



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

16 June 2022*

(Reference for a preliminary ruling – Public procurement – Regulation (EU, Euratom) 2018/1046 – Regulation (EU, Euratom) No 966/2012 – Inapplicability to public contracts awarded by Member States and financed by resources from the European Structural and Investment Funds – Directive 2014/24/EU – Direct and unconditional reference to provisions of EU law in national legislation – Applicability to a contract whose estimated value is lower than the threshold set in the directive – Article 32(2)(a) – Option for a contracting authority to invite only one economic operator to participate in a negotiated procedure without prior publication after deeming a prior open procedure unsuccessful – Obligation to maintain the initial conditions of the contract without introducing substantial alterations)

In Case C-376/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), made by decision of 28 May 2021, received at the Court on 17 June 2021, in the proceedings

Zamestnik-ministar na regionalното развитие i blagoustroystvoto i rakovoditel na Upravlyavashtia organ na Operativna programa ‘Regioni v rastezh’ 2014-2020

v

Obshtina Razlog,

THE COURT (Eighth Chamber),

composed of N. Jääskinen, President of the Chamber, M. Safjan and M. Gavalec (Rapporteur),
Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the European Commission, by D. Drambozova, P. Ondrůšek, P. Rossi and G. Wils, acting as Agents,

* Language of the case: Bulgarian.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 102 and 104 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1), as amended by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 (OJ 2015 L 286, p. 1) ('Regulation No 966/2012'), as well as Articles 160 and 164 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation No 966/2012 (OJ 2018 L 193, p. 1) ('the Financial Regulation').
- 2 The request has been made in proceedings between the Zamestnik-ministar na regionalno razvitiie i blagoustroystvoto i rakovoditel na Upravlyavashtia organ na Operativna programa 'Regioni v rastezh' 2014-2020 (Deputy Minister for Regional Development and Public Works and Head of the Managing Authority of the operational programme 'Regions in Growth' 2014-2020; 'the Minister') and the Obshtina Razlog (municipality of Razlog, Bulgaria) concerning that managing authority's decision to apply a financial correction to that municipality because of breaches of rules relating to, first, public procurement and, second, the use of EU funds allocated to that municipality.

Legal context

European Union law

Regulation No 966/2012

- 3 Article 102 of Regulation No 966/2012, entitled 'Principles applicable to public contracts', provided:
 - '1. All public contracts financed in whole or in part by the budget [of the European Union] shall respect the principles of transparency, proportionality, equal treatment and non-discrimination.
 2. All contracts shall be put out to competition on the broadest possible basis, except when use is made of the procedure referred to in point (d) of Article 104(1)....'

- 4 Article 104 of that regulation, entitled ‘Procurement procedures’, provided, in paragraph 1 thereof:

‘Procurement procedures for awarding concession contracts or public contracts, including framework contracts shall take one of the following forms:

...

(d) negotiated procedure, including without prior publication;

...’

- 5 Article 117 of that regulation, entitled ‘The contracting authority’, provided, in paragraph 1 thereof:

‘The institutions within the meaning of Article 2, executive agencies and bodies within the meaning of Articles 208 and 209 shall be deemed to be contracting authorities in the case of contracts awarded on their own account, except where they purchase from a central purchasing body. ...

Those institutions shall delegate, in accordance with Article 65, the necessary powers for the exercise of the function of contracting authority.’

The Financial Regulation

- 6 Article 2 of the Financial Regulation, entitled ‘Definitions’, provides:

‘For the purposes of this Regulation, the following definitions apply:

...

(51) “public contract” means a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of Articles 174 and 178, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services, comprising:

...

(b) supply contracts;

...’

- 7 Article 63 of that regulation, entitled ‘Shared management with Member States’, provides, in paragraph 1 thereof:

‘Where the [European] Commission implements the budget under shared management, tasks relating to budget implementation shall be delegated to Member States. The Commission and Member States shall respect the principles of sound financial management, transparency and non-discrimination and shall ensure the visibility of the Union action when they manage Union funds. To that end, the Commission and Member States shall fulfil their respective control and audit obligations and assume

the resulting responsibilities laid down in this Regulation. Complementary provisions shall be laid down in sector-specific rules.’

