Case C-459/23

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:

21 July 2023

Referring court:

Sąd Najwyższy (Poland)

Date of the decision to refer:

21 April 2023

Appellant on a point of law:

E. S.A.

Respondents on a point of law:

W. sp. z o.o.

Bank S.A.

Subject matter of the main proceedings

Action brought by E. Spółka Akcyjna (a joint stock company) in G, against W. sp. z o.o. (a public limited company) in P. and Bank Spółka Akcyjna (a joint stock company), seeking a declaration that there is no contractual obligation arising from the conclusion on 24 February 2011 by E. Spółka Akcyjna in G. and W. sp. z o.o. in P of an 'agreement for the sale of property rights' (CPA – certificate purchase agreement).

Subject matter and legal basis of the request

(1) · The EU standard for designating national judges without their consent to adjudicate in an organisational unit of a national court other than that in which they normally perform their duties. (2) Interpretation of certain provisions of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Article 2d(1)(a) of Council

Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. (3) Interpretation of the general principle which prohibits any abuse of rights. Legal basis: Article 267 TFEU.

Questions referred for a preliminary ruling

1. Must the second subparagraph of Article 19(1) TEU, in the light of the interpretation given by the Court of Justice in its judgment in Case C-487/19 *W.Ż.*, be interpreted as meaning that designating a judge of the Sąd Najwyższy (Supreme Court, Poland) , without his or her consent, to adjudicate temporarily in another chamber of the Sąd Najwyższy is, like transferring a judge of an ordinary court between two divisions of that ordinary court, in breach of the principle of the irremovability and independence of judges, where:

- the judge is appointed to adjudicate in cases whose subject matter does not coincide with the substantive jurisdiction of the chamber to which the judge of the Supreme Court was appointed to adjudicate;

- the judge has no judicial remedy against the decision regarding that designation which meets the requirements laid down in paragraph 118 of the judgment in Case C-487/18 *W.Ż.*;

- the order of the First President of the Supreme Court on the appointment to adjudicate in another chamber and the order of the President who directs the work of the Civil Chamber of the Supreme Court on the allocation of specific cases have been issued by persons appointed to the position of judge of the Supreme Court in the same circumstances as in Case C-487/18 *W.Ż.*, and, in the light of previous case-law, judicial proceedings involving such persons are either invalid or infringe a party's right to a fair trial under Article 6 ECHR;

- designating, without his or her consent, a judge to adjudicate for a fixed period in a chamber of the Supreme Court other than that in which he or she performs his or her duties, while maintaining the obligation to adjudicate in his or her home chamber, has no basis in national law;

- designating a judge, without his or her consent, to adjudicate for a fixed period in chamber of the Supreme Court other than that in which he or she performs his or her duties results in an infringement of Article 6(b) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9)?

2. Regardless of the answer to the Question 1, must the second subparagraph of Article 19(1) TEU be interpreted as meaning that a court in a formation constituted as a result of an order of the First President of the Supreme Court on

an appointment to adjudicate in another chamber of the Supreme Court and an order of the President who directs the work of the Civil Chamber of the Supreme Court on the allocation of specific cases, issued by persons appointed to the position of judge of the Sąd Najwyższy, in the same circumstances as in Case C-487/18 *W.Ż.*, does not constitute a tribunal 'established by law' where, according to previous case-law, judicial proceedings involving persons so appointed are invalid or infringe a party's right to a fair trial under Article 6 ECHR?

3. In the event that Question 1 is answered in the affirmative or Question 2 is answered to the effect that a court thus established does not constitute a tribunal 'established by law', must the second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law be interpreted as meaning that judges appointed to a formation of a court established in the manner described in Questions 1 and 2 may refuse to act in the case allocated to them (which includes refusing to adjudicate), regarding as non- existent the orders regarding designation to adjudicate in another chamber of the Sąd Najwyższy and allocation of specific cases, or are they to deliver their ruling, leaving it to the parties to decide whether to contest it on the grounds that it infringes a party's right to have a case heard by a court or tribunal which meets the requirements laid down in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights?

4. In the event that the above questions are answered to the effect that the referring court is a tribunal established by law within the meaning of the second paragraph of Article 19(1) TEU, must Article 3(3)(b) of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1, as subsequently amended), in conjunction with Article 20 and Article 1(2)(c) thereof, be interpreted as meaning that a public undertaking, as referred to in Article 2(1)(b) of the directive, carrying on activity relating to the wholesale and retail sale of electricity, is obliged to acquire, through a public procurement procedure, green certificates, as referred to in Article 2(k) to (l) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16, as subsequently amended)?

