Case C-513/23

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:

9 August 2023

Referring court:

Administrativen sad Pleven (Administrative Court, Pleven, Bulgaria)

Date of the decision to refer:

28 July 2023

Applicant:

Obshtina Pleven (Municipality of Pleven, Bulgaria)

Defendant:

Rakovoditel na Upravlyavashtia organ na Operativna programa „Regioni v rastezh“ 2014–2020 (Head of the Management Authority of the ‘Regions in Growth’ Operational Programme 2014-2020)

Subject matter of the main proceedings

This case concerns the action brought by a municipality against an administrative measure imposing on it a financial correction in the amount of 25% of the eligible expenditure in connection with a contract which it had concluded with the contractor awarded one of the lots in a public procurement procedure.

Subject matter and legal basis of the request

Interpretation under the first paragraph of Article 267 TFEU of Article 42(3)(b) of Directive 2014/24/EU of the European Parliament and of the Council, together with Annex VII, point 2 thereof, in particular the words ‘or equivalent’ in relation to the standard to be complied with

Question referred for a preliminary ruling

Is Article 42(3)(b) of Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC, together with point 2 of Annex VII thereto, to be interpreted as meaning that national legislation and case-law, according to which the contracting authority is always obliged to include with each reference made in the contract notice to a standard to be complied with the words 'or equivalent', even in the case where compliance is required with a harmonised standard which was adopted on the basis of Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, or on the basis of Directive 89/106/EEC, is admissible?

Provisions of European Union law and case-law relied on

Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, recitals 1, 2, 14 and 16; Article 17(1)

Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council, Article 160

Regulation No 1303/2013, Article 2, point 36, and Article 152(1); Regulation No 1083/2006, Article 2, point 7

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, Article 42 and points 1 and 2 of Annex VII

Judgments of the Court of Justice of 27 October 2016, C-613/14, paragraph 40, and of 17 December 2020 in Joined Cases C-475/19 P and 688/19 P, paragraphs 65 and 66.

Provisions of national law relied on

Zakon za obshtestvenite porachki (Law on the award of public contracts, 'the: ZOP'), Article 2(1), points 1 and 2, and (2), Article 18(1), point 12), Article 48(2), Article 59(2), Article 107, point 1, and Article 112(1), point 2, Article 181(4)

Naredba Nr. RD-02-20-1 ot 5 fevruari 2015 za usloviyata i reda za vlagane na stroitelni produkti v stroezhite na Republika Balgaria (Regulation No RD-02-20-1 of 5 February 2015 on the conditions and the procedure for the installation of construction products in construction works in the Republic of Bulgaria), adopted by the Ministar na regionalnoto razvitie i blagoustroystvoto (Minister for Regional

Development and Public Works) (Official Gazette No 14 of 20 February 2015, in force since 1 March 2015)

Naredba za posochvane na nerednosti, predstavlyavashti osnovania za izvarshvane na finansovi korektsii, i protsentnite pokazateli za opredelyane razmera na finansovite korektsii po reda na Zakona za upravlenie na sredstvata ot Evropeyskite strukturni i investitsionni fondove (Regulation determining irregularities warranting financial corrections and the percentage thereof to be applied in accordance with the Law on the management of ESI Funds) (adopted by Council of Ministers order No 57 of 28 March 2017, Official Gazette No 27 of 31 March 2017, in force since 31 March 2017)

Succinct presentation of the facts and procedure in the main proceedings

1 The present judicial proceedings concern a challenge to Decision No RD-02-36-313 of 20 March 2023 of the Head of the Management Authority of the 'Regions in Growth' Operational Programme 2014-2020 ('the Management Authority') imposing on the Municipality of Pleven a 25 (twenty five) % financial correction to the eligible expenditure of 1 449 180.17 Bulgarian leva (BGN) exclusive of VAT, BGN 1 739 016.20 inclusive of VAT, incurred in connection with the contract (No BG16RFOP001-1.007-0004-C01-S-09 (IRO-2541)/23.03.2021) which it had concluded with the contractor 'DIKISTROY'. The financial correction amounts in total to BGN 434 754.05 BGN inclusive of VAT.

