Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 12 May 2022[1]

Case C-54/21

Konsorcjum: ANTEA POLSKA S.A., Pectore-Eco sp. z o.o., Instytut Ochrony Środowiska – Państwowy lnstytut Badawczy

v

Państwowe Gospodarstwo Wodne Wody Polskie,

interveners:

ARUP Polska sp. z o.o.,

CDM Smith sp. z o.o.,

Konsorcjum: Multiconsult Polska Sp. z o.o., ARCADlS Sp. z o.o., HYDROCONSULT sp. z o.o. Biuro Studiów i Badań Hydrogeologicznych i Geofizycznych

(Request for a preliminary ruling from the Krajowa Izba Odwoławcza (Public Procurement Office, Poland))

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 21 – Confidentiality – Reasoned request for a declaration of confidentiality and proof – Powers of the contracting authority – Declaration of confidentiality – Statement of reasons – Modification of the scope of confidentiality by national legislation – Trade secrets – Directive (EU) 2016/943 – Applicability – Assessment of confidentiality in relation to categories of documents – Exclusion – Case-by-case assessment)

1. In the present reference for a preliminary ruling, the Court is asked to specify the limits of the confidentiality of information included by tenderers in their tenders in procedures for the award of public contracts.

2. In the judgment in *Klaipėdos*,[2] delivered after this request for a preliminary ruling was registered, the Court addressed the issues raised by the articles of Directive 2014/24/EU,[3] in particular Article 21, that deal with the confidentiality of such information.

[1] Original language: Spanish.

[2] Judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700; 'the judgment in *Klaipėdos*'). Its bearing on this case was addressed by those who attended the hearing.

[3] Directive of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

3. The findings in that judgment provide answers to some of the questions raised by the Krajowa Izba Odwoławcza (Public Procurement Office, Poland), which is the referring body. [4]

I. Legal framework

A. European Union law

1. Directive 2014/24

4. Article 21 ('Confidentiality') states:

'1. Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

2. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.'

5. Article 50 ('Contract award notices') provides:

'…

4. Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.'

6. In accordance with Article 55 ('Informing candidates and tenderers'):

'…

3. Contracting authorities may decide to withhold certain information referred to in paragraphs 1 and 2, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.'

[4] The standing of that body to make a reference for a preliminary ruling was recognised by the Court in the judgments of 13 December 2012, *Forposta and ABC Direct Contact* (C-465/11, EU:C:2012:801), and of 11 May 2017, *Archus and Gama* (C-131/16, EU:C:2017:358), inter alia.

2. Directive (EU) 2016/943 [5]

7. According to recital 18:

'Furthermore, the acquisition, use or disclosure of trade secrets, whenever imposed or permitted by law, should be treated as lawful for the purposes of this Directive. … In particular, this Directive should not release public authorities from the confidentiality obligations to which they are subject in respect of information passed on by trade secret holders, irrespective of whether those obligations are laid down in Union or national law. Such confidentiality obligations include, inter alia, the obligations in respect of information forwarded to contracting authorities in the context of procurement procedures, as laid down, for example, in … Directive 2014/24/EU …'

8. Article 1 ('Subject matter and scope') states:

'…

2. This Directive shall not affect:

…

(c) the application of Union or national rules requiring or allowing Union institutions and bodies or national public authorities to disclose information submitted by businesses which those institutions, bodies or authorities hold pursuant to, and in compliance with, the obligations and prerogatives set out in Union or national law;

…'

9. Article 2 ('Definitions') states:

'For the purposes of this Directive, the following definitions apply:

(1) "trade secret" means information which meets all of the following requirements:

(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) it has commercial value because it is secret;

(c) it has been subject to reasonable steps under the circumstances, by the persons lawfully in control of the information, to keep it secret;

…'

10. Article 3 ('Lawful acquisition, use and disclosure of trade secrets') provides:

'…

[5] Directive of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1).

2. The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law.'

B. Polish law

1. Ustawa z dnia 29 stycznia 2004 r. – Prawo zamówień publicznych [6]

11. Article 7 provides:

'1. The contracting authority shall prepare and conduct the procurement procedure in a manner ensuring fair competition and equal treatment of all economic operators and in accordance with the principles of proportionality and transparency.