5. In the event that Question 4 is answered in the affirmative, must Article 14 of Directive 2004/17, in conjunction with Article 1(4) thereof, be interpreted as meaning that a framework agreement between such an undertaking and a renewable energy producer is to be concluded through a public procurement procedure where the estimated (albeit not specified in the agreement) total value of the green certificates acquired in performance of that agreement exceeds the threshold laid down in Article 16(a) of that directive, but the value of the individual transactions concluded in performance of the agreement does not exceed that threshold?

6. In the event that the Questions 4 and 5 are answered in the affirmative, does the conclusion of a contract in complete disregard of the rules on public procurement constitute a case referred to in Article 2d(1)(a) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14, as subsequently amended) or is it a different case of infringement of EU public procurement law which allows a contract to be declared null and void outside the procedure laid down in national law implementing the above directive?

7. In the event that Questions 4 to 6 are answered in the affirmative, must the general principle which prohibits any abuse of rights be interpreted as meaning that a contracting undertaking, as referred to in Article 2(1)(b) of Directive 2004/17, cannot seek cancellation of a contract which it concluded with a supplier in breach of national provisions implementing EU directives on public procurement where the actual reason for seeking cancellation of the contract is not compliance with EU law but a loss of profitability of performance thereof by the contracting authority?

Provisions of European Union law relied on

Second paragraph of Article 19(1) TFEU

Article 47 of the Charter of Fundamental Rights of the European Union

Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time;

Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors;

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

Provisions of national law relied on

Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym (Law of 8 December 2017 on the Supreme Court): Articles 1, 3, 30, 31 and 35

Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych (Law of 27 July 2001 on the organisation of the ordinary courts): Article 22a

Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy (Law of 26 June 1974 establishing the Labour Code): Article 140

Ustawa z dnia 29 stycznia 2004 r. – Prawo zamówień publicznych (Law of 29 January 2004 on public procurement): Articles 132, 138a, and 146

Succinct presentation of the facts and procedure in the main proceedings

1 The appellant on a point of law ('the appellant') is engaged in the trading of electricity. Its sole shareholder is E. Spółka Akcyjna. The Public Treasury holds more than 50% of the shares in that company. Respondent No 1 carries out an activity relating to the generation, transmission and distribution of electricity. Respondent No 2 is a bank.

2 On 24 February 2011, the appellant (E. Spółka Akcyjna) concluded with W. sp. z o.o. (respondent No 1) 'Agreement for the sale of property rights No [. . .]' (CPA – certificate purchase agreement). Under that agreement, respondent No 1 undertook vis-à-vis the appellant to transfer ownership of all property rights arising from certificates of origin obtained in connection with the generation of electricity from a renewable energy source (RES), and the appellant undertook to acquire all property rights from those certificates through off-exchange transactions on the property rights market of the Polish Power Exchange. The CPA stipulated the remuneration for the acquired property rights at the level of 0.91 x UsF (unit substitution fee in force in the period during which the energy from RES was generated).

3 Respondent No 1 concluded an assignment of claims agreement with respondent No 2 to secure respondent No 2's claims under the loan agreements granted to respondent No 1.

4 Initially, the appellant acquired certificates of origin from respondent No 1 pursuant to the CPA. It then made an unsuccessful attempt to renegotiate the price conditions. The CPA was executed by the parties from 22 February 2012 until 31 July 2017. In September 2017, the appellant's management board decided to discontinue the performance of approximately 150 agreements for the sale of property rights arising from certificates of origin similar to the CPA at issue in the present case. The orders for the sale of certificates of origin submitted by respondent No 1 have not been accepted by the appellant since then.

5 The appellant brought an action before the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk) seeking a declaration that there is no contractual obligation which has arisen from the conclusion of the CPA at issue.

6 In its view, the CPA agreement is absolutely null and void under Article 353^1 of the Civil Code, in conjunction with Article 58(1) thereof, in conjunction with Article 7(3) and Article 132(1)(3) of the Law of 29 January 2004 on public

procurement (consolidated text as at the date on which the CPA was concluded: Dz.U. of 2010, No 113, item 759, as amended; 'the Law on public procurement').

7 By judgment of 6 December 2018, the Regional Court, Gdańsk, dismissed the action.

8 By judgment of 13 August 2019, the Sąd Apelacyjny w Gdańsku (Court of Appeal, Gdańsk) dismissed the appeal lodged by the appellant against the judgment of the Regional Court, Gdańsk.

