Case C-682/21

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:

11 November 2021

Referring court:

Lietuvos Aukščiausiasis Teismas (Lithuania)

Date of the decision to refer:

11 November 2021

Appellants in cassation and applicants at first instance:

‘HSC Baltic’ UAB

‘Mitnija’ UAB

‘Montuotojas’ UAB

Other party to the proceedings in cassation and defendant at first instance:

Vilniaus miesto savivaldybės administracija

Third parties:

‘Active Construction Management’ UAB, a company subject to insolvency proceedings

‘Vilniaus vystymo kompanija’ UAB

Subject matter of the main proceedings

Claim by the appellants in cassation (applicants at first instance) for a declaration that the decision of the other party to the proceedings in cassation (the defendant at first instance) to enter them on the list of unreliable suppliers on account of improper performance of a public procurement contract by a multi-member supplier and termination of that contract on the ground of a substantial breach is unlawful.

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

Interpretation 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, in particular of Article 18(1) and Article 57(4)(g) and (6) thereof, and of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, in particular of the fourth subparagraph of Article 1(1) and Article 1(3) thereof; third paragraph of Article 267 of the Treaty on the Functioning of the European Union.

Questions referred for a preliminary ruling

1. Are Article 18(1) and Article 57(4)(g) and (6) of Directive 2014/24 and the fourth subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 (together or separately, but without limitation to those provisions) to be interpreted as meaning that a decision of a contracting authority to enter the economic operator concerned on the list of unreliable suppliers and thus restrict for a certain period its ability to participate in procurement procedures announced subsequently on the ground that that economic operator has substantially breached a contract concluded with that contracting authority is a measure which may be challenged before a court?

2. If the answer to the first question is in the affirmative, are the provisions of EU law cited above (together or separately, but without limitation to those provisions) to be interpreted as precluding national rules and the practice for applying them under which: (a) the contracting authority, when terminating a public procurement contract on the ground of a substantial breach thereof, does not take any formal (separate) decision concerning the entry of economic operators on the list of unreliable suppliers; (b) an economic operator is not informed in advance about forthcoming entry on the list of unreliable suppliers and is therefore unable to submit relevant explanations and subsequently to contest entry effectively; (c) the contracting authority does not carry out any individual examination of the circumstances of improper performance of a contract, and therefore, if the public procurement contract has been lawfully terminated on the ground of a substantial breach thereof, the economic operator *de jure* responsible for that breach is automatically entered on the list of unreliable suppliers?

3. If the answers to the first two questions are in the affirmative, are the provisions of EU law cited above (together or separately, but without limitation to those provisions) to be interpreted as meaning that joint-activity partners (entities forming a joint supplier) which performed the public procurement contract lawfully terminated on the ground of a substantial breach may demonstrate their reliability and thus be excluded from the list of unreliable suppliers, inter alia, on the basis of the amount of the share (value) of the contract performed, the

insolvency of the lead partner, actions on the part of that partner and the contracting authority's contribution to non-performance of the contract?

Provisions of EU law cited

Directive 2014/24, in particular Article 18(1), Article 57(3), (4) and (6), Article 90 and Article 91.

Council Directive 89/665, in particular the fourth subparagraph of Article 1(1) and Article 1(2) and (3).

Provisions of national law cited

Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on public procurement; 'the Law on public procurement'): Article 2(36) (definition of the term 'supplier'); paragraphs 4(6), 7 and 8 of Article 46, entitled 'Grounds for exclusion of a supplier'; Article 91, entitled 'Non-performance or improper performance of a procurement contract'; and paragraphs 1 and 2 of Article 101, entitled 'Right to challenge actions of or decisions taken by the contracting authority'.

Lietuvos Respublikos civilinis kodeksas (Civil Code of the Republic of Lithuania; 'the Civil Code'): paragraphs 1 and 3 to 6 of Article 6.6, entitled 'Joint and several obligation of debtors'; Article 6.15(1); Article 6.217, entitled 'Termination of a contract'; Article 6.219; paragraph 1 of Article 6.969, entitled 'Concept of a joint-activity (partnership) agreement'; Article 6.975, entitled 'Liability of partners under joint obligations'; and paragraphs 1(2) and (3) and 3 of Article 6.978, entitled 'End of a joint-activity agreement'.

