of judgments in the present summary. The referring court makes particular reference to the cases that formed the basis for the following judgments:
- 15 Judgment of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10:

- the European Union legislature intended to require the awarding authority to examine the details of tenders which are abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine (paragraph 28);
- Article 55(1) of Directive 2004/18 requires the contracting authority to set out clearly the request sent to the tenderers concerned so that they are in a position fully and effectively to show that their tenders are genuine (paragraph 31).
- Article 55 of Directive 2004/18, far from precluding a provision of national legislation, which, in essence, provides that if a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal, requires the inclusion of such a provision in the national legislation on public procurement (paragraph 33).

16 Judgment of 4 July 2017, *European Dynamics Luxembourg and Others*, T-392/15:

- compliance with the duty to state reasons must, in principle, be determined in accordance with the information available to the applicants, at the latest, when the action was brought. The reasons for a decision cannot be explained for the first time *ex post facto* before the Court. Only exceptional circumstances may justify the Court taking into consideration evidence adduced in the course of the proceedings (paragraph 74).
- the abnormally low nature of a tender must be assessed by reference to the composition of the tender and the services at issue (paragraph 83).
- the contracting authority's obligation to check the seriousness of a tender arises where there are doubts beforehand as to its reliability, bearing in mind that the main purpose of that article is to enable a tenderer not to be excluded from the procedure without having had an opportunity to explain the terms of its tender which appears abnormally low. Thus, it is only where such doubts exist that the evaluation committee is required to request relevant information on the composition of the tender, before, if necessary, rejecting it. However, if a tender does not appear abnormally low under Article 158(4) of the Implementing Regulation, that article does not apply (paragraph 85);
- in the first stage, the contracting authority need only determine whether the tenders submitted contain evidence likely to arouse suspicion that they might be abnormally low. That is the case in particular, where the price proposed in a tender submitted is considerably less than that of the other tenders submitted or the normal market price. If the tenders submitted do not contain such evidence and therefore, do not appear to be abnormally low, the contracting authority may continue the evaluation of that tender and the award procedure for the contract (paragraph 88).

- however, if there is evidence which arouses suspicion that a tender may be abnormally low, the contracting authority must, in the second stage, check the composition of the tender in order to ensure that it is not abnormally low. Where it carries out that check, the contracting authority must give the tenderer which submitted that bid the opportunity to set out the reasons why it considers its tender is not abnormally low (paragraph 89).
- 17 judgment of 28 January 2016, *Agriconsulting Europe*, T-570/13:
- the contracting authority may, in the course of its examination of the abnormally low nature of a tender, take into consideration all the factors that are relevant in the light of the services at issue (paragraph 55);
 - the existence of a proper exchange of views, at an appropriate time in the procedure for examining tenders, between the contracting authority and the tenderer, to enable the latter to demonstrate that its tender is genuine, constitutes a fundamental requirement in the award of public contracts (paragraph 71).
- 18 judgment of 18 December 2014, *Data Medical Service*, C-568/13:
- it is for the Member States and, in particular, the contracting authorities to determine the method of calculating an anomaly threshold constituting an ‘abnormally low tender’ (paragraph 49);
 - the abnormally low character of a tender must be assessed ‘in relation to the service to be provided’. Thus, the contracting authority may take into consideration all the factors that are relevant in the light of the service at issue (paragraph 50).
- 19 judgment of 4 May 2017, *Esaprojekt*, C-387/14, EU:C:2017:338:
- the bids of all tenderers must be subject to the same conditions; all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that all tenderers can understand their exact significance and interpret them in the same way and the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (paragraph 36).
- 20 The referring court notes that the European Commission, in its ‘Guidance on the participation of third-country bidders and goods in the EU procurement market’, states that Member States are free to set up national rules or methods to be used for identifying tenders that are suspected of being abnormally low, provided that these rules are objective and non-discriminatory. Moreover, in case national law has not set up a method, contracting authorities themselves can establish transparent and non-discriminatory methods. The European Commission also stated that offers may appear to be abnormally low in relation to any of the

relevant parameters and award criteria. This may be the case, for example, if the relationship between the quality offered and the price is suspicious. As is clear from that communication, the contracting authority is under a legal obligation to request an explanation of the price offered.

- 21 The inclinations of the referring court's deliberations in relation to the decision in this legal dispute and possible answers to the questions referred are presented below.
- 22 In accordance with the principle established in the Bulgarian *Administrativno-protsesualen kodeks* (Code of Administrative Procedure), the absence of justification in respect of the decisive activity of the administrative authority constitutes a procedural defect of the administrative act, which precludes the possibility of defending the rights and interests of the parties concerned, as well as effective judicial review. The Court of Justice and the General Court have analogously made reference to the existence of similar principles in relation to the activity of EU institutions (judgments of 20 September 2011, *Evropaiki Dynamiki*, T-461/08, EU:C:2011:494, paragraph 100, and of 4 June 2013, ZZ, C-300/11, EU:C:2013:363, paragraph 53).
- 23 In the light of the circumstances in the present case, it must be concluded that the national contracting authority does not have any evaluation criterion other than that in Article 72 of the national *Zakon za obshtestvenite porachki* (Law on public procurement (ZOP)).
- 24 The term 'mean value' within the meaning of Article 72(1) of the national *Zakon za obshtestvenite porachki* (Law on public procurement) is a term that is not used as a criterion in EU law. It was introduced independently by the national legislature and is intended as a sub-criterion to clarify the term 'abnormally low tender' that is used in EU law. By doing so, the national legislature has implicitly introduced the requirement that three tenders are submitted.
- 25 Article 56 of Directive 2014/24, and, respectively, Article 38 of Directive 2009/81, set out for their part a legal principle that requires additional clarification as to how it is expressed and what conditions must be fulfilled in order to permit deviation from it or for it to be disappplied.
- 26 Article 69 of Directive 2014/24 uses the term 'abnormally low tender', while the wording of Article 49 of Directive 2009/81 makes reference to 'abnormally low tenders', which implies some discretion in the choice of evaluation criteria, whether at a legislative level or by the contracting authority in question, in so far as the criterion is objective and is announced in advance. For its part, the national *Zakon za obshtestvenite porachki* (Law on procurement) circumscribes the powers by linking the term 'abnormally advantageous tender' to the criterion of the 'mean value of the tenders' and therefore implicitly also to the requirement for three tenders; this raises the question of whether it considerably restricts or limits the means of achieving the imperative and objective of the directive.