9 The appellant lodged an appeal on a point of law against the judgment of the Court of Appeal, Gdańsk.

10 In that appeal, it raised a number of pleas alleging infringement of national procedural and substantive law. The pleas alleging infringement of substantive law mainly concern an incorrect interpretation of various provisions of the Law on public procurement, namely one at odds with a correct interpretation of EU directives (Directives: 2004/17; 2009/28; 92/13, 2014/25). Hence, a ruling on the merits of the pleas raised in the appeal on a point of law also requires prior interpretation of the provisions of EU law which have been implemented in Polish law by the national provisions cited in the grounds of the appeal.

11 By order of 26 May 2020, the Supreme Court admitted the appeal on a point of law. By order of the President of the Civil Chamber of the Supreme Court of 2 June 2022, the appeal on a point of law was assigned to judge Karol Weitz under file reference II CSKP 1588/22. By order of the First President of the Supreme Court ('the First President') No 23/2023 of 15 February 2023 appointing a judge of the Supreme Court to adjudicate for a fixed period in the Civil Chamber, judge Dawid Miąsik was appointed to adjudicate in the Civil Chamber of the Supreme Court for a fixed period from 1 April to 30 June 2023, and the rules for allocating cases for each month of the appointment period were laid down at the same time. Subsequently, by an order of the First President of 2 March 2023, case II CSKP 1588/22 was assigned to judge of the Supreme Court Dawid Miąsik, and the basis for the change of the judge-rapporteur was abovementioned order No 25/2023, with the case expected to be heard in April 2023. By order of 22 March 2023, the date of the closed session was set for 21 April 2023. The panel of the Supreme Court thus established to hear the present case consists of two judges of the Labour and Social Insurance Chamber ('the Labour Chamber') of the Supreme Court and – as the presiding judge – a judge who normally adjudicates in the Civil Chamber of the Supreme Court. Judge of the Supreme Court Jolanta Frańczak was appointed to adjudicate in the same way as a judge-rapporteur.

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

Questions 1 to 3

12 As regards Questions 1 to 3, which are identical to those in Case C-455/23, the referring court shares the position of the referring court in that case and refers to them.

Question 4

13 That question concerns interpretation of Article 3(3) of Directive 2004/17. The issue is whether EU law must be interpreted as meaning that an electricity trader is obliged to acquire green certificates through the procedure laid down by EU public procurement law. It follows from that provision of Directive 2004/17 that the directive concerns two activities: (a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity; or (b) the supply of electricity to such networks.

14 That provision is interpreted in national case-law based on Article 132(1)(3) of the 2004 Law on public procurement as not covering traders such as the appellant. Article 132(1)(3) of the Law on public procurement has considered as sectoral activities only the 'formation of networks' which are intended to provide services relating to the production, transmission or distribution of electricity and the 'supply of electricity to such networks'. The appellant is not an electricity producer and consequently it does not supply 'electricity to the grid'. Nor does it build networks.

15 Article 132(1a) of the Law on public procurement (added by the Ustawa z dnia 22 czerwca 2016 r. o zmianie ustawy – Prawo zamówień publicznych oraz niektórych innych ustaw (Law of 22 June 2016 amending the Law on public procurement and certain other laws), Dz. U., item 1020), under which 'distribution as referred to in paragraph 1(3) and (4) shall also be understood as meaning wholesale and retail sales', has only been in force since 28 July 2016. Therefore, the rule under which the appellant, which is engaged in energy trading, is to be treated as a sectoral contracting authority, was not introduced until after the conclusion of the CPA. The addition of paragraph 1a to Article 132 of the Law on public procurement is treated in case-law as a confirmation that the practice of electricity undertakings from 2005 to 2015 of not applying the Law on public procurement to transactions to acquire green certificates is correct. That is also supported by the addition of Article 138a thereof. That provision excluded from the scope of Law on public procurement undertakings carrying on activity referred to in Article 132(1)(3) (and thus consisting in the formation of electricity networks, not the sale of electricity) with regard to the purchase of green certificates.

