

**Case C-82/24**

**Request for a preliminary ruling**

**Date lodged:**

1 February 2024

**Referring court:**

Sąd Okręgowy w Warszawie (Poland)

**Date of the decision to refer:**

21 December 2023

**Applicant:**

Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m. st. Warszawie S.A.

**Defendant:**

Veolia Water Technologies sp. z o.o.

Krüger A/S

OTV France

Haarslev Industries GmbH

Warbud S.A.

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[...]

21 December 2023

**ORDER**

The Sąd Okręgowy w Warszawie XXVI Wydział Gospodarczy (Regional Court, Warsaw, 26th Division dealing with Commercial Matters) [...]

following the hearing on 21 December 2023 in Warsaw

[...]

of the case

**brought by**

- Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m. st. Warszawie S.A. with its seat in Warsaw

against

- Veolia Water Technologies spółka z ograniczoną odpowiedzialnością with its seat in Warsaw,
- Kruger A/S with its seat in Soborg (Denmark),
- OTV France with its seat in Saint Maurice Cedex (France),
- Haarslev Industries GmbH with its seat in Bruchsal (Germany),
- and Warbud S.A. with its seat in Warsaw

for payment

**brought by**

- Veolia Water Technologies spółka z ograniczoną odpowiedzialnością with its seat in Warsaw,

against

- Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m. st. Warszawie S.A. with its seat in Warsaw

for payment

**and brought by**

- Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m. st. Warszawie S.A. with its seat in Warsaw

against

- Veolia Water Technologies spółka z ograniczoną odpowiedzialnością with its seat in Warsaw,
- Kruger A/S with its seat in Soborg (Denmark),
- OTV France with its seat in Saint Maurice Cedex (France),
- Haarslev Industries GmbH with its seat in Bruchsal (Germany),

- and Warbud S.A. with its seat in Warsaw

for payment

**decides:**

1. to refer the following question to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

Must the principles of transparency, equal treatment and fair competition referred to in Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (now Article 18(1) 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) be interpreted as precluding an interpretation of national law that would allow the provisions of a public procurement contract concluded with a consortium of entities from different EU Member States to include an obligation that may indirectly affect the determination of the price contained in the tender submitted by that contractor, which obligation is not expressly provided for in the contract or in the tender documents, but which arises from a provision of national law that does not apply directly to that contract, but is applicable by analogy?

2. to stay the proceedings in the case.

[...]

**Grounds for the order of 21 December 2023**

**1 Referring court**

2 Sąd Okręgowy w Warszawie XXVI Wydział Gospodarczy (Regional Court, Warsaw, 26th Division dealing with Commercial Matters), composed of:

[...]

**3 Parties to the main proceedings and their representatives**

**4 Applicant:**

Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m. st. Warszawie spółka akcyjna with its seat in Warsaw

[...]

**5 Defendants:**

Veolia Water Technologies spółka z ograniczoną odpowiedzialnością with its seat in Warsaw;

Krüger A/S with its seat in Soborg (Kingdom of Denmark);

OTV with its seat in Saint Maurice (French Republic);

Haarslev Industries GmbH with its seat in Bruchsal (Federal Republic of Germany);

WARBUD spółka akcyjna with its seat in Warsaw.

[...]

**6 Succinct presentation of the facts and procedure in the main proceedings [...]**

**7 Subject matter of the dispute**

The present proceedings were initiated by the contracting authority – Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m.st. Warszawie spółka akcyjna [Municipal Water and Sewage Enterprise for the Capital City of Warsaw joint-stock company] with its seat in Warsaw (Case XXVI GC 277/20), which brought an action for payment of contractual penalties amounting to PLN 22 338 591.35 together with statutory interest, to be paid jointly and severally by the defendants (in the course of the case, the applicant withdrew the action).

**8 Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m.st. Warszawie spółka akcyjna with its seat in Warsaw is also the applicant in Case XXVI GC 914/21. The contracting authority initiated the case on 14 June 2021 by bringing an action for payment of:**

- a. EUR 5 661 772.39 in contractual penalties, together with an alternative claim.
- b. PLN 11 351 601.62 (after amendment of the claim) as compensation for improper performance of the contract, or alternatively for the amount of EUR 2 533 839.65.