…'

12. Article 8 reads:

'1. The procurement procedure shall be public.

2. The contracting authority may restrict access to information related to the procurement procedure only in the cases determined by law.

2a. The contracting authority may set out in the tender specifications requirements that must be met in order to maintain the confidentiality of information provided to the economic operator in the course of the procedure.

3. Information constituting a business secret within the meaning of the provisions on unfair competition shall not be disclosed if the economic operator, not later than the deadline for submission of tenders or requests to participate, has stated that the information concerned may not be disclosed and has demonstrated that the reserved information constitutes a business secret. An economic operator may not designate as confidential the information referred to in Article 86(4). This provision shall apply *mutatis mutandis* to competitions.

…'

2. Ustawa z dnia 16 kwietnia 1993 r. o zwalczaniu nieuczciwej konkurencji [7]

13. Article 11(2) states:

'A "business secret" shall be construed as technical, technological, scientific and organisational information of an undertaking or other information of economic value that is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons normally dealing with that type of information, provided that the entity authorised to use such information or to which such information is available has taken reasonable measures to keep it confidential.'

6 Law on public procurement of 29 January 2004.

7 Law on unfair competition of 16 April 1993.

II. Facts, procedure and questions referred for a preliminary ruling

14. In 2019,[8] the Państwowe Gospodarstwo Wodne Wody Polskie (National Water Management Authority, Poland) launched an open procedure to award a contract for the 'preparation of draft second updates of river basin management plans (II aPGW) together with the methodologies'.

15. The tender specifications stated that tenders would be evaluated on the basis of three criteria: price (40%), concept of the study (42%) and description of the manner of performance of the contract (18%).

16. Tenders were submitted by four operators, including a consortium of undertakings headed up by ANTEA POLSKA S.A. ('Antea Polska').[9] The contract was awarded to CDM Smith Sp. z o.o. ('CDM').

17. Antea Polska, which had been ranked second, appealed the award before the Krajowa Izba Odwoławcza (Public Procurement Office). Among its claims, it sought access to certain documents and to the information described by CDM and other tenderers as being a trade secret.

18. Antea Polska was of the view that classifying that information as secret infringed the principles of equal treatment and transparency requiring confidentiality to be interpreted strictly. It further claimed that the excessive admittance of information as confidential, combined with the absence of an adequate statement of reasons for the classifications granted, had deprived it of its right to an effective remedy, since it was unaware of the details of its competitors' tenders.

19. In rebuttal of that position, the contracting authority argued, inter alia, that:

— The holders of the confidential information had discharged their duty to provide a reasonable explanation for the need to protect that information as secret.

— The concept of the study and the description of the manner of performance of the contract are authored studies the disclosure of which could prejudice the interests of their creator.

— The information contained in CDM's tender had commercial value. Its disclosure would allow competitors to use the tenderer's know-how and the technical or organisational solutions it had developed.

— The list of persons due to participate in the performance of the contract contains data by which those persons could be identified, an eventuality which could expose the economic operator to the risk of loss if the competition tried to 'poach' the persons in question. Similarly, the data in the tender form contain detailed information on the third parties providing resources which has a commercial value.

[8] Contract notice published in the *Official Journal of the European Union* on19 December 2019 under number 2019/S 245 603343.

[9] In addition to Antea Polska, the consortium comprised Pectore-Eco sp. z o.o. and the Instytut Ochrony Środowiska – Państwowy Instytut Badawczy.

20. It was in those circumstances that the Krajowa Izba Odwoławcza (Public Procurement Office), which is responsible for adjudicating on the challenge to the contracting authority's decision, referred seven questions for a preliminary ruling. As directed by the Court, I shall deal only with the first four, which are worded as follows:

'(1) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24 … permit Article 21(1) of Directive 2014/24 and Article 2(1) of Directive 2016/943 …, including in particular the terms "is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible" and "has commercial value because it is secret" and the indication that "the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential", to be interpreted in such a manner that an economic operator can reserve, as a trade secret, any information on the ground that it does not wish to disclose that information to competing economic operators?