16 However, the Supreme Court notes that recital 23 of Directive 2014/25 makes it clear that 'production, wholesale and retail sale of electricity are covered when this Directive refers to the supply of electricity'. In that situation, it remains unclear whether Article 3(3)(b) of Directive 2004/17, which is worded in the same way (as Article 9(1)(b) of Directive 2014/25), must be interpreted having regard

to recital 23 of Directive 2014/25. The content of that recital of Directive 2014/25 ('Without in any way extending the scope of this Directive') can be read as merely confirming a specific understanding of the concept of sectoral activity, which should have been adopted under Directive 2004/17.

17 It is clear from decisions of the European Commission adopted pursuant to Directive 2004/17 (for example, Decision 2007/141/EC) that electricity trading has been regarded as a sectoral activity.

18 Question 4 also concerns interpretation of Article 3(3)(b) of Directive 2004/17, in conjunction with Article 20 thereof, and namely whether the purchase of green certificates takes place for the pursuit of an activity consisting in the supply of electricity. That is because it is a purchase made in order to meet the statutory obligation concerning support for renewable energy sources. The activity consisting in the sale of electricity can be carried on without purchasing green certificates, although that involves a substitution fee or a fine. Therefore, the purchase of green certificates is not 'for the pursuit of' an activity consisting in selling electricity.

19 On the other hand, since the legislature has imposed an obligation on electricity traders to purchase green certificates, the purchase thereof is nevertheless a consequence of carrying on an activity consisting in supplying electricity.

20 Furthermore, if it were to accepted, however, that the acquisition of green certificates does not fall within the scope of sectoral activities and therefore does not take place for the pursuit of those activities within the meaning of Article 20 of Directive 2004/17, the national legislature would not have introduced an exemption for such purchases in Article 138a(1) of the Law on public procurement. The appellant refers to the need for a broad understanding of sectoral activity and procurements made 'for the pursuit of such an activity' as including those even indirectly related to sectoral activity, with reference to the judgment of the Court of Justice of 10 April 2008, C-393/06, *Ing. Aigner, Wasser-Warme-Umwelt, GmbH* v *Fernwarme Wien GmbH* (ECLI:EU:C:2008:213, paragraphs 28 to 33). That judgment accepts that, in order for a contract to fall under the sectoral procurement regime, it is sufficient that the contract 'relates to' the sectoral activities carried on. Such relationship undoubtedly exists between the obligation to submit green certificates and the appellant's main activity of selling energy because the total amount of electricity sales determines how many green certificates the appellant must purchase on the market.

21 At the same time, in the abovementioned judgment (paragraph 27), the Court of Justice emphasised the need for a narrow interpretation of the provisions of Directive 2004/17, which would support the view that a public undertaking such as the appellant is not obliged to acquire green certificates through a public procurement procedure.

22 The referring court also points to the different objective of acquiring green certificates (to promote environmental policy) and the objectives relating to the protection of competition in respect of which the law requires that sectoral contracts be awarded in competitive procedures.

Question 5

23 Question 5 concerns whether the CPA was subject to the law on public procurement on account of its structure.

24 In proceedings thus far, it has been accepted that the CPA does not fall within the scope of public procurement law because the individual transactions involving the transfer of rights to certificates of origin concluded in performing it did not exceed the EU thresholds for sectoral contracts. Those thresholds at the date on which the CPA was concluded were EUR 387 000. It is established that the total annual value of the transactions concluded by the appellant and respondent No 1 pursuant to the CPA amounted to approximately PLN 3 000 000 (which is approximately twice the EU threshold according to the Euro exchange rate on the date on which the CPA was concluded). In performing the CPA, the parties generally concluded one transaction per month with an average value of EUR 65 000. Those transactions did not exceed the EU threshold. It was accepted that there were no grounds for considering all the on-exchange transactions as a single public contract because the CPA did not specify the amount of electricity to be covered by the certificates of origin issued by the Chair of the Polish Energy Regulatory authority, nor the amount of the appellant's supply to respondent No 1. Therefore, the CPA was not considered to be a framework contract, but merely a contract requiring that agreements for the sale of property rights be concluded, which meant that only implementing agreements (agreements for the sale of certificates of origin of energy issued to respondent No 1 in a particular month) had to be concluded through the procedure laid down in the Law on public procurement.

25 Therefore, since the CPA did not predetermine the value of the transactions concluded pursuant to it and the value of each of the implementing agreements did not exceed the EU thresholds, the CPA does not fall within the scope of EU procurement law.