8 Article 160 of that regulation, entitled ‘Principles applicable to contracts and scope’, provides:

‘1. All contracts financed in whole or in part by the budget shall respect the principles of transparency, proportionality, equal treatment and non-discrimination.

2. All contracts shall be put out to competition on the broadest possible basis, except when use is made of the procedure referred to in point (d) of Article 164(1).

...’

9 Article 164 of that regulation, entitled ‘Procurement procedures’, provides:

‘1. Procurement procedures for awarding concession contracts or public contracts, including framework contracts shall take one of the following forms:

...

(d) negotiated procedure, including without prior publication;

...

4. In all procedures involving negotiation, the contracting authority shall negotiate with tenderers the initial and any subsequent tenders or parts thereof, except their final tenders, in order to improve their content. The minimum requirements and the criteria specified in the procurement documents shall not be subject to negotiation.

...’

10 Article 174 of the Financial Regulation, entitled ‘The contracting authority’, provides, in the first subparagraph of paragraph 1 thereof:

‘Union institutions, executive agencies and Union bodies referred to in Articles 70 and 71 shall be deemed to be contracting authorities in respect of contracts awarded on their own account, except where they purchase from a central purchasing body. Departments of Union institutions shall not be deemed to be contracting authorities where they conclude service-level agreements amongst themselves.’

Directive 2014/24/EU

- 11 Recitals 2 and 50 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 (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015 (OJ 2015 L 307, p. 5) ('Directive 2014/24'), state:

'(2) Public procurement ... [is] one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth, while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to 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)] and 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)] should be revised and modernised in order to increase the efficiency of public spending ...

...

- (50) In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should be used only in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract. This is the case for works of art, where the identity of the artist intrinsically determines the unique character and value of the art object itself. Exclusivity can also arise from other reasons, but only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure.

Contracting authorities relying on this exception should provide reasons why there are no reasonable alternatives or substitutes such as using alternative distribution channels including outside the Member State of the contracting authority or considering functionally comparable works, supplies and services.

Where the situation of exclusivity is due to technical reasons, they should be rigorously defined and justified on a case-by-case basis. They could include, for instance, near technical impossibility for another economic operator to achieve the required performance or the necessity to use specific know-how, tools or means which only one economic operator has at its disposal. Technical reasons may also derive from specific interoperability requirements which must be fulfilled in order to ensure the functioning of the works, supplies or services to be procured.

Finally, a procurement procedure is not useful where supplies are purchased directly on a commodity market, including trading platforms for commodities such as agricultural products, raw materials and energy exchanges, where the regulated and supervised multilateral trading structure naturally guarantees market prices.'

12 Article 4 of that directive, entitled ‘Threshold amounts’, provides:

‘This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

...

(c) EUR 209 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities; ...

...’

13 Under Article 5 of that directive, entitled ‘Methods for calculating the estimated value of procurement’:

‘1. The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents.

...

3. The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons.

4. That estimated value shall be valid at the moment at which the call for competition is sent, or, in cases where a call for competition is not foreseen, at the moment at which the contracting authority commences the procurement procedure, for instance, where appropriate, by contacting economic operators in relation to the procurement.

...’

14 Article 18 of that directive, entitled ‘Principles of procurement’, provides, in paragraph 1 thereof:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

15 Article 26 of Directive 2014/24, entitled ‘Choice of procedures’, provides, in paragraphs 4 and 6 thereof:

‘4. Member States shall provide that contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue in the following situations:

...

- (b) with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted. In such situations contracting authorities shall not be required to publish a contract notice where they include in the procedure all of, and only, the tenderers which satisfy the criteria set out in Articles 57 to 64 and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

In particular, tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low, shall be considered as being irregular. In particular tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure shall be considered as unacceptable.

...

6. In the specific cases and circumstances referred to expressly in Article 32, Member States may provide that contracting authorities may apply a negotiated procedure without prior publication of a call for competition. Member States shall not allow the application of that procedure in any other cases than those referred to in Article 32.'

