

**Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Lithuania) lodged on 18 October 2016 — Šiaulių regiono atliekų tvarkymo centras v 'Specializuotas transportas' UAB**

(Case C-531/16)

(2017/C 006/34)

*Language of the case: Lithuanian*

### Referring court

Lietuvos Aukščiausiasis Teismas

### Parties to the main proceedings

*Appellants in cassation:* Šiaulių regiono atliekų tvarkymo centras, 'Specializuotas transportas' UAB

*Other parties:* 'VSA Vilnius' UAB, 'Švarinta' UAB, 'Specialus autotransportas' UAB, 'Ecoservice' UAB

### Questions referred

1. Must the free movement of persons and services set out, respectively, in Articles 45 TFEU and 56 TFEU, the principles of equality of tenderers and of transparency set out in Article 2 of Directive 2004/18 <sup>(1)</sup> and the principle, which flows from the aforementioned principles, of free and fair competition between economic operators (together or separately, but without limitation to those provisions) be understood and interpreted as meaning that:

if related tenderers, whose economic, management, financial or other links may give rise to doubts as to their independence and the protection of confidential information and/or may provide the preconditions (potential) for them to have an advantage over other tenderers, have decided to submit separate (independent) tenders in the same public procurement procedure, are they, in any event, under a duty to disclose those links between them to the contracting authority, even if the contracting authority does not inquire of them separately, irrespective of whether or not the national legal rules governing public procurement state that such a duty does in fact exist?

2. If the answer to the first question:

(a) is in the affirmative (that is to say, tenderers must in any event disclose their links to the contracting authority), is the circumstance that that duty was not complied with in such a case, or that it was not properly complied with, sufficient for the contracting authority to take the view, or for a review body (court) to decide, that related tenderers which have submitted separate tenders in the same public procurement procedure are participating without being genuinely in competition (and are engaged in a pretence of competition)?

(b) is in the negative (that is to say, tenderers do not have any additional duty — which is not laid down in legislation or in the tendering conditions — to disclose their links), must the risk posed by participation of related economic operators and the risk of the consequences flowing from this then be borne by the contracting authority, if the contracting authority did not indicate in the public tendering documentation that tenderers were under such a duty of disclosure?

3. Irrespective of the answer to the first question, and having regard to the judgment of the Court of Justice in Case C-538/13, *eVigilo*, must the provisions of law referred to in the first question and the third subparagraph of Article 1(1) of Directive 89/665 <sup>(2)</sup> and Article 2(1)(b) of that directive (together or separately, but without limitation to those provisions) be understood and interpreted as meaning that:

(a) if, in the course of the public procurement procedure, it becomes clear, in whatever way, to the contracting authority that significant links (connections) exist between certain tenderers, that contracting authority must, irrespective of its own assessment of that fact and (or) of other circumstances (for example, the formal and substantive dissimilarity of the tenders submitted by the tenderers, the public commitment given by a tenderer to engage in fair competition with other tenderers, and so forth), separately address the related tenderers and request them to clarify whether and how their personal situation is compatible with free and fair competition between tenderers?

- (b) if the contracting authority has such a duty but fails to discharge it, is there a sufficient basis for the court to declare the actions of that contracting authority to be unlawful, as having failed to ensure procedural transparency and objectivity, and as having failed to request evidence from the applicant or having failed to take a decision, on its own initiative, as to the possible influence that the personal situation of related persons might have on the outcome of the tendering procedure?
4. Must the legal provisions referred to in the third question and Article 101(1) TFEU (together or separately, but without limitation to those provisions), be understood and interpreted, in the light of the judgments of the Court of Justice in Case C-538/13, *eVigilo*, Case C-74/14, *Eturas and Others*, and Case C-542/14, *VM Remonts*, as meaning that:
- (a) where a tenderer (the applicant) has become aware of the rejection of the lowest-priced tender submitted by one of two related tenderers in a public tendering procedure (tenderer A) and of the fact that the other tenderer (tenderer B) has been declared the successful tenderer, and also having regard to other circumstances connected with those tenderers and their participation in the tendering procedure (*the fact that tenderers A and B have the same board of directors; the fact that they have the same parent company, which did not take part in the tendering procedure; the fact that tenderers A and B did not disclose their links to the contracting authority and did not separately provide additional clarifications as to those links, inter alia because no inquiries had been made of them; the fact that tenderer A provided, in its tender, inconsistent information on the compliance by the proposed means of transport (refuse lorries) with the EURO V condition of the call for tenders; the fact that that tenderer, which submitted the lowest-priced tender, which was rejected because of deficiencies identified in it, first, did not challenge the contracting authority's decision and, second, lodged an appeal against the judgment of the court of first instance, in which appeal, inter alia, it [challenged] the lawfulness of the rejection of its tender; etc.*), and where, in respect of all of those circumstances, the contracting authority did not take any action, is that information alone sufficient to found a claim addressed to the review body that it should regard as unlawful the actions of the contracting authority in failing to ensure procedural transparency and objectivity, and, in addition, in not requiring the applicant to provide concrete evidence that tenderers A and B were acting unfairly?
- (b) tenderers A and B did not prove to the contracting authority that they were genuinely and fairly taking part in the public tendering procedure solely because tenderer B voluntarily submitted a declaration of genuine participation, the management quality standards for participating in public tendering were applied by tenderer B, and, in addition, the tenders submitted by those tenderers were not formally and substantively identical?
5. Can the actions of mutually related economic operators (both of which are subsidiaries of the same company) which are participating separately in the same tendering procedure, the value of which reaches the value for international competitive tendering, and where the seat of the contracting authority which announced the tendering procedure and the place where the services are to be provided are not very far distant from another Member State (the Republic of Latvia), be in principle assessed — regard being had to, inter alia, the voluntary submission by one of those economic operators that it would be engaging in fair competition — under the provisions of Article 101 TFEU and the case-law of the Court of Justice which interprets those provisions?

<sup>(1)</sup> 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).

<sup>(2)</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

**Request for a preliminary ruling from the Lietuvos vyriausiasis administracinis teismas (Lithuania)  
lodged on 18 October 2016 — Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų  
ministerijos v AB SEB bankas**

(Case C-532/16)

(2017/C 006/35)

Language of the case: Lithuanian

**Referring court**

Lietuvos vyriausiasis administracinis teismas