26 In the view of the appellant, however, in the case of an intention to acquire goods of identical type pursuant to sales agreements concluded with a single contractor, over a predetermined period of time, to achieve a single economic goal, the value of the contract should be the total value of all goods whose acquisition is covered by the contracting authority's intention. It referred to the prohibition on splitting a contract in order to circumvent the EU thresholds under national law and Article 17(2) of Directive 2004/17. The CPA concerned implementing agreements that were identical in terms of subject matter, between the same parties, and for a specific period of time.

27 In the alternative, the appellant proposes that all the certificates of origin acquired in a particular calendar year from all renewable energy producers (including respondent No 1) for the purposes of fulfilling the obligation to submit certificates of origin for clearance purposes be regarded as the value of the contract.

28 It is therefore necessary to interpret the provisions of EU law referred to in Question 5 in order to determine whether an agreement such as a CPA, the purpose of which is to lay down the conditions relating to price and quantity under which the contracting authority will conclude future implementing agreements, is subject to procurement law as a framework agreement (Article 14 of Directive 2004/17, in conjunction with Article 1(4) thereof), and how it is to be determined that the thresholds for the EU procurement rules to apply have been exceeded for the purposes of a procedure for declaring an agreement non-existent. In such a situation, is it the contract value estimated *ex ante*, or only *ex post* on the basis of the actual value of the implementing transactions concluded in a particular calendar year, or the total value of all implementing transactions carried out, none of which individually exceeded the EU thresholds, that determines whether a contract is subject to procurement law?

Question 6

29 The contested judgment is based on the assumption that, if it were to be accepted that the sales agreement had been concluded in breach of the public procurement law, consisting in complete disregard of the procedure for concluding agreements laid down under that law, the only permissible procedure for calling into question the validity of that agreement is provided for in Article 146 of the Law on public procurement. That provision determines the conditions for cancelling a contract. At the same time, it rules out application of Article 189 of the Code of Civil Procedure (on which the appellant bases its action) to declare a contract null and void. The list of conditions for cancelling a contract under Article 146 of the Law on public procurement is limited. In the circumstances of the present case, only Article 146(1)(2) of the Law on public procurement is applicable, pursuant to which ‘a contract shall be cancelled if the contracting authority failed to publish a contract notice in the Public Procurement Bulletin or failed to communicate the contract notice to the Publications Office of the European Union’. That provision transposes into Polish law Article 2d(1)(a) of Directive 92/13, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

30 The courts of both instances interpreted that provision as covering the failure to conduct a public procurement procedure contrary to the obligation to do so. They considered that that provision constitutes a legal basis for the application of penalties to cases of unlawful direct award of a contract. Such conduct was considered by the Court of Justice to be the most serious infringement of EU law on public procurement (recital 14 of Directive 2007/66). In the view of the courts

of both instances, the contracting authority's conduct, consisting in the direct award of a public contract in disregard of the public procurement rules, is covered by the condition relating to failure to publish a contract notice. If – despite the obligation to do so – the procedure for concluding a contract required by the Law on public procurement was not carried out, an appropriate contract notice was not published either. In order to apply the procedure for cancelling a contract under Article 146 of the Law on public procurement, mere failure to comply with the obligation to publish is sufficient. Other types of infringement of the Law on public procurement are covered by the scope of the other paragraphs of Article 146 of the Law on public procurement or special provisions thereof.

31 If a substantive examination were made of the present case, that opinion would, in the view of the referring court, have to be shared. That is supported by the content of the recitals to the directive. According to recital 14 thereof, direct awards should include all contract awards made without prior publication of a contract notice. However, that would require a broad and functional interpretation of Article 146(1)(2) of the Law on public procurement, which is admissible in the light of national law.

32 However, the appellant advocates an interpretation of that provision according to which a complete failure to apply the provisions Law on public procurement when awarding a public contract cannot be classified as an infringement thereof consisting in a failure to place a contract notice in the relevant publication. According to the appellant, the list of grounds for cancelling a public procurement contract under Article 146(1) of the Law on public procurement is limited. In its view, the infringement referred to in Article 146(1)(2) of the Law on public procurement occurs only where the contract award procedure has already been initiated by the contracting authority. It argues that the legislature draws a distinction between awarding a contract without the required notice and awarding it without applying public procurement law and treats complete disapplication of the Law on public procurement as a separate requirement for infringement of that law, which is not mentioned in Article 146 thereof. Such an interpretation of Article 146 of the Law on public procurement, on the other hand, opens up the possibility, approved in academic legal writing, of applying the penalty of cancellation under Article 58(1) of the Civil Code. The appellant further argues that Directive 92/13, as amended by Directive 2007/66, is based on minimum harmonisation. The penalty of cancellation under Article 58(1) of the Civil Code is itself a more severe penalty than the penalty of ineffectiveness of a contract under Article 146 of the Law on public procurement. The latter is subject to limitations not only as regards the grounds for declaring a contract null and void, but also as regards the time limit and the entity which may request cancellation of the contract.