**9 At the same time, the leader of the contractors – Veolia Water Technologies spółka z ograniczoną odpowiedzialnością [Veolia Water Technologies limited liability company] with its seat in Warsaw – initiated Case XXVI GC 1095/20 in which it seeks payment of EUR 3 766 666.36 as reimbursement of the amounts collected by Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m.st. Warszawie spółka akcyjna with its seat in Warsaw using the bank guarantees provided by Veolia Water Technologies spółka z ograniczoną odpowiedzialnością with its seat in Warsaw.**

**10 The abovementioned cases have been joined for joint consideration as Case XXVI GC 277/20.**

**11 Relevant facts**

- 12 On 1 August 2008, Miejskie Przedsiębiorstwo Wodociągów i Kanalizacji w m.st. Warszawie spółka akcyjna with its seat in Warsaw ('the contracting authority') and a consortium consisting of Veolia Water Technologies spółka z ograniczoną odpowiedzialnością with its seat in Warsaw as the consortium leader, Krüger A/S with its seat in Soborg (Kingdom of Denmark), OTV with its seat in Saint Maurice (French Republic), Haarslev Industries GmbH with its seat in Bruchsal (Federal Republic of Germany) and WARBUD spółka akcyjna [WARBUD joint-stock company] with its seat in Warsaw ('the consortium' or 'the contractors') entered into contract No 8/JRP/R/2008 in connection with the implementation of the 'Modernisation and expansion of the Czajka sewage treatment plant (thermal treatment of sewage sludge)' project ('the contract'). The contract included, in particular, the construction of a sewage sludge thermal treatment plant, encompassing, inter alia, two recuperators on two independent waste incineration lines. The contract was concluded as a result of a public contract awarded by way of open tender in accordance with the ustawa z dnia 29 stycznia 2004 r. Prawo zamówień publicznych (Public Procurement Law of 29 January 2004). Initially, the work covered by the contract was to be completed by 30 October 2010, but subsequently the final completion date was set for 30 November 2012.
- 13 An integral part of the contract, as acknowledged by the parties, was the Quality Guarantee document (warranty card), according to which the warranty period was to start from the date of issue of the Work Completion Certificate and was to last 36 months; the warranty period was to expire no later than 30 April 2015, unless the commencement of final tests and warranty acceptance tests was prevented by circumstances for which the contractor was responsible.
- 14 In subclause 6.1 of the Quality Guarantee (warranty card), the parties included the following provision: 'Where this warranty card is silent, the relevant provisions of Polish law, including in particular the Civil Code, shall apply'. In the contract, the parties did not specify whether this reference only applied to the provisions governing the construction contract or also to the provisions governing guarantee at sale.
- 15 On 21 March 2013, the Work Completion Certificate was issued.
- 16 On 26 September 2014, the contracting authority notified the contractors of the failure of the line 2 recuperator. The recuperator was replaced by the contractors with a new one, which was commissioned on 22 February 2016. The contractors replaced the recuperator under warranty.
- 17 On 3 March 2015, the contracting authority notified the contractors of the failure of the line 1 recuperator. The recuperator was replaced by the contractors with a new one, which was commissioned on 28 April 2016. The contractors replaced the recuperator under warranty.
- 18 On 27 November 2018, the contracting authority notified the contractors of the failure of both recuperators – line 1 and line 2 – requesting that they be repaired or

replaced under warranty. The contractors responded that the warranty period had expired, and thus they had no warranty responsibility, and refused to repair or replace the recuperators under warranty.