2 The Municipality of Pleven is a beneficiary under Management Contract No RD-02-37-44 of 10 July 2020 and Annex 1 thereto (for the grant of financial aid under Priority Axis 1, 'Sustainable and integrated urban development', of the 'Regions in Growth' Operational Programme, procedure BG16RFOP001-1.001-039, 'Implementation of Integrated Plans for Urban Regeneration and Development 2014-2020', putting into effect project proposal BG16RFOP001-1.007-0004, 'Creation of a sustainable urban environment in Pleven – Stage 2), which it had concluded with the MRRB [Ministerstvo na regionalnoto razvitie i blagoustroystvoto (Ministry of Regional Development and Public Works)].

3 In connection with that contract, it conducted a public procurement procedure, more specifically a public selection procedure within the meaning of Article 18(1), point 12, of the ZOP, entitled 'Performance of construction works for the renovation of linear objects in an urban environment in Pleven, consisting of three lots'. The procurement documents contain, inter alia, the requirements referred to in the decision at issue.

4 Of the total number of 17 bids submitted, including six for Lot No 1, the committee for the examination, assessment and selection of the bids submitted, appointed by the mayor of the municipality by order of October 2020, after excluding some of the participants, put forward three participants for selection for Lot No 1. Following the opening of the price offers, two participants were selected, the third having since withdrawn its tender. The ranking of participants

for Lot No 1 was established by Decision No RD-10-159/16.02.2021 of the mayor of the municipality on the selection of contractors for tendered lots. On the basis of a report by the chairperson of the aforementioned committee stating that the name of the invitation to tender had been incorrectly cited in the minutes and in the decision, and on the basis of the chairperson's proposed correction, the contractors [to be awarded contracts under] the individual lots were determined retrospectively by Decision No RD-10-186/19.02.2021 of the mayor of the municipality. The contract for Lot 1, referred to in paragraph 1 above, was concluded on the basis of that selection. A technical specification and a work programme were attached to that contract.

5 The management authority was sent for review a control sheet expressing a suspicion of irregularities and administrative proceedings were instituted on that basis. The municipality was informed about that suspicion of irregularities by letter No 99-00-6-69/17.02.2023 and was given the opportunity to present reasons and adduce written evidence with a view to contesting the management authority's initial findings in respect of those irregularities. On 2 March 2023, the Municipality of Pleven lodged appeal No BG16RFGP001-1.007-0004-C02-M061, in which it raised the same objections as are set out in its application [to this court].

6 Among the documents submitted in the case pending before the referring court was a letter from the Bulgarski Institut po standartizatsia (Bulgarian Institute for Standardisation, 'the BIS') containing the following considerations:

'On 25 March 2005, Bulgarian standard BDS 624:1987 – concrete curbs – was replaced by the current Bulgarian standard BDS EN 1340:2005 – concrete curbs for paving. Requirements and testing procedures. The latter standard was the subject of corrigendum BDS EN 1340:2005/AC:2006.

The Bulgarian standard introducing European standard BDS EN 60332-1-2:2006 – Tests on electric and optical fibre cables under fire conditions – Part 1-2: Test for vertical flame propagation for a single insulated wire or cable – Procedure for 1 kW pre-mixed flame – is a uniformly introduced international standard, IEC 60332-1-2:2004. It was the subject of corrigendum IEC 60332-l-2: 2004/AMDl:2015 EDI and of three amendments: BDS EN 60332-1-2:2004/l1:2015, BDS EN 60332-1- 2:2004/11:2017 and BDS EN 60332-1-2:2004/A12:2021'.

On the question of whether equivalent standards exist, the letter from the BIS states: 'There is no such thing as "equivalent standards" in the context of standardisation. This follows from the principle of international, European and national standardisation to the effect that there can only be one standard for an object. Standards which contain different reference numbers or the same number but with a different year of creation cannot be equivalent.

BDS EN 1340:2005 is currently in force and repealed BDS 624:1987, while BDS EN 60332-1-2:2006 is currently in force and repealed BDS EN 50265-2-1:2002.

If a European standard is introduced as a national standard, the BIS, as the Bulgarian national standardisation body, must repeal the conflicting national standard in order to comply with the principle of harmonisation that is a key principle of the European free market.

If a new version of a standard is created, this usually repeals the old version with immediate effect. In some cases, the repeal is postponed for a certain time during which both versions of the standard are applicable, the so-called period of joint application'.