- 16 Article 32 of that directive, entitled 'Use of the negotiated procedure without prior publication', provides, in paragraph 2 thereof:

'The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in any of the following cases:

- (a) where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests.

A tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Article 57 or does not meet the selection criteria set out by the contracting authority pursuant to Article 58;

...'

Bulgarian law

The Law on public procurement

- 17 The zakon za obshtestvenite porachki (Law on public procurement) (DV No 13 of 16 February 2016), in the version applicable to the dispute in the main proceedings ('the Law on public procurement'), provides, in Article 2 thereof:

'(1) Public contracts shall be awarded in accordance with the principles of [the FEU Treaty], in particular the free movement of goods, freedom of establishment, freedom to provide services and mutual recognition, and with the principles deriving therefrom:

1. equal treatment and non-discrimination;
2. free competition;
3. proportionality;
4. publicity and transparency.

(2) When awarding public contracts, contracting authorities are not entitled to restrict competition by laying down conditions or requirements which confer an unjustified advantage or which unduly restrict the participation of economic operators in public procurement and which are not linked to the subject matter, value, complexity, quantity or volume of the contract concerned.'

- 18 Article 18 of that law provides, in paragraphs 1, 2 and 7 thereof:

'(1) The procedures covered by this Law are:

...

8. negotiation without prior publication;
9. negotiation without prior invitation to participate;
10. negotiation without publication of a contract notice;

...

13. direct negotiation.

(2) Open procedures and public competitive tendering are procedures in which any interested party may submit a tender.

...

(7) In negotiated procedures within the meaning of points 8 to 10 of paragraph 1, as well as point 13 thereof, the contracting authority shall negotiate the terms of the contract with one or more well-defined persons.'

19 According to Article 79(1) of that law:

‘Public contracting authorities may use a negotiated procedure without prior publication only in the following cases:

1. where, in an open or restricted procedure, no tender or request to participate has been submitted or where the tenders or requests to participate were not suitable, and the initial conditions of the contract are not substantially altered;

...’

20 Article 110 of that law provides, in paragraph 1 thereof:

‘The contracting authority shall discontinue the procedure by reasoned decision where:

1. no tender, request to participate or competitive project has been submitted, or where no participant has attended negotiations;

2. none of the tenders or requests to participate satisfied the conditions for submission, including with regard to forms, methods and deadlines, or none of those tenders or requests to participate were suitable;

...’

21 Article 182 of the Law on public procurement provides:

‘(1) The contracting authority may negotiate directly with specified persons where one of the grounds referred to in points 3 and 5 to 9 of Article 79(1) applies or where:

...

2. the procedure for the award of a contract by means of public competitive tendering was discontinued on the ground that no tender had been submitted or that the tenders submitted were not suitable and that the initial conditions were not substantially altered;

...’

The Law on the European structural and investment funds

22 Article 49(2) of the zakon za upravljenie na sredstvata ot Evropeyskite strukturni i investitsionni fondove (Law on the management of resources from the European Structural and Investment Funds) (DV No 101 of 22 December 2015), in the version applicable to the dispute in the main proceedings (‘the Law on the European structural and investment funds’), provides:

‘For the appointment of a contractor responsible for tasks related to works, services and/or supplies of goods which are the subject of a public contract within the meaning of the Law on public procurement, the following rules shall apply:

1. the rules laid down in the Law on public procurement, where the beneficiary is a contracting authority within the meaning of that law;

...’

The Regulation implementing the Law on public procurement

- 23 Article 64 of the *pravilnik za prilagane na zakona za obshtestvenite porachki* (Regulation implementing the Law on public procurement) (DV No 28 of 8 April 2016), in the version applicable to the dispute in the main proceedings, provides, in paragraph 1 thereof:

‘In the decision discontinuing the procedure referred to in points 8 to 10 and 13 of Article 18(1) of the Law on public procurement, contracting authorities shall also indicate the persons who shall be invited to participate in the negotiation, except in the cases referred to in points 7 and 8 of Article 79(1), point 2 of Article 138(1), [and] points 9 and 10 of Article 164(1) of [that law], as well as in the cases referred to in point 3 of Article 182(1) of [that law].’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 24 The municipality of Razlog received EU funds allocated with a view to improving the educational infrastructure and learning process in the Vocational High School of Agricultural Mechanisation located in its territory. To that end, it organised, in its capacity as contracting authority, a procurement procedure involving public competitive tendering, the subject matter of which was the supply of technology, equipment and furniture for the needs of that school.
- 25 The contract was divided into four lots. The only tender submitted exclusively concerned Lot No 2, entitled ‘Metalworking equipment’. The contracting authority did not deem that tender to be in line with the conditions of the contract, on the ground that its amount was more than twice the estimated value of the contract. The contracting authority then found that that procedure had been unsuccessful and discontinued it by a decision of 1 November 2017 taken on the basis of points 1 and 2 of Article 110(1) of the Law on public procurement.
- 26 By decision of 1 December 2017, the contracting authority, pursuant to point 1 of Article 79(1) of that law, used a negotiated procedure without prior publication, the subject matter of which was the ‘Supply of metalworking equipment for the needs of the Vocational High School of Agricultural Mechanisation of the town of Razlog’. The estimated value of the contract, which reproduced, without alteration, the initially announced conditions of the contract for that lot, was 33 917.82 leva (BGN) excluding VAT (approximately EUR 17 370). The contracting authority stated that the reason for choosing that form of award was the lack of a suitable tender for that lot in the prior open procedure.
- 27 The contracting authority invited only one economic operator to take part in that negotiated procedure without prior publication – in this instance, Dikar Konsult OOD – and awarded it, by a contract concluded on 29 December 2017, a contract with a value of BGN 33 907 excluding VAT (approximately EUR 17 365).
- 28 That negotiated procedure without prior publication was the subject of a report made to the Minister. That report criticised the contracting authority for having, without any justification, favoured the chosen economic operator and for having thus eliminated free competition, in breach of the principles referred to, in particular, in Article 160 of the Financial Regulation.

- 29 By letter of 20 March 2020, the Minister informed the contracting authority, in its capacity as a recipient of EU funds, of the report received and the initiation of a financial correction procedure.
- 30 The contracting authority maintained that it was entitled to choose, in accordance with Article 18(7) of the Law on public procurement, to negotiate with one or more specified persons. Furthermore, it argued that the negotiated procedure without prior publication was inseparable from the public competitive tendering procedure which preceded it, in which all interested parties had the opportunity to participate. It stated that the submission of only one tender, the amount of which was more than twice the estimated value of the contract, demonstrated that there was a lack of interest in participating in that procedure because of the low value of the contract. The fact that the public competitive tendering procedure had been discontinued without a successful result thus justified the contracting authority's decision to invite only one economic operator to participate in the subsequent negotiated procedure without prior publication.
- 31 By decision of 15 April 2020 ('the decision of 15 April 2020'), the Minister applied to the contracting authority a financial correction of 10% of the expenditure eligible for funding from the EU funds linked to the contract concluded with Dikar Konsult. In that decision, the Minister challenged the methods for the implementation of the negotiated procedure without prior publication. He stated that it is apparent in particular from Article 160 of the Financial Regulation that the principle of free competition absolutely must be complied with in a public procurement procedure. Accordingly, point 1 of Article 79(1) of the Law on public procurement cannot justify the award of a contract that has not been put out to competition at all, given that, by referring to 'persons' in the plural, Article 64(1) and (3) of the regulation implementing that law expressly requires that several persons must be invited to participate in the negotiations. Thus, by inviting only Dikar Konsult without giving reasons for that decision, the contracting authority conferred an unjustified advantage on that economic operator and restricted the participation of an undefined circle of economic operators interested in the contract.
- 32 Following an action brought by the contracting authority, the Administrativen sad Blagoevgrad (Administrative Court, Blagoevgrad, Bulgaria) annulled the decision of 15 April 2020. According to that court, the conditions under which the negotiated procedure without prior publication was conducted make it factually impossible to apply the principle of safeguarding competition on the broadest possible basis, either because of the specific subject matter of the contract or given the lack of suitable tenders. Furthermore, Article 18(7) of the Law on public procurement expressly provides the contracting authority with the option to negotiate the terms of the contract with one or more specified persons.
- 33 Hearing an appeal on a point of law brought by the Minister, the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) questions whether a contracting authority infringes the principles of equal treatment, non-discrimination and free competition when it sends an invitation to conclude a public contract to only one economic operator in a negotiated procedure without prior publication which, first, is launched following the discontinuation of an unsuccessful open procedure and, second, reproduces the initial conditions of the contract without altering them, even though the subject matter of the contract does not have special characteristics which justify its performance being entrusted to the economic operator invited to negotiate.