- 19 The applicant's position is that Article 581(1) of the Civil Code concerning contracts of sale applies *mutatis mutandis* to the relationship between the parties. According to that provision, the warranty period runs anew from the time the thing is delivered free of defects or the repaired thing is returned, in view of which, at the time the failure was notified to the contractors on 27 November 2018, the subject matter of the contract was under warranty, since the 36-month warranty period ran anew from 22 February 2016 for the line 2 recuperator and from 28 April 2016 for the line 1 recuperator. The applicant also considers that in view of the contractors' refusal to repair or replace the subject matter of the contract under warranty, it is entitled to claim contractual penalties as the contractors did not rectify the recuperators' failure under warranty.
- 20 The defendants take the position that at the time the failure was notified on 27 November 2018, the subject matter of the contract was no longer covered by warranty, as its term had expired, while Article 581(1) of the Civil Code cannot be applied, since it applies to contracts of sale, and neither the contract signed by the parties nor the contracting authority's contract notice included information that that provision would apply to the warranty provided by the contractors. In view of the above, according to the defendants, applying that provision by analogy would be contrary to the principles of transparency, equal treatment and fair competition set out in Directive 2004/18/EC (now: Directive 2014/24/EU), as it would imply a reference to requirements that do not clearly arise from the tender documents or applicable national laws, but only from the interpretation of those laws. Furthermore, according to the defendants, the contract, together with the warranty card, govern the warranty terms in a comprehensive and precise manner, and thus it was not the will of the parties entering into the contract to renew the warranty.
- 21 **Relevant provisions of law**
- 22 **Provisions of national law relied on**
- 23 Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Civil Code of 23 April 1964, dziennik Ustaw (Journal of Laws) of 1964, No 16, item 93, as amended; 'the CC').
- 24 Contracting parties may arrange their legal relationship at their own discretion as long as the substance or purpose of the contract is not contrary to the properties (nature) of the relationship, the law, or the rules of social conduct (Article 353<sup>1</sup> of the CC).
- 25 If within the exercise of his duties the guarantor has delivered to the party entitled under guarantee a thing free from defects in place of the defective thing or if he or she has made essential repairs to the thing included in the scope of guarantee, the period of guarantee shall run anew from the moment of delivering the thing free

from defects or the delivery of the repaired thing. If the guarantor has replaced part of the thing, the above provision shall apply *mutatis mutandis* to the replaced part (Article 581(1) of the CC, in the title on contracts of sale).

- 26 Ustawa z dnia 29 stycznia 2004 r. Prawo zamówień Publicznych (Public Procurement Law of 29 January 2004, Journal of Laws of 2007, No 223, item 1655, as amended; ‘the former PPL’), now: ustawa z dnia 11 września 2019 r. Prawo zamówień publicznych (Public Procurement Law of 11 September 2019, Dz. U. of 2023, item 1605; ‘the PPL’).
- 27 The subject matter of the contract shall be described in an unequivocal and exhaustive manner, by means of sufficiently precise and comprehensible terms, taking into account the requirements and circumstances which could affect the preparation of a tender (Article 29(1) of the former PPL; Article 99(1) of the PPL).
- 28 The tendering specifications shall contain at least the following: 16) provisions essential to the parties which will be introduced into the concluded public procurement contract, general terms of the contract or model contract, if the contracting authority requires the economic operator to conclude a public procurement contract with it on those terms (Article 36(1)(16) of the former PPL); now: The tendering specifications shall contain at least the following: 20) the proposed provisions of the public procurement contract to be introduced into the public procurement contract (Article 134(1)(20) of the PPL).
- 29 **Provisions of EU law relied on**
- 30 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114; ‘Directive 2004/18/EC’), now: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65; ‘Directive 2014/24/EU’).
- 31 Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner (Article 2 of Directive 2004/18/EC, now Article 18(1) of Directive 2014/24/EU).
- 32 **Succinct presentation of the reasoning in the request for a preliminary ruling**
- 33 **Considerations of national law**
- 34 Articles 647–658 of the CC govern construction contracts. In those articles, there are no separate provisions on guarantees. The only references to other types of contracts are found in Article 656 of the CC, under which the provisions on contracts for a specific work apply *mutatis mutandis* to the effects of the contractor’s delay in commencing or completing the works or the effects of performing the works in a manner which is defective or incompatible with the

contract, to statutory warranty for defects as well as to the investor's right to withdraw from the contract prior to completion of the works.