The essential arguments of the parties in the main proceedings

7 The defendant management authority contends that, in the course of the conduct of the award procedure, three infringements were permitted, only the first of which forms the subject of this request for a preliminary ruling, namely: infringement of Article 2(2) and Article 48(2) in conjunction with Article 2(1), points 1 and 2, of the ZOP – unlawful selection criterion. The technical specification for Lot No 1 lays down the following standards: – BDS 624-87; – BDS EN 1340:2005; – EN 60332-1-2. The contracting authority did not make it possible for candidates to submit a tender offering standards equivalent to these, thereby infringing Article 48(2) of the ZOP, according to which any reference to a standard, a specification, a technical assessment, a technical approval or a technical standard for comparison within the meaning of Article 1, point 2, must be accompanied by the words 'or equivalent'. In the light of the condition formulated to that effect, the management authority submits that the contracting authority wrongly restricted the possibility of participation by persons who could have delivered the contract by recourse to equivalent standards. That infringement is significant because of its potential financial repercussions. It is noted that, in accordance with Article 6 of Regulation No RD-02-20-1 of 5 February 2015 on the conditions and the procedure for the installation of construction products in construction works in the Republic of Bulgaria, construction products must meet the requirements governing their characteristics laid down in the harmonised technical specifications of Regulation (EU) No 305/2011, the regulations referred to in Article 3(3), the delegated regulations referred to in Article 3(4) and the national requirements governing intended use. When formulating the terms of the contract, however, the contracting authority has an obligation to accompany any reference to a standard with the words 'or equivalent'. Reference must be made in this regard to the case-law contained in judgment No 7298 of 16 May 2019 of the VAS [Varhoven administrativen sad (Supreme Administrative Court)] in administrative case No 2451/2019.

8 The contested decision also referred to an infringement of Article 160 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the

Council and to irregularities within the meaning of Article 2, point 36, of Regulation (EU) No 1303/2013 of the European Parliament and of the Council. According to the management authority, the latter have financial repercussions, since an irregularity may be present even in the case where there is a possibility of prejudice to the budget of the Union, there being no need to prove the existence of a specific financial repercussion. The first infringement in particular constitutes an irregularity within the meaning of point 11(b) of Annex 1 to Article 2(1) of the Regulation determining irregularities warranting financial corrections and the percentage thereof to be applied in accordance with the Law on the management of ESI Funds, since that irregularity concerns the application of award criteria which are not discriminatory on national/regional/local grounds but have the effect of restricting access for candidates or participants to the award procedure concerned. In accordance with Article 5(1) of the regulation determining irregularities, the financial correction is to be determined in accordance with the principle of proportionality, since the financial repercussions of infringements cannot actually be quantified. The financial correction was set at the highest rate of 25%, in accordance with Article 7 of the regulation determining irregularities.

9 The appeal lodged by the Municipality of Pleven on 2 March 2023 was dismissed as unfounded by the management authority.

10 That decision was challenged by the applicant, the Municipality of Pleven, on the ground that it is incompatible with material law. The management authority's findings in respect of the infringements committed by the applicant, in its capacity as public contracting authority, in the course of the invitation to tender and in the conduct of the public award procedure, as well as in the conclusion of the contract at issue, are erroneous, unfounded and incompatible with the provisions of the ZOP and the ZUT [Zakon za ustroystvo na teritoriyata (Law on Spatial Planning)]. The application states, with regard to the first infringement, that the technical specifications for Lot No 1 refer to standards BDS 624-87, BDS EN 1340:2005 and EN 60332-1-2, but do not make it possible for participants to submit a tender [based on equivalent standards]. The management authority submits that the public contracting authority wrongly restricted the eligibility to participate of persons able to submit a tender for performance of the contract [based on equivalent standards]. This, however, is not the case, for the following reasons.

11 Standard BDS 624-87 governs the material tests, properties, requirements and testing procedures for cement-bonded, unreinforced precast concrete blocks for kerbs, gutters and additional elements used in paved areas for transport and roof coverings, in accordance with the Bulgarski darzhaven standart (Bulgarian State standards). At the same time, the aforementioned standard BDS EN 1340:2005 constitutes a 'harmonised standard' within the meaning of Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products. Article 2(2) of Regulation No RD-02-20-1 of 5 February 2015 states that, 'construction products provided for in the designing of construction works and

used in the execution of those works must meet the basic requirements for construction works set out in Annex 1 to Regulation (EU) No 305/2011'. Accordingly, the failure to include the words 'or equivalent' did not have the effect of deterring potential candidates from participating in the award procedure, as the management authority submits, since, in accordance with the regulation and the technical specification, participants must use kerbs that meet the requirements of the Bulgarski darzhaven standart (Bulgarian State standards) or the standard harmonised in accordance with Regulation (EU) No 305/2011. In the present case, the equivalent to the BDS is the harmonised BDS EN standard, there being no other equivalent standard inasmuch as any other standard would be contrary to Regulation No RD-20-02-1 and Regulation (EU) No 305/2011. Although the contracting authority formally failed to comply with Article 48(2) of the ZOP, that formal infringement does not have any financial repercussions, the ESI (European and Structural Investment) Funds have not been prejudiced and the third constituent element of an irregularity is not present.