- 34 In that regard, that court notes divergences among the Bulgarian courts, including within the referring court itself, as regards the interpretation of point 1 of Article 79(1) of the Law on public procurement, read in conjunction with Article 160(2) and Article 164(1)(d) of the Financial Regulation. It observes, first of all, that although Article 160(2) of the Financial Regulation allows, exceptionally, derogation from the principle of public procurement involving competition on the broadest possible basis, that provision does not have the effect of setting aside the principles of equal treatment and non-discrimination. The first sentence of Article 164(4) of the Financial Regulation refers, moreover, to ‘tenderers’ in the plural.
- 35 Next, although the Financial Regulation does not normally apply to national contracting authorities, the referring court considers that it is necessary for it to apply that regulation in this case, since the value of the public contract concerned does not reach the threshold set by Directive 2014/24. The application of Article 160(1) and (2) of the Financial Regulation may be justified by the use of resources from the budget of the Union.
- 36 Lastly, the referring court notes that the relevant facts in this case occurred while Regulation No 966/2012 was still in force, whereas the decision of 15 April 2020 was adopted after the repeal of that regulation and the entry into force of the Financial Regulation. In any event, the content of Article 160 of the Financial Regulation and that of Article 102(1) and (2) of Regulation No 966/2012, which is applicable to the dispute in the main proceedings, are identical.
- 37 In those circumstances the Varhoven administrativen sad (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Are Article 160(1) and (2) of Regulation 2018/1046 and Article 102(1) and (2) of Regulation No 966/2012 to be interpreted as also applying to contracting authorities of Member States of the European Union where the public contracts that they award are financed by resources from the European Structural and Investment Funds?
- (2) If the first question is answered in the affirmative, are the principles of transparency, proportionality, equal treatment and non-discrimination enshrined in Article 160(1) of Regulation 2018/1046 and Article 102(1) of Regulation No 966/2012 to be interpreted as permitting a total restriction of competition in the award of a public contract by way of a negotiated procedure without prior publication where the subject matter of the public contract does not have special characteristics which objectively require it to be performed only by the economic operator invited to negotiate? In particular, are Article 160(1) and (2) of Regulation 2018/1046, read in conjunction with Article 164(1)(d) thereof, and Article 102(1) and (2) of Regulation No 966/2012, read in conjunction with Article 104(1)(d) thereof, to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, following the discontinuation of a public procurement procedure on the ground that the sole tender submitted is unsuitable, the contracting authority may invite only one economic operator to participate in a negotiated procedure without prior publication where the subject matter of the public contract does not have special characteristics which objectively require it to be performed only by the economic operator invited to negotiate?’