- 35 In Polish law, guarantees are only directly regulated with respect to contracts of sale. Under Article 581 of the CC, if within the exercise of his or her duties the guarantor has delivered to the party entitled under guarantee a thing free from defects in place of the defective thing or if he or she has made essential repairs to the thing included within the scope of guarantee, the period of guarantee runs anew from the time the thing is delivered free of defects or the repaired thing is returned, but if the guarantor has replaced part of the thing, the above provision applies *mutatis mutandis* to the replaced part.
- 36 The provisions of the CC relating to contracts for a specific work (to which reference is made in the title of the Civil Code relating to construction contracts) do not govern guarantees either. On the other hand, on 25 December 2014, an amendment was introduced to Article 638 of the Civil Code governing contracts for a specific work: paragraph 2 was added, under which, where the buyer has been issued with a guarantee for the completion of a specific work, the provisions on guarantee at sale apply *mutatis mutandis*, but that regulation does not apply in the case at issue.
- 37 It is generally accepted in Poland, both by parties to economic transactions and in case-law, that the absence of a statutory regulation directly governing guarantees in construction contracts does not preclude parties to a legal relationship from deciding to apply a guarantee to those contracts in accordance with the principle of freedom of contract, under which contracting parties may arrange their legal relationship at their own discretion as long as the substance or purpose of the contract is not contrary to the properties (nature) of the relationship, the law, or the rules of social conduct (Article 353<sup>1</sup> of the CC).
- 38 Within the limits set out above, the parties may determine the application of the guarantee in any way they wish – using the provisions of the CC on guarantee at sale. The parties may explicitly exclude the application of those provisions and design their own arrangements, or modify those provisions, for instance by applying them only in part (by reference to individual provisions) and supplementing them with their own contractual terms.
- 39 The application of the provisions on guarantees to construction contracts by analogy to contracts of sale has been a matter of dispute both in the case-law of national courts and in jurisprudence. The referring court shares the view that given the reference in the contract to the relevant provisions of the Civil Code, to the extent that warranty on the subject matter of the construction contract is not governed by contractual provisions, the provisions of the Civil Code on guarantee at sale should apply thereto.
- 40 At the same time, national laws on procurement do not regulate the abovementioned issue either. They only refer to the subject matter of the contract

in general and stipulate that the requirements and circumstances which could affect the preparation of a tender should be described in precise terms. However, the information that must be included in the contract notice does not include, for instance, information on applicable laws, as it is presumed that entities engaging in business activity are aware of generally applicable laws, even where the application of certain legal norms is controversial.

- 41 Having regard to the above, the referring court is of the opinion that national public procurement law (irrespective of which statute governing that issue is applicable) does not preclude the application by analogy of provisions of national law which are not explicitly referred to in the contractual provisions, in the tender documents, and in the laws governing the type of contract which the tender concerns.
- 42 The evidentiary proceedings conducted did not provide grounds to establish that the parties effectively excluded the application of Article 581 of the CC; as a consequence, the warranty period would begin to run anew as a result of the recuperators being replaced with ones that are free of defects.
- 43 **Considerations of EU law**
- 44 The applicant's position as to the application by analogy of the provisions on guarantee at sale to the contract between the parties is correct in the context of national law, which should result in a finding that the warranty was renewed. It must therefore be assessed whether, in view of the cross-border nature of the contract and the fact that the defendants are a consortium composed of entities from different Member States, the provisions of EU law do not preclude that interpretation of national law.
- 45 Pursuant to Article 2 of Directive 2004/18/EC (now Article 18(1) of Directive 2014/24/EU), contracting authorities must treat economic operators equally and without discrimination and must act in a transparent and proportionate manner.
- 46 The principles of equal treatment and non-discrimination require that all tenderers have the same opportunities when preparing their tenders, and that all tenders must be subject to the same conditions. That principle does not conflict with the requirements imposed on contractors, with the proviso that those requirements must be imposed on contractors to the same extent (judgment of 10 October 2013, *Manova*, C- 336/12, EU:C:2013:647).
- 47 As regards the principle of transparency, the Court of Justice, for instance in its judgment in Case C-35/17, held that that obligation implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (see, to that effect, the judgment of

6 November 2014, *Cartiera dell'Adda*, C-42/13, EU:C:2014:2345, paragraph 44 and the case-law cited, and the judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 36).