12 The application also states that standard EN 60332-1-2 lays down the flame propagation tests for cables. This is a harmonised standard for the resistance testing of vertical flame propagation on a core, an insulated wire or cable or an optical fibre cable under certain conditions. EN 60332-1-2 is a cable-testing standard which is generally applicable in the territory of the EU and is referred to in the technical specification in the context of passive fire protection measures. In this case, the aforementioned standard EN 60332-1-2 is a harmonised standard within the meaning of Regulation (EU) No 305/2011, no other standard being equivalent inasmuch as any other standard would infringe Regulation No RD-02-20-1 and Regulation (EU) No 305/2011. Although the public contracting authority did not formally comply with Article 48(2) of the ZOP, this did not have any financial repercussions and the ESI Funds were not prejudiced, which is to say that the third constituent element of an irregularity is not present.

13 For the foregoing reasons, the applicant submits that there has been no infringement of Article 2(2) and Article 48(2) in conjunction with Article 2(1), points 1 and 2, of the ZOP such as to constitute an irregularity within the meaning of point 11 of Annex 1 to Article 2(1) of the regulation determining irregularities, and therefore claims that the decision should be annulled in its entirety, including the finding of an infringement in point 1 of the contested decision.

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

14 The facts as established above raise the following questions, which are relevant to the assessment of the lawfulness of the contested decision: is there an irregularity within the meaning of Article 2, point 36, of Regulation No 1303/2013 (or Article 2, point 7, of Regulation No 1083/2006 in the light of Article 152(1) of Regulation No 1303/2013), according to which 'irregularity' means any breach of Union law, which is to say: 1. is there any evidence of an infringement of a provision of Union law resulting from an act or omission by an economic

operator; 2. is the general budget of the European Union the subject of any actual or potential prejudice in the form of an ineligible/unjustified item of expenditure; and 3. is there a causal link between the infringement and the prejudice?

15 In particular, it is for the referring court to establish, in relation to the infringement described for the purposes of the present request for a preliminary ruling, as referred to in point 1.1 of the contested decision, whether that infringement is

a) an infringement of point 11(b) of Annex 1 to Article 2(1) of the regulation determining irregularities, in the version applicable at the time of the contested decision making a financial correction – point 11: 'Use of' grounds of exclusion, selection criteria or conditions for performance of the contract or technical specifications which are not discriminatory within the meaning of point 10 of that annex but restrict access for candidates or participants'; letter b – cases in which discriminatory criteria/conditions/specifications were used but a minimum degree of competition is present, inasmuch as two or more tenders were submitted which meet the selection criteria;

b) an infringement of Article 2(2) and Article 48(2) in conjunction with Article 2(1), points 1 and 2, of the ZOP; and

c) an infringement of Article 160 if Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council.

16 In order to clarify and correctly answer some of those questions, it is necessary to interpret provisions of Community law, in particular a directive of the European Parliament and of the Council which has been transposed into Bulgarian law but the purpose and content of which are unclear as regards the alleged absence of any infringement of Article 2(2) and Article 48(2) in conjunction with Article 2(1), points 1 and 2, of the ZOP.

17 In particular, as regards the failure also to mention in the documentation the possibility of submitting a tender [based on standards], in respect of kerbs and cables, equivalent to the standards referred to in that documentation, the court took the following into account: Article 48(2) of the ZOP, which is alleged to have been infringed, provides that any reference to a provision, a specification, a technical assessment or a technical approval within the meaning of paragraph 1, point 2 thereof, must be accompanied by the words 'or equivalent'. In the present case, it is common ground that the procurement documents contained no reference to that possibility in respect of standards.