(2) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24 permit Article 21(1) of Directive 2014/24 and Article 2(1) of Directive 2016/943 to be interpreted in such a manner that economic operators competing for a public contract may reserve the documents referred to in Articles 59 and 60 of Directive 2014/24 and in Annex XII to Directive 2014/24 in whole or in part as trade secrets, including in particular the description of their experience, the list of references, the list of persons proposed to perform the contract and their professional qualifications, the names and capacities of the entities whose capacities they rely on or of their subcontractors, where those documents are required in order to prove fulfilment of the conditions for participation in the procedure or for the purpose of conducting an evaluation in accordance with the criteria for the evaluation of tenders or for ascertaining the compliance of the tender with the other requirements of the contracting authority contained in the procedure documentation (contract notice, tender specifications)?

(3) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24, read in conjunction with Articles 58(1), 63(1) and 67(2)(b) thereof, permit the contracting authority to accept the economic operator's declaration that it has at its disposal the personal resources required by the contracting authority or declared by the economic operator, the entities on whose resources it wishes to rely or their subcontractors, which it must demonstrate to the contracting authority in accordance with applicable laws, and at the same time the economic operator's declaration that the mere disclosure to competing economic operators of the details of those persons or entities (their names, experience and qualifications) may result in their being "poached" by those economic operators, with the result that it is necessary to treat that information as a trade secret? In the light of the foregoing, may such an impermanent link between the economic operator and those persons and entities be regarded as evidence of the availability of the resource in question and, in particular, may the economic operator be awarded additional points under the tender evaluation criteria?

(4) Do the principle of equal and non-discriminatory treatment of economic operators and the principle of transparency set out in Article 18(1) of Directive 2014/24 permit Article 21(1) of Directive 2014/24 and Article 2(1) of Directive 2016/943 to be interpreted in such a manner that economic operators competing for a public contract may reserve as trade secrets documents required for the purpose of examining the compliance of their tender with the

requirements of the contracting authority contained in the tender specifications (including the description of the subject matter of the contract) or for the purpose of evaluating the tender under the tender evaluation criteria, particularly where those documents relate to the fulfilment of the requirements of the contracting authority laid down in the tender specifications, in applicable laws or in other documents which are generally available or accessible to interested parties, and in particular where that evaluation does not take place according to objectively comparable schemes and mathematically or physically measurable and comparable indicators, but rather according to an individual assessment by the contracting authority? Consequently, are Article 21(1) of Directive 2014/24 and Article 2(1) of Directive 2016/943 to be interpreted as meaning that a declaration made by an economic operator in the context of its tender that it will perform the subject matter of the contract in accordance with the contracting authority's requirements included in the tender specifications, compliance with which is monitored and assessed by the contracting authority, can be regarded as a trade secret of the economic operator in question, even though it is for the economic operator to choose the methods intended to achieve the result required by the contracting authority (the subject matter of the contract)?'

III. Procedure before the Court

21. The request for a preliminary ruling was registered at the Court on 29 January 2021.

22. Written observations were lodged by Antea Polska, Państwowe Gospodarstwo Wodne Wody Polskie (National Water Management Authority), the Austrian and Polish Governments and the European Commission.

23. The hearing, held on 16 March 2022, was attended by Antea Polska, Państwowe Gospodarstwo Wodne Wody Polskie (National Water Management Authority), CDM, the Polish Government and the Commission.

IV. Assessment

A. Preliminary observation: Applicable directive

24. In the judgment in *Klaipėdos* (paragraphs 96 to 102), the Court held that the legislation applicable to cases relating to the protection of confidentiality in procedures for the award of public contracts is contained in Directive 2014/24, which is the *lex specialis*, and not in Directive 2016/943.

25. That finding took into account, among other considerations, the fact that:

– 'Having regard to its purpose, as set out in Article 1(1) thereof, read in conjunction with recital 4 thereof, Directive 2016/943 concerns only the unlawful acquisition, use or disclosure of trade secrets *and does not provide for measures to protect the confidentiality of trade secrets in other types of court proceedings, such as proceedings relating to public procurement*'.[10]

[10] Judgment in *Klaipėdos*, paragraph 97 (emphasis added). In that case, the reference to court proceedings was apposite, as the question referred concerned the interpretation of Article 9 of Directive 2016/943 ('Preservation of the confidentiality of trade secrets in the course of legal proceedings'). The lines of reasoning informing that judgment can nonetheless readily be extended to the prior stage, in which the contracting authority must adjudicate on confidentiality.