Succinct presentation of the facts and procedure in the main proceedings

1 On 7 December 2016, the defendant at first instance, the Vilniaus miesto savivaldybės administracija (Municipal Administration of the City of Vilnius), published notice of a procurement procedure for the award of a public works contract for the construction of the Lazdynai multifunctional wellness centre in Vilnius ('the procurement procedure').

2 In order to participate in the procurement procedure, on 30 January 2017 the applicants at first instance – 'Montuotojas' UAB, 'Mitnija' UAB, 'HSC Baltic' UAB and 'Axis Power' UAB – concluded a joint-activity agreement. The partners under the joint-activity agreement agreed that, in the event of award of the contract, the proportions of the value of commitments (contribution to the joint activity) constituting the total price of the tender would be as follows: 'Active Construction Management' UAB – 65% (lead partner), 'HSC Baltic' UAB – 15%, 'Axis Power' UAB – 10%, 'Mitnija' UAB – 5%, and 'Montuotojas' UAB – 5%.

3 On 5 June 2017, the defendant at first instance concluded a works contract with ‘Active Construction Management’ UAB, in which the deadline for carrying out the construction works was set at 5 December 2018.

4 The works contract was not performed in due time. On 21 August 2019, after the defendant at first instance had acknowledged deficiencies in the technical design, the deadline for carrying out the works under the contract was changed and a new date of 28 May 2020 was set. However, even after the extension of the deadline, the works did not proceed smoothly and fell behind the new schedule.

5 By order of 28 October 2019, the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania) instituted insolvency proceedings against ‘Active Construction Management’ UAB. The defendant at first instance and the applicants at first instance were informed thereof by letter of the insolvency administrator of 6 December 2019, in which it was also stated that the lead partner would no longer perform the works contract and the contract was therefore regarded as having come to an end in respect of that partner.

6 The defendant at first instance and the remaining partners, that is to say, the applicants at first instance, failed to reach common agreement on further performance of the works contract.

7 By letter of 22 January 2020, the defendant at first instance informed the applicants at first instance of the termination of the works contract on the ground of a substantial breach of that contract.

8 On 21 February 2021, the applicants at first instance brought an action before the Regional Court, Vilnius, seeking (1) a declaration that the unilateral termination of the works contract by the defendant at first instance on the ground of a substantial breach of that contract was unlawful; (2) a declaration that the works contract had come to an end due to the fault of the defendant at first instance; and (3) a declaration that the decision of the defendant at first instance to enter the applicants at first instance on the list of unreliable suppliers in the Central public procurement information system was unlawful.

9 By judgment of 27 August 2020, the Regional Court, Vilnius, dismissed the action of the applicants at first instance in its entirety.

10 The court held that the works contract was terminated lawfully on the ground of a substantial breach through non-performance or improper performance of the public procurement contract, and that in such a case contracting authorities are obliged to enter suppliers (or, in the case of a group of suppliers, all the members of the group) in that list of unreliable suppliers. Moreover, the court stated that, under the national rules, the applicants at first instance would be able to rehabilitate themselves by self-cleaning when participating in other procurement procedures, so they were not precluded from participation in them.

11 By order of 21 January 2021, the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania) dismissed the appeal brought by the applicants at first instance against the judgment of the Regional Court, Vilnius.

12 On 22 January 2021, on the initiative of the defendant at first instance, the Viešųjų pirkimų tarnyba (Public Procurement Office) entered the applicants at first instance on the list of unreliable suppliers.

13 On 18 to 22 February 2021, the applicants at first instance appealed against the order of the Court of Appeal, Lithuania, to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania; 'the referring court'). Their request for interim measures was granted – they were deleted from the list of unreliable suppliers pending the outcome of the proceedings in cassation.

14 By partial order of 11 November 2021, the referring court upheld those parts of the decisions delivered by the first instance and appellate courts by which the claims in the action concerning the proper performance of the contract and the lawfulness of the termination of that contract were dismissed.