33 The position of the Public Procurement Office is that, apart from cases of relative nullity of a contract (voidability) for reasons relating to infringements of the procedures for awarding public contracts (specified in Article 146(1) and (6) of the Law on public procurement), 'cases of absolute nullity of a contract may arise

for reasons other than those relating to infringements of the procedures for awarding public contracts (Article 58 of the Civil Code)'. However, that position does not resolve whether a complete disregard of the procedure for concluding contracts laid down in the Law on public procurement constitutes an infringement of the procedure for awarding contracts itself.

Question 7

34 Question 7 concerns application of the principle which prohibits any abuse of rights as a general principle of EU law. The courts of both instances held that the request for a declaration that the CPA does not exist on the grounds that it was concluded in possible disregard of public procurement law could not be granted since making such a request constitutes an abuse of that right. The appellant made that request, as is apparent from the findings of fact, on account of the loss of profitability in performing that contract as a result of the fall in the price of certificates of origin on the stock market.

35 According to that principle, the addressees of EU Law may not rely on 'EU law for abusive or fraudulent ends' (see judgments of the Court of Justice of: 6 February 2018, *Altun and Others*, C-359/16, ECLI:EU:C:2018:63, paragraph 48; 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraph 37; 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99). That principle thus prevents 'incorrect' implementation of EU law. EU law is abused when an individual's action is contrary to the purpose of EU law (judgment of the Court of Justice of 26 February 2019, *T Danmark and Y Denmark*, C-116/16 and C-117/16, ECLI:EU:C:2019:135, paragraphs 76 and 79 to 80), while at the same time complying with the letter of that law. In order for there to be an abuse of rights, it must be established that the individual – by relying on EU law – obtains an 'advantage'. In the view of the referring court, an advantage is to be understood as any application of EU law in accordance with the requests of the individual relying on that law. Such an advantage may be the release of a party to proceedings from the effects of an obligation entered into by him or her in a contract contrary to EU law (national provisions implementing that law).

36 The finding of an abuse of EU law by an individual requires a test consisting of two elements: an objective one and a subjective one (judgments of the Court of Justice of: 6 February 2018, *Altun and Others*, C-359/16, ECLI:EU:C:2018:63, paragraph 50; 13 March 2014, *SICES and Others*, C-155/13, ECLI:EU:C:2014:145, paragraph 31; and 28 July 2016, *Kratzer*, C-423/15, ECLI:EU:C:2016:604, paragraph 38). The objective element of the test of abuse is that 'it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved' (judgments of the Court of Justice of: 13 March 2014, *SICES and Others*, C-155/13, ECLI:EU:C:2014:145, paragraph 32; 14 December 2000, *Emsland Starke*, C-110/99, EU:C:2000:695, paragraph 52). The subjective element focuses on the objective pursued by the individual and is

also based on an analysis of ‘a number of objective factors’ (judgment of the Court of Justice of 13 March 2014, *SICES and Others*, C-155/13, ECLI:EU:C:2014:145, paragraphs 37 and 39) from which it is apparent that the main aim of the action of the individual corresponding to the letter of the law is ‘to obtain an undue advantage’ (judgments of the Court of Justice of 13 March 2014, *SICES and Others*, C-155/13, ECLI:EU:C:2014:145, paragraph 33; and 28 July 2016, *Kratzer*, C-423/15, ECLI:EU:C:2016:604, paragraph 40).

37 In the present case, in view of the status of the prohibition of abuse of rights as a general principle of EU law, it is necessary for the Court of Justice to determine whether the raising by an individual of a plea alleging that an agreement is unlawful, on the ground that it was concluded in breach of the EU law and national public procurement law, may be classified as contrary to the purpose of EU public procurement law, where such a plea is raised by an individual in order to dispense with the need to perform a contract on account of a change in the conditions of the market environment which makes the continued performance of that agreement less profitable than anticipated at the time when it was concluded. In such circumstances, a plea alleging that an agreement is contrary to public procurement law is merely a pretext for achieving objectives quite different from those pursued by the EU legislature when it formulated the penalty for concluding a contract without following the procedure laid down by public procurement law.