– Recital 18 of Directive 2016/943 reads '… this Directive should not release public authorities from the confidentiality obligations to which they are subject in respect of information passed on by trade secret holders, irrespective of whether those obligations are laid down in Union or national law. Such confidentiality obligations include, inter alia, the obligations in respect of information forwarded to contracting authorities in the context of procurement procedures, as laid down, for example, in … Directive [2014/24] …'.

26. On that basis, there is no reason why account should not be taken of the concepts under Directive 2016/943[11] where, as here, the national legislation refers to them in laying down the rules governing confidentiality in public procurement procedures. I shall come back to this point later.

B. First question

27. The referring court wishes to ascertain first and foremost whether the interpretation of Article 21 of Directive 2014/24[12] authorises the tenderer to classify as confidential, on the ground that it is a trade secret, any information which it does not wish to disclose to its competitors.

28. It must be assumed that the concern which the referring court raises by that question has to do not so much which the tenderer's unilateral action as with the consequences which that action has for the contracting authority.

29. To my mind, the answer can be inferred from the judgment in *Klaipėdos*, where the Court held:

– '… the principal objective of the EU rules on public procurement is the opening-up of public procurement to undistorted competition in all the Member States and …, in order to achieve that objective, it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures.'[13]

– 'It follows from the provisions of Directive 2014/24, cited in paragraphs 113 and 114 [of this judgment] [Article 21(1) and (2), Article 50 and Article 55(2)(c) of Directive 2014/24], and from … case-law …, that a contracting authority which has received a request from an economic operator for disclosure of information deemed confidential in the tender of the competitor to which the contract was awarded, must not, in principle, disclose that information.'[14]

– 'However, … the contracting authority cannot be bound by an economic operator's mere claim that the information submitted is confidential. Such an operator must demonstrate the genuinely confidential nature of the information which it claims should not be disclosed, by establishing, for example, that that information contains technical or trade secrets, that it

[11] Some language versions (the Spanish, English, German, Romanian, Italian and Portuguese) refer without distinction to 'trade secrets' both in Directive 2014/24 and in Directive 2016/943. Other versions (such as the Polish and the French, for example) use the expression 'trade secrets' in the former directive and 'business secrets' in the latter. The discrepancy has no bearing on this dispute, since the two terms are equivalent.

[12] Although the question also cites the principles of equal treatment of economic operators and transparency, it can be answered simply on the basis of an interpretation of Article 21 of Directive 2014/24, which implements those principles.

[13] Judgment in *Klaipėdos*, paragraph 115.

[14] *Ibidem*, paragraph 116.

could be used to distort competition or that its disclosure could be damaging to that operator.' [15]

– '… If the contracting authority has doubts as to the confidential nature of the information submitted by that operator, it must, before taking a decision granting the applicant access to that information, give the operator concerned the opportunity to provide additional evidence in order to ensure that its rights of defence are respected.' [16]

30. Thus, both the contracting authority and the bodies reviewing its decisions are entrusted with the task of evaluating the confidentiality claimed by the tenderer, rather than simply being able to assume that assertion to be true. They have sufficient powers to combat what, according to the order for reference, would constitute an abusive practice ('pathological abuse') on the part of tenderers used to making disproportionate use of the option of classifying as confidential elements of their tenders which are in fact not.

31. It follows from the order for reference that, notwithstanding that the Polish legislature sought to limit the extent of confidentiality, certain tenderers systematically claim that a large part of the information contained in their tenders is a trade secret and contracting authorities are inclined to give credence to such claims. [17]

32. If that is the case and there is an anomaly in the implementation of the national provision transposing Directive 2014/24, it is for the national courts to correct that anomaly in accordance with EU law.