18 Article 48(2) of the ZOP transposes 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 Article 42 thereof, into national law. In accordance with the first sentence of Article 42(1), technical specifications as defined in point 1 of Annex VII are to be set out in the procurement documents. The technical specification must lay down the characteristics of construction works, services or supplies. In accordance with Article 42(2), technical

specification must afford equal access of economic operators to the procurement procedure and must not have the effect of creating unjustified obstacles to the opening up of public procurement to competition. Article 42(3(b) provides that, without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications must be formulated in one of the following ways: … b) by reference to technical specifications and, in order of reference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or – when any of those do not exist – national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference must be accompanied by the words ‘or equivalent’.

19 The aforementioned point 2 of Annex VII states that ‘“standard” means a technical specification, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory, and which is one of the following: (a) “international standard” means a standard adopted by an international standardisation organisation and made available to the general public, (b) “European standard” means a standard adopted by a European standardisation organisation and made available to the general public, (c) “national standard” means a standard adopted by a national standardisation organisation and made available to the general public’.

20 As is clear from those provisions, Article 42 of Directive [2014/24/EU] concerns a ‘standard’ in the sense of a technical specification, adopted by a recognised standardisation body for repeated or continuous application, with which compliance is not compulsory.

21 On the other hand, there is Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Directive 89/106/EEC. According to recitals 1 and 2 of that regulation, the rules of Member States require that construction works be designed and executed so as not to endanger the safety of persons, domestic animals or property nor damage the environment. Those rules have a direct influence on the requirements of construction products. Those requirements are consequently transposed to national product standards, national technical approvals and other national technical specifications and provisions related to construction products. Because of their disparity, those requirements hinder trade within the Union. Recital 14 states that, where an intended use requires threshold levels in relation to any essential characteristic to be fulfilled by construction products in Member States, those levels should be established in the harmonised technical specifications. According to recital 16, threshold levels determined by the Commission pursuant to this Regulation should be generally recognised values for the essential characteristics of the construction product in question with regard to the provisions in Member

States and should ensure a high level of protection within the meaning of Article 114 of the Treaty on the Functioning of the European Union (TFEU).

22 In the light of those considerations, harmonised standards are to be established, in accordance with the procedure laid down in Article 17(1) of that regulation, by the European standardisation bodies listed in Annex I to Directive 98/34/EC on the basis of requests (‘mandates’) issued by the Commission in accordance with Article 6 of that directive after having consulted the Standing Committee on Construction referred to in Article 64 of this Regulation.

23 The legal nature of those harmonised standards has formed the subject of the case-law of the Court of Justice of the European Union. The referring court refers to the judgment of the Court of Justice (Third Chamber) of 27 October 2016, C-613/14, paragraph 40: ‘It follows from the above that a harmonised standard such as that at issue in the main proceedings, adopted on the basis of Directive 89/106 and the references to which have been published in the Official Journal of the European Union, forms part of EU law, since it is by reference to the provisions of such a standard that it is established whether or not the presumption laid down in Article 4(2) of Directive 89/106 applies to a given product’. That presumption states that Member States must presume that the products are fit for their intended use if they enable works in which they are employed, provided the latter are properly designed and built, to satisfy the essential requirements referred to in Article 3, where those products bear the EC mark indicating their conformity with all of the provisions of that directive, including the conformity assessment procedures set out in Chapter V and the procedure laid down in Chapter III. It also refers to the judgment of the Court of Justice (First Chamber) of 17 December 2020 in Joined Cases C-475/19 P and C-688/19 P, paragraphs 65 and 66.

24 In the present case, since the aforementioned standards mentioned in relation to concrete kerbs and cables constitute harmonised standards within the meaning of the regulation, they may be regarded as binding. This raises the question as to whether they are caught by Article 42 of the public procurement directive, and the answer to that question will determine whether the contracting authority is obliged or entitled to require the performance of works [based on a standard] equivalent to the standard in question. It is important to take into consideration that, according to letter No 3527/7.06.2023 from the BIS, no other standards exist. This in turn will answer the question as to whether those standards are binding in relation to the construction products, namely kerbs and electricity cables, which the contractor must install in the works.

25 In accordance with the third paragraph of Article 267 TFEU, the Court of Justice of the European Union has exclusive jurisdiction to interpret Community law. The adjudicating chamber of the referring court, after examining the case-law of the Court of Justice of the European Union, finds that the Court of Justice has not ruled on this or a comparable question in any proceedings for interpretation or annulment. The present request for a preliminary ruling is made at the instance of the court seised. In the light of all the foregoing, the proceedings in the present

case must be stayed and a request for a preliminary ruling submitted to the Court of Justice.