Principal arguments of the parties to the main proceedings

15 The applicants at first instance submitted before the referring court that the rules set out in Article 91 of the Law on public procurement, even if it is accepted that the objective resulting from their application is to exclude dishonest economic operators from legal relationships in the field of public procurement, cannot be interpreted as meaning that economic operators that formed a multi-member supplier (contractor) and *de facto* did not carry out any works under a public procurement contract (prior to the insolvency proceedings, the contracted works were carried out exclusively by the lead partner) would be entered on the list of unreliable suppliers, where the non-performance (or improper performance) of the relevant contractual obligations led to the termination of that contract; otherwise, similar situations, where the respective works under a public procurement contract have not been carried out by a subcontractor or by the relevant joint-activity partner, would be treated unequally, as subcontractors are to be entered on the list of unreliable suppliers only when a breach concerns that part of the public procurement contract which has been subcontracted to them; the courts misapplied Article 91 of the Law on public procurement, and infringed the principles of public procurement, by not taking account of the specific actions of the respective economic operators in the performance of the works contract, that is to say, of their integrity and reliability; Article 91 of the Law on public procurement is applicable on the basis of the personal responsibility of an economic operator; it was noted in the judgment of the Court of Justice of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19), that joint-activity partners may be held liable for actions of one of them only if they had knowledge thereof, that is to say, actions of all partners are assessed on the basis of the principle of personal responsibility, and not that of joint and several liability.

16 The defendant at first instance stated before the referring court that it supports the findings made by the courts and that the contracting authority does not have freedom of choice in applying Article 91 of the Law on public procurement and is therefore obliged to enter the economic operators concerned on the list of unreliable suppliers. When implementing that obligation, it does not take into account which partner forming a multi-member supplier specifically caused a substantial breach of the public procurement contract by his actions; a contrary interpretation is incompatible with the joint and several liability of joint-activity partners, and thus mitigating circumstances are relevant only for the self-cleaning of entities that have already been entered on the list of unreliable suppliers.

Succinct presentation of the reasons for the request for a preliminary ruling

17 The referring court points out that the dispute concerning the inclusion of the applicants at first instance on the list of unreliable suppliers has arisen as a matter of interpretation and application of the provisions of the Law on public procurement, *a fortiori* Article 91 thereof, and their relationship with the provisions of the Civil Code concerning joint activities. The arguments of the parties to the dispute on the interpretation and application of national rules entail closely interrelated points of law and doubts on the part of the court, concerning the compliance of the provisions of the Law on public procurement with EU law, as to (a) whether the entering of suppliers on the list of unreliable suppliers constitutes a decision of the contracting authority amenable to review of legality; and (b) if such a decision is challengeable, the basis for its adoption and for assessing its lawfulness.

18 As the first instance and appellate courts held and as the defendant at first instance submits, under the rules laid down in Lithuania (Article 91 of the Law on public procurement) contracting authorities have no discretion to decide whether to enter the economic operator concerned on the list of unreliable suppliers if that economic operator has committed a substantial breach of the public procurement contract, and that breach has led to the unilateral termination of that contract by the contracting authority. The non-discretionary nature of the actions of contracting authorities is reflected by their statutory obligation to enter all entities forming a multi-member supplier – joint-activity partners – in that list.

19 In fact, the content of Article 91 of the Law on public procurement suggests that the entering of economic operators on the list of unreliable suppliers lacks autonomy both in substance and in form. Under the Lithuanian legal rules, such entry does not constitute a separate decision, but a legal consequence of another decision unilaterally terminating a public procurement contract: if an economic operator does not dispute the termination of the contract on the ground of a substantial breach at all, or such a decision is found by the court to be lawful, the economic operator concerned, which performed that contract on its own or with partners, is necessarily entered on the list of unreliable suppliers.

20 Such legal rules presuppose that, first, situations where a contracting authority would be able to terminate a contract lawfully on the ground of a substantial breach thereof but the supplier would not be entered on the list of unreliable suppliers due to the circumstances of the individual case are *de jure* not possible and, second, the supplier may, in essence, dispute only the unilateral termination of the public procurement contract.