33. Although the referring body does not devote particular attention to the issue which I shall be looking at now, the restriction imposed by the national provision (Article 8(3) of the Law on public procurement), which prevents the disclosure only of the information constituting a trade secret within the meaning of the legislation on unfair competition, was discussed both in the parties' observations and at the hearing. [18]

34. That issue had to do with whether the aforementioned national provision is compliant with Article 21 of Directive 2014/24, which protects a much broader sphere of confidentiality than technical and trade secrets [19] (it also covers, for example, 'confidential aspects of tenders').

[15] *Ibidem*, paragraph 117.

[16] *Ibidem*, paragraph 118.

[17] Paragraph IV.B of the order for reference. The referring court explains that the contracting authorities have two motivations for acting in this way: on the one hand, they have a fear of disclosing documents submitted as confidential that is borne of a desire not to expose themselves to difficulties or to incur liability; and, on the other hand, such opacity suits them, inasmuch as it renders their decisions practically unchallengeable, since tenderers lack information on the qualities or weaknesses of the successful tenderer's tender.

[18] That lack of attention may be due to the fact, as explained by the Polish Government at the hearing, that, if the information included in the successful tender is secret, it will fall within the concept of a trade secret. There will therefore be no need to discuss the remaining concepts under Article 21 of Directive 2014/24.

[19] For the purposes of Directive 2016/943, technical secrets form part of trade secrets. Recital 14 thereof defines technical knowledge as being a component of 'trade secrets'.

35. As I have explained previously,[20] in accordance with Article 21 of Directive 2014/24, protection is not confined to technical and trade secrets but also extends to, inter alia, the confidential aspects of tenders. That provision may therefore cover information that cannot strictly be classified as a technical or trade secret. In my view, that same idea is latent in various passages of the judgment in *Klaipèdos*.[21]

36. In so far as the reform of Article 11 of the Law on unfair competition,[22] which transposes Directive 2016/943, includes the definition of 'trade secret' contained in that directive, the Polish legislation on public procurement arrives, via that chain of references, at a concept of 'trade secret' as that term is used in Directive 2016/943.[23]

37. This indirectly raises the question as to whether Article 21 of Directive 2014/24 is compatible with domestic legislation which confers on confidentiality a more restricted scope than that specified in that provision.

38. At first sight, there would appear to be no reason why the national law should not contain such a restriction, since Directive 2014/24 applies 'unless otherwise provided in this Directive or in the national law to which the contracting authority is subject'.

39. That caveat confers on Member States a discretion similar to that conferred by other provisions of Directive 2014/24 that refer to national legislation. An example is Article 57(7) of Directive 2014/24, which requires Member States to specify the implementing conditions for that article, 'having regard to Union law'.

40. The Court, however, has adopted the interpretation that 'the Member States' discretion is not absolute and …, once a Member State decides to incorporate one of the optional grounds for exclusion provided for in Directive 2014/24, it must respect the essential characteristics thereof, as expressed in that directive. By stipulating that the Member States are to specify "the implementing conditions for this Article" "having regard to Union law", Article 57(7) of Directive 2014/24 prevents Member States from distorting the grounds for exclusion laid down in that provision or ignoring the objectives or principles underlying each of those grounds'.[24]

41. In my opinion, that case-law is transposable, by analogy, to this case. Since Member States may modulate the scope of confidentiality, provided that they have due regard for EU law, there is in principle no reason why the types of information benefiting from protection should not be confined to 'trade secrets' and, as such, be more restricted than under the general provision contained in Article 21 of Directive 2014/24.

[20] Opinion in *Klaipèdos* (C-927/19, EU:C:2021:295, point 44).

[21] For example, in paragraph 130, which refers to the 'need to protect *genuinely confidential information and in particular the trade secrets* of participants in the procurement procedure'. Emphasis added.

[22] The Polish Government confirmed at the hearing that the ustawa z dnia 5 lipca 2018 r. o zmianie ustawy o zwalczaniu nieuczciwej konkurencji oraz niektórych innych ustaw (Law amending the Law on unfair competition and other Laws (Dz. U. 2018/1637 z dnia 2018.08.27)) transposed Directive 2016/943 into domestic law.

[23] A comparison of Article 11(2) of the Law on unfair competition with Article 2(1) of Directive 2016/943 points to the existence between the concepts of trade secret as employed in those two texts respectively of a substantial overlap which the referring court does not suggest is in any way problematic.