- 48 In light of the above principles, it is questionable whether and to what extent the parties' obligations that were not explicitly indicated in the public procurement contract or in the tender documents can be determined on the basis of provisions of national law applied by analogy at the stage of performance of the public contract.
- 49 The question is whether it is compatible with the principle of transparency to derive the contractor's obligations from an interpretation of the law contained in national case-law, which is particularly disadvantageous for tenderers established in other Member States, inasmuch as their level of knowledge of national law and its interpretation, and of the practice of the national authorities, cannot be compared to that of national tenderers.
- 50 The above applies, in particular, to an interpretation of national law that is based not only on the provisions of national law directly applicable to the type of contract in question, but also on the provisions applied as a result of supplementing national law by analogy with provisions applicable to other types of contracts.
- 51 Importantly, the application of such provisions by analogy may have an indirect effect on the scope of the contractors' obligations arising from the terms of the contract, but not explicitly stated in the contract notice or specifications. The scope of those obligations, in turn, has a direct impact on the price stated in the contractors' tenders, since, for obvious reasons, entities participating in tendering procedures, as entrepreneurs, act with the aim of making a profit, and thus the tenders they submit must include remuneration in excess of the value of the services they will be obliged to provide under the contract. In view of the above, failure to precisely specify the scope of those obligations, for instance by not stating explicitly that the replacement of parts of the subject matter of the contract with new ones will result in the warranty period running anew, may affect the bid prices submitted, and ultimately, with regard to tenderers without full knowledge of all aspects of the national legal order, may result in a situation where a tenderer submits a tender that it would not have submitted had it been fully aware of the applicable regulations.
- 52 The Court of Justice has already held that the principle of equal treatment and the obligation of transparency must be interpreted as precluding an economic operator from being excluded from a procedure for the award of a public contract as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national

authorities or administrative courts (see, to that effect, the judgment of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 51).

53 Although the Court's ruling cited above referred to a different issue related to public procurement (namely the exclusion of a contractor from a tender), the conclusion itself, which states that where the obligations of a participant in a public procurement procedure do not arise directly from the applicable national law and tender documents, those obligations must not be derived solely from an interpretation of a national law, should have broader application. However, given the different substance of the abovementioned ruling (which concerns the tendering procedure stage) compared to the present case (which concerns the stage of performance of a public contract), referring a question to the Court of Justice is justified. Moreover, in the context of the issue at hand, a tenderer that knows how the law is applied in practice in a given Member State will factor into the [tender] price the potential risk of the guarantee being renewed and will submit a less favourable tender. Such a situation could also distort competition in the single market and is not desirable. On the other hand, the principles of non-discrimination and equal treatment of entities from different Member States should result in a situation in which the contract and tender documents are prepared in a manner that allows all reasonably informed tenderers exercising ordinary care to calculate a price on the basis of clearly stated obligations. Thus, it appears questionable whether to allow the scope of those obligations to be determined on the basis of national law applied by analogy, merely on the basis of a general reference contained in the contract. Determining within the time specified in the public procurement procedure that the provisions of another type of contract apply by analogy to the contract designated in the procedure goes beyond ordinary care on the part of tenderers, especially where that interpretation results from the practice of national authorities, which is not uniform.

54 **The question referred and the proposed answer**

55 In view of the foregoing, the following question is referred to the Court of Justice of the European Union pursuant to Article 267 TFEU:

Must the principles of transparency, equal treatment and fair competition referred to in Article 2 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (now Article 18(1) 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) be interpreted as precluding an interpretation of national law that would allow the provisions of a public procurement contract concluded with a consortium consisting of entities from different EU Member States to include an obligation that may indirectly affect the determination of the price contained in the tender submitted by that contractor, which obligation is not expressly provided for in the contract or in the tender documents, but arises from a provision of national law that does not apply directly to that contract, but is applicable by analogy?

56 The referring court proposes that the question should be answered in the affirmative.

WORKING DOCUMENT