21 The national legal rules in question do not seem *per se* incompatible with the effective defence of the rights of suppliers, since, as is the situation in the present case, the economic operator may effectively contest the unilateral termination of the public procurement contract by arguing that it did not commit a substantial breach, that the contracting authority is also partly responsible for the failure to attain the objectives of the contract, and so forth. However, it should be noted in this regard that, under the Lithuanian legal rules, when a contract is terminated on the ground of a substantial breach the subjective aspect of the actions of the party in breach of the contract is not, in essence, taken into account.

22 It may be concluded on the basis of the case-law of the Court of Justice that the reasons that led to the breach of the contract, the nature of that breach and other circumstances are legally relevant for the purpose of deciding on the restriction of the right of suppliers to participate in other procurement procedures. In its judgment of 19 June 2019, *Meca* (C-41/18), the Court of Justice noted that, under Article 57(5) of Directive 2014/24, contracting authorities must be allowed to conduct their own assessment of the acts which an economic operator has committed or omitted either before or during the procurement procedure, in any of the cases referred to in Article 57(4) of that directive; in the light of this, contracting authorities cannot be bound by a previous investigation of an infringement, as this would not be in line with the principle of proportionality, a principle which inter alia implies the need to assess the nature of an infringement, that is to say, its minor or material nature and repetition.

23 As previously noted, the first instance and appellate courts and the defendant at first instance rely, in essence, on the rule of legal interpretation referred to above in considering that, at this stage of the dispute, it is not possible and there is no need to assess the nature of the actions of the applicants at first instance, as they will be able to rehabilitate themselves by self-cleaning when participating in other procurement procedures. This model resulting from the national rules is consistent with the *ratio decidendi* of the judgment in *Meca* (C-41/18), particularly as in subsequent procurement procedures the contracting authority concerned does not have to be bound by an assessment conducted by another contracting authority, which is not, however, the case as regards a decision made by a court. If entry of the economic operator on the list of unreliable suppliers were to be held lawful by the court, it is questionable whether the contracting authority concerned would be able to review such a decision in a non-judicial procedure.

24 However, in the view of the referring court, that position adopted by the courts and by the defendant at first instance leads, in fact, to a paradoxical situation.

25 First, in order for it to be possible to take account of the nature of the actions on the part of the economic operator concerned, that operator has first to be entered on the list of unreliable suppliers; therefore, the circumstances of the performance of the contract become relevant when deciding not on its inclusion, but on its *ad hoc* deletion from that list. In that context, inter alia, the past actions of an economic operator included on the list of unreliable suppliers for a three-year period, as laid down by the legislation in force, may be treated differently. The fact that the breach committed by such an economic operator will be considered minor by one contracting authority does not mean *per se* that another contracting authority will reach the same conclusions.

26 Second, under such a model, a decision on the content of the actions of the economic operator would be made not by the contracting authority with the best knowledge of the breach, but by other contracting authorities which will, in essence, rely on explanations provided by the supplier concerned. In any case, the ability to assess the circumstances of the breach of the contract only in respect of economic operators that have already been entered on the list of unreliable suppliers is not justified by a legitimate objective or good practice.

27 The referring court does not share the view of the defendant at first instance that a different interpretation of Article 91 of the Law on public procurement, that is to say, an individual assessment of the behaviour of the applicants at first instance in performing the works contract, may be incompatible with the joint and several liability of joint-activity partners. The question of the importance of joint and several liability in assessing the reliability of joint-activity partners under Article 57 of Directive 2014/24 has already been raised by the referring court in *Klaipėdos regiono atliekų tvarkymo centras*, cited above; however, as explained by the Court of Justice, a contracting authority has to make an individual assessment of the actions of every economic operator (partner). As ‘Mitnija’ UAB correctly submits, Article 91(1) of the Law on public procurement provides *expressis verbis* that other economic operators on whose capacities the supplier has relied and which have assumed joint and several liability with the supplier for the performance of the contract under Article 49(5) of that law are also to be entered on the list of unreliable suppliers, provided that a breach concerns that part of the contract which has been subcontracted to them. It is common ground that a joint-activity partner and a provider of economic or financial capacities, essentially acting as a financial guarantor, are not identical entities; however, if they are jointly and severally liable (the former on the basis of the Civil Code, the latter on the basis of the Law on public procurement), a different assessment of their actions is not justified.