[24] Judgment of 19 June 2019, *Meca* (C-41/18, EU:C:2019:507, paragraph 33). This view is reiterated in the order of 20 November 2019, *Indaco Service*, (C-552/18, not published, EU:C:2019:997, paragraph 23).

42. When it comes to interpreting the concept of trade secret, it may be useful to refer to Directive 2016/943, which clarifies the definition of that concept as employed in Article 21 of Directive 2014/24. This will be the case in particular where national legislation, by the operation of references which I have described above, links the assessment of confidentiality in the context of public procurement to trade secrets as defined in the law transposing Directive 2016/943.

43. Directive 2016/943, in so far as it is intended to lay down general rules on trade secrets, will enable the contracting authority – and the bodies reviewing its decisions – to strike a balance between the principles that specifically apply to confidentiality and those on which the system of public procurement under Directive 2014/24 is based, as well as to access an effective scheme of remedies.

44. However, it is important to take into account provisions of Directive 2014/24 other than Article 21, in the light of the general objectives pursued by that directive. Pursuant to these, certain confidential information, even if it does not strictly fall within the concept of trade secret, must be protected in order to preserve undistorted competition between economic operators or the legitimate commercial interests of an economic operator.

45. Article 21 of Directive 2014/24 requires the contracting authority to provide candidates and tenderers with the information laid down in Articles 50 and 55. That information does not in principle constitute confidential information but it may become confidential should the circumstances referred to in Article 50(4) and Article 55(3) of Directive 2014/24 materialise.

46. Thus, the duty of confidentiality is to apply to data (not necessarily constituting trade secrets) the disclosure of which 'would prejudice the legitimate commercial interests of a particular economic operator … or might prejudice fair competition between economic operators'.

47. Although Article 55(3) of Directive 2014/24 specifically refers to the information mentioned in paragraphs 1 and 2 of that article, what matters for the purposes of this case is the exhortation not to prejudice the *legitimate* commercial interests of a (rival) economic operator and to preserve competition.

48. In its case-law on public procurement, the Court has adopted a broader interpretation of that twofold exhortation. It follows from this that:

– - Competition between operators could suffer if one of them takes unlawful advantage of sensitive information supplied by others in procedures of this kind. In the judgment in *Klaipèdos*, the Court confirmed that '*… it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition*, whether in an ongoing procurement procedure or in subsequent procedures'. [25]

– The need to avoid any detriment to the legitimate interests of other economic operators, whether public or private, must act as a logical limit to the disclosure of information which those operators have provided to the contracting authority. [26] It is the contracting authority

[25] Paragraph 115 (emphasis added).

[26] Judgment in *Klaipèdos*, paragraph 115: '… Since public procurement procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, *without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to those operators* (see, to that effect, judgments of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraphs 34 to 36, and of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraph 112 and the case-law cited).' Emphasis added.

itself which is responsible for assessing whether or not there is a legitimate interest in preserving the secrecy of particular information, at the behest of the tenderer requesting that it be kept secret.

49. Article 50(4) and Article 55(3) of Directive 2014/24 leave in the hands of the contracting authorities the decision not to communicate the sensitive information to which those two provisions refer. Since neither of those provisions includes the reservation that characterises Article 21(1) of that directive ('unless otherwise provided … in national law'), their application is not conditional upon provisions of national law.

50. In any event, the ability of contracting authorities to disclose information contained in tenders, even if it is not a trade secret *stricto sensu*, may be limited by other sectoral provisions imposing such restrictions. [27]

51. In short, in answer to the first question referred for a preliminary ruling, I take the view that Article 21 of Directive 2014/24:

– Precludes an economic operator from classifying any information as secret simply because it does not wish to disclose that information to competitors.

– Establishes that the contracting authority is not bound by an economic operator's mere claim that the information submitted is confidential.

– Does not preclude a Member State from limiting confidentiality to trade secrets, provided that it does so in compliance with EU law and that the information disclosed on the ground that it does not fall within that concept cannot be used to the detriment of the legitimate commercial interests of other economic operators or to distort competition between them.