- 27 At the same time, even though Article 56 of Directive 2014/24, and, respectively, Article 38 of Directive 2009/81, have the character of a legal principle, it follows from the wording of Article 69 of Directive 2014/24 and Article 49 of Directive 2009/81 that the assessment as to whether an abnormally low tender exists becomes mandatory if the tenders appear to be abnormally low. This particular wording requires an interpretation as to whether this assessment is a subjective option or whether it always has an objective nature, and, being a principle, whether it must be justified in the contracting authority's decision on the ranking of tenderers.
- 28 Next, it must be clarified, by means of interpretation, whether this requirement is only applicable if the contracting authority intends to reject an abnormally low tender, or whether carrying out an evaluation as to whether an abnormally low tender exists is of importance for the lawful conduct of the procedure and as such applies always. This is all the more relevant in the light of the present case, where only two tenders have been submitted and the second-ranked tenderer's main objection is that an abnormally low tender has been submitted by the successful tenderer.
- 29 In the alternative, if the contracting authority has not undertaken any evaluation as to whether an abnormally low tender exists, which implies a presumption that there is no suspicion, must the contracting authority provide justification in its decision on the ranking of candidates as to why there was no suspicion that the first-ranked tender may be an abnormally low tender? In other words, why it considers the submitted tenders to be genuine in accordance with Article 69 of Directive 2014/24, or, respectively, Article 49 of Directive 2009/81, so that the presumption of no suspicion can be subjected to judicial review.
- 30 The existence of a criterion that is laid down in law but cannot be applied in practice, and the absence of a different criterion announced beforehand concerning the identification of abnormally low tenders, raise the question of whether the contracting authority is released from the requirement to undertake an evaluation of whether an abnormally low tender exists, given that the Court of Justice has expressly ruled in its case-law that the contracting authority must ensure that the submitted tenders are genuine.
- 31 Is the contracting authority consequently required to always provide reasons in relation to the existence of an abnormally low tender, or can it defend its decision on the ranking of tenderers when it becomes a party to proceedings in which its decision is challenged in court, when it would do so by providing substantive arguments to be evaluated by the court? This question must be examined from the perspective of the case-law of the Court of Justice of the European Union, in which that court has consistently expressed the view that the reasons can be presented as part of proceedings to challenge the legal act only under exceptional circumstances.

- 32 Next, the absence of any definition of the term ‘abnormally low tender’ in the directive in conjunction with the term ‘appear to be’ used in relation to tenderers’ tenders creates a condition for the unequal treatment of economic operators by the various contracting authorities within the European Union.
- 33 Since the existence of a ‘suspicion’ constitutes an internal, subjective element that forms part of the cognitive-analytical activity of the contracting authority or auxiliary authority in respect of the procedure for the award for a public contract, this raises the question, as far as the referring court is concerned, of whether the absence of any suspicion as to whether the tender is genuine must be duly justified by the contracting authority, in order to enable a judicial review.
- 34 As their content shows, Article 69 of Directive 2014/24 and, respectively, Article 49 of Directive 2009/81, concern the contracting authority and impose specific obligations on it under certain circumstances. On the other hand, Article 56 of Directive 2014/24 and Article 38 of Directive 2009/81 contain a provision the purpose of which is to protect; in other words, it is intended to guarantee the lawful conduct of the procedure for the award of a public contract. The role of ensuring lawfulness for the purposes of the directive belongs, in fact, primarily and in the first place, to the contracting authority.
- 35 The requirement of an effective judicial review implies for its part that all relevant aspects of the procedure can be duly contested by the parties, and evaluated and analysed by the court.
- 36 If the reverse conclusion were to be drawn, it should be assumed that the absence of any suspicion as to whether a particular tender is genuine represents an irrebuttable presumption that forms an implicit part of the contracting authority’s decision in favour of a successful tenderer, without requiring reasons and justification for the legal act in that regard, and without allowing that presumption to be rebutted in a subsequent judicial review. However, such an outcome also does not categorically follow from the provisions of the directive and the case-law of the Court of Justice.
- 37 The answers to the questions summarised above are not unequivocally apparent from the applicable legal basis of EU law. In the absence of any case-law of the Court of Justice of the European Union on a similar case, the referring court hereby refers the abovementioned questions to the Court of Justice for a preliminary ruling.