28 Nevertheless, the joint and several liability of joint-activity partners for the purposes of Article 91 of the Law on public procurement (Article 57(4)(g) of Directive 2014/24) is, in general, a secondary aspect if the position were to be accepted that the list of unreliable suppliers is to include only those economic operators the individual assessment of whose actions entails their being considered unreliable (dishonest). In that case, the termination of the public

procurement contract on the ground of a substantial breach would not *per se* entail their entry on the list of unreliable suppliers (for example, insolvency, fault on the part of other entities, force majeure, and so forth); consequently, there would not (should not) be any difference according to whether the contractor that failed to perform the public procurement contract acted on its own or as a group of independent economic operators (under a joint-activity agreement). Otherwise multi-member suppliers would unjustifiably be placed at a disadvantage.

29 The referring court also has doubts as to the classification of the contracting authority's decision to enter an economic operator on the list of unreliable suppliers. According to the case-law of the Court of Justice, the concept of 'decisions taken by the contracting authorities' must be interpreted broadly as covering virtually all their decisions without distinguishing between those decisions according to their content or time of adoption; Article 1(1) of Directive 89/665 does not lay down any restriction with regard to the nature and content of the decisions it refers to (judgment of 11 January 2005, *Stadt Halle and RLP Lochau*, C-26/03, paragraphs 28 and 30).

30 Moreover, the present court draws attention to the wording of the fourth subparagraph of Article 1(1) of Directive 89/665, which, in the light of language versions, is not identical. The Lithuanian and English language versions refer to 'su sutartimis … susiję … sprendimai' ['decisions connected with contracts'] and 'contracts … decisions' respectively, while the French language version refers to 'les procédures de passation des marchés'. The French wording appears not to be so broad as it relates specifically to procedures for the conclusion (award) of contracts and not to consequences of the termination of those contracts. The concept of 'procedures for the award of contracts' is also used in Article 1(2) of Directive 89/665. Furthermore, Article 1(3) of Directive 89/665 provides inter alia that a person who may initiate a review procedure at least should have an interest in obtaining a particular contract and should have been harmed by unlawful actions on the part of the contracting authority.

31 It is clear that this dispute has not arisen on account of the contracting authority's decisions granting or restricting the right to be awarded (to conclude) a particular public procurement contract, since the works contract was concluded with the applicants at first instance; what is more, their actions led to a lawful decision of the defendant at first instance to terminate that contract. On the other hand, the entry of the economic operators concerned on the list of unreliable suppliers restricts their rights to conclude other public procurement contracts, pursuant to the ground for exclusion laid down in Article 57(4)(g) of Directive 2014/24. Consequently, on the basis of a general trend in the case-law of the Court of Justice of giving a broad interpretation to the concept of a 'decision taken by a contracting authority', it would, in principle, be justified to classify the decision of the defendant at first instance at issue in this case as a decision referred to in the fourth subparagraph of Article 1(1) of Directive 89/665.

32 If the contracting authority's decision at issue in a part of the national proceedings falls within the scope of the fourth subparagraph of Article 1(1) of Directive 89/665, it is important to establish bases for assessing the lawfulness of such a decision. The applicants at first instance place the greatest emphasis on the following circumstances as a basis for judging their reliability, irrespective of the fact that the works contract has been terminated: the proportion of the contractual obligations (contributions) of the contractors in respect of performance of the public procurement contract; the fact that, prior to the termination of the works contract, all works were carried out only by the lead partner, that is to say, the applicants at first instance had not yet started to carry out any contracted works; the insolvency proceedings instituted against the lead partner; certain actions on the part of the defendant at first instance which may have led to improper performance of the works contract, and other circumstances.

33 In the view of the referring court, the circumstances noted above may be relevant for the purpose of assessing the reliability of the economic operators which performed the works contract with regard to their entry on the list of unreliable suppliers. If, according to the judgment in *Meca* (C-41/18), such an assessment of reliability has to be conducted by contracting authorities which have published notice of new procurement procedures, it would not be unreasonable to require that the contracting authority that awarded the terminated public procurement contract, that is to say, the defendant at first instance, also conduct such an assessment.