C. Second, third and fourth questions

52. By these questions, which can be answered together, the referring body expresses its doubts as to whether the tenderer may seek the benefit of confidentiality in particular for:

– 'The description of their experience, the list of references, the list of persons proposed to perform the contract and their professional qualifications, the names and capacities of the entities whose capacities they rely on or of their subcontractors' (second question).

– 'The economic operator's declaration that it has at its disposal the personal resources required by the contracting authority or declared by the economic operator, the entities on whose resources it wishes to rely or their subcontractors' (third question).

– 'Documents required for the purpose of examining the compliance of their tender with the requirements of the contracting authority contained in the tender specifications (including the description of the subject matter of the contract) or for the purpose of evaluating the tender under the tender evaluation criteria, particularly where those documents relate to the fulfilment of the requirements of the contracting authority laid down in the tender

[27] Considerations such as the protection of personal data and intellectual property rights were mentioned at the hearing. I shall come back to these later.

specifications, in applicable laws or in other documents which are generally available or accessible to interested parties' (fourth question).

53. Once again, the judgment in *Klaipèdos* provides the referring body with the key to drawing its own inference, in the dispute under its examination, as to whether or not that information (or any other information included in a tenderer's tender) is confidential.

54. In the judgment in *Klaipèdos*, the Court takes the view, as I see it, that confidentiality should be as specific as possible: [28]

– First, the link between the 'decision to treat certain data as confidential' and the duty to 'communicate in a neutral form … the essential content of [confidential data] to … a tenderer which requests it' [29] suggests that declarations claiming comprehensive confidentiality or relating to generic categories of document should be rejected.

– Second, although the ways in which the balance between the conflicting principles can be maintained are varied and difficult to define, 'the contracting authority may, inter alia and in so far as it is not precluded from doing so by the national law to which it is subject, communicate in summary form certain aspects of an application or tender and their technical characteristics, in such a way that the confidential information cannot be identified.' [30]

– Third, the contracting authorities have available to them mechanisms which extend their discretion: 'pursuant to Article 21(2) of Directive 2014/24, [they] may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure. Thus, assuming that the non-confidential information is adequate for that purpose, a contracting authority may also avail itself of that power in order to ensure that the unsuccessful tenderer's right to an effective review is respected, by requesting the successful tenderer to provide it with a non-confidential version of the documents containing confidential information.' [31]

55. The interpretation of Article 21 of Directive 2014/24 that flows from that line of case-law is consistent with other provisions of that directive that refer to the *specificity* of confidentiality. [32]

56. At the hearing, the attendees discussed the 'principle of minimisation', to use the referring body's term, as a criterion for limiting confidentiality to the minimum necessary. Thus, only information, data, aspects or sections of the documents included in tenders (or of the tenders themselves) which are deemed essential to safeguarding the legitimate interests of the tenderer and to ensuring that none of its rivals distorts competition between them may be treated as confidential.

[28] In paragraph 129 of the judgment in *Klaipèdos*, the Court refers to the notion of there being 'sufficient information' to safeguard the right to an effective remedy. That right 'must be weighed against the right of other economic operators' to have their confidential information protected.

[29] Judgment in *Klaipèdos*, paragraph 123.

[30] *Ibidem*, paragraph 124.

[31] *Ibidem*, paragraph 125. The provision of a non-confidential version is an expression of the specific and targeted withholding of information. It means that the same document can be processed in such a way that only certain parts of it are kept from public knowledge.

[32] This is true, for example, of Article 31(6) of Directive 2014/24: 'In the case of an innovation partnership with several partners, the contracting authority shall not, in accordance with Article 21, reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of *specific information*' (emphasis added).

57. There is no reason why that principle, which applies only to specific parts of the information supplied, and not to the documents in their entirety, should not be implemented if the contracting authority considers it appropriate to do so. In any event, it is not possible to establish a priori when any given documents are likely to be classified as confidential, since their classification as such depends on the characteristics of each document in a particular dispute.

58. The order for reference seems to support the inference that the contracting authority acted in a general manner in relation to specific categories of information, thus departing from the case-by-case classification required.

59. This, however, is an assessment that falls exclusively to the referring body, which must carry out a detailed and reasoned evaluation of:

– Whether the tenderer made a reasoned and justified request for a declaration as to the trade secret status of all or part of each document the content of which it wished to keep concealed from its competitors.

– Whether the contracting authority adjudicated on a case-by-case basis on the reasons why it was of the view that a particular document or a collection of documents should be regarded as being covered by confidentiality, and on the required scope of, and conditions governing, that confidentiality.

– Whether the reasons given by the contracting authority for not declassifying the information which the tenderer had submitted as being reserved were justified.

60. Without wishing to take the referring body's place in carrying out this task (which, in fact, has more to do with implementing the provision than with interpreting it), I shall refer briefly to the tender information with which the questions referred for a preliminary ruling are concerned, and which the referring body summarises as falling into two categories.

61. The first category includes documents which describe the 'subjective situation of the economic operator selected, from the point of view of its experience and the entities and personnel proposed for the purposes of performing the contract'.

62. According to the referring body, the only documents required by the tender specifications were those referred to in Articles 59 and 60 of, and Annex XII to, Directive 2014/24 (in addition to those required by national law).

63. If that is the case, it is difficult to regard documents the disclosure of which is prescribed by Directive 2014/24 as being capable of having the status of a trade secret or some other type of confidential information.

64. The referring body goes on to say, with regard to data relating to the tenderer's subjective situation (financial capacity), that the tender specifications simply stated that this must be in excess of a certain level, but did not require the tenderer to provide details of its financial capacity or to specify the funds which it holds in its bank.

65. Much the same can be said of the situation of third parties or entities on whose resources the tenderer wishes to rely, or of the subcontractors it proposes in its tender. Without prejudice to the general obligations in relation to the protection of personal data, no such designations can be kept secret where the tender specifications require them to be disclosed, any claim of a hypothetical risk that the tenderers' human resources may be 'poached' being insufficient in this regard.

66. The second category of documents includes 'studies required by the contracting authority … to aid the evaluation of tenders according to quality criteria', more specifically 'the concept of the study' and the 'description of the manner of performance of the contract'.

67. In principle, the possibility cannot be ruled out that one or more of the documents included by an economic operator in its tender will contain sensitive information benefiting from protection as constituting intellectual property to which third parties may not have access without proper authorisation. [33]

68. At the hearing, some of the attendees expressed disagreement with the foregoing proposition, although they ultimately confirmed that it will be for the referring body to assess, in the light of the circumstances of the dispute, whether such rights have been infringed. [34]

69. The foregoing reflections bear out how difficult it is to adopt a priori an abstract classification as confidential information, whether or not constituting a trade secret, of data included in tenderers' tenders. Inevitably, Article 21 of Directive 2014/24 has to use generic formulae that contracting authorities and review bodies can apply in a reasoned manner in each particular case.

V. Conclusion

70. In the light of the foregoing, I propose that the answers to the four questions referred for a preliminary ruling by the Krajowa Izba Odwoławcza (Public Procurement Office, Poland) should be as follows:

Article 21 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 must be interpreted as meaning that:

– The contracting authority is not bound by an economic operator's mere claim that the information submitted in its tender is confidential.

– A Member State may limit confidentiality to trade secrets, provided that it does so in compliance with EU law and that information disclosed on the ground that it does not fall within that concept cannot be used to the detriment of the legitimate interests of a particular economic operator or in order to distort fair competition between operators.

– A contracting authority to which an economic operator has submitted a request for information deemed to be confidential must make a detailed and reasoned determination of

[33] Articles 2 to 4 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) impose on Member States the obligation, in particular, to guarantee for authors the exclusive rights to authorise or prohibit the reproduction of their works (Article 2(a)), to authorise or prohibit their communication to the public (Article 3(1)) and to authorise or prohibit their distribution (Article 4(1)).

[34] The order for reference (paragraph IV.B) states that nobody has denied that 'the studies did not contain solutions which would constitute industry innovations – and therefore contained knowledge which is available to professionals'.

whether preference must be given to the right of the operator concerned to have its information protected over the right of its competitors to have access to that information, with a view, where appropriate, to challenging the contract award decision.