Consideration of the questions referred

The first question

- 38 By its first question, the referring court asks, in essence, whether Article 160(1) and (2) of the Financial Regulation and Article 102(1) and (2) of Regulation No 966/2012 must be interpreted as applying to procedures for the award of public contracts organised by contracting authorities of the Member States where those contracts are financed by resources from the European Structural and Investment Funds.
- 39 Article 160 of the Financial Regulation, entitled ‘Principles applicable to contracts and scope’, provides, in paragraph 1 thereof, that ‘all contracts financed in whole or in part by the budget shall respect the principles of transparency, proportionality, equal treatment and non-discrimination’. Paragraph 2 of that provision states that ‘all contracts shall be put out to competition on the broadest possible basis, except when use is made of the procedure referred to in point (d) of Article 164(1)’, namely the negotiated procedure, including without prior publication.
- 40 As is apparent from paragraph 35 of this judgment, that first question is based on the premiss that, although not applicable to national contracting authorities, the Financial Regulation could nevertheless offset the inapplicability of Directive 2014/24 to a public contract whose value does not reach the threshold set by that directive.
- 41 The referring court rightly observes that the Financial Regulation does not apply to procurement procedures organised by contracting authorities of the Member States.
- 42 It follows from Article 2(51) of the Financial Regulation that, for the purposes of that regulation, a ‘public contract’ means ‘a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of Articles 174 and 178, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services ...’.
- 43 Article 174 of that regulation, which is entitled ‘The contracting authority’, provides, in the first sentence of the first subparagraph of paragraph 1 thereof, that ‘Union institutions, executive agencies and Union bodies referred to in Articles 70 and 71 shall be deemed to be contracting authorities in respect of contracts awarded on their own account, except where they purchase from a central purchasing body’.
- 44 As indicated in Annex II to the Financial Regulation, the wording of Article 174 of that regulation corresponds to that of Article 117(1) of Regulation No 966/2012, which was repealed by the Financial Regulation with effect from 2 August 2018.
- 45 Accordingly, the essence of the concept of ‘contracting authority’ derived from Regulation No 966/2012 remained unchanged after the entry into force of the Financial Regulation, with the result that that concept must be interpreted in the same way in both of those regulations.

- 46 Thus it is clear from Article 174 of the Financial Regulation that the concept of ‘contracting authority’ to which Article 2(51) of that regulation refers includes, like Article 117 of Regulation No 966/2012, only the institutions of the European Union, executive agencies and bodies of the European Union referred to in Articles 70 and 71 of the Financial Regulation.
- 47 It follows that neither of those regulations is applicable to procedures for the award of public contracts by the contracting authorities of the Member States.
- 48 Moreover, it follows from Article 63(1) of the Financial Regulation that, where the Commission implements the budget under shared management, tasks relating to budget implementation are to be delegated to Member States. The Member States must comply, in particular, with the complementary provisions laid down in sector-specific rules. Therefore, as the Commission pointed out in its written observations, Article 63(1) of that regulation requires Member States, even when carrying out budget implementation tasks through public procurement financed by resources from the European Structural and Investment Funds, to apply not the Financial Regulation but their national legislation, including the provisions transposing the directives on public procurement.
- 49 It consequently appears that, even where a public contract is financed by resources from the European Structural and Investment Funds, the obligation on the contracting authorities of the Member States to comply with the fundamental principles of public procurement, namely the principles of equal treatment, non-discrimination, transparency and proportionality, cannot arise from Article 160 of the Financial Regulation.
- 50 In the light of the foregoing considerations, the answer to the first question is that Article 160(1) and (2) of the Financial Regulation and Article 102(1) and (2) of Regulation No 966/2012 must be interpreted as not applying to procedures for the award of public contracts organised by contracting authorities of the Member States, even where those contracts are financed by resources from the European Structural and Investment Funds.

The second question

- 51 As a preliminary point, it should be recalled that a question referred for a preliminary ruling must be examined in the light of all the provisions of the Treaties and of secondary legislation which may be relevant to the issue raised (see, to that effect, judgment of 11 July 1985, *Mutsch*, 137/84, EU:C:1985:335, paragraph 10). The fact that a national court’s question refers to certain provisions of EU law does not mean therefore that the Court of Justice may not provide the national court with all the guidance on points of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to those points in its question (see, to that effect, judgments of 12 December 1990, *SARPP*, C-241/89, EU:C:1990:459, paragraph 8, and of 8 June 2017, *Medisanus*, C-296/15, EU:C:2017:431, paragraph 55).
- 52 By its second question, the referring court refers to Articles 160 and 164 of the Financial Regulation and Articles 102 and 104 of Regulation No 966/2012. It follows from the answer given to the first question that those provisions do not apply in the present case.
- 53 However, those provisions, which set out the principles of public procurement, have a purpose equivalent to that of Article 18(1) of Directive 2014/24, which also gives rise to an obligation to comply with the fundamental principles of public procurement.

- 54 Although the value of the contract at issue in the main proceedings does not reach the threshold for the applicability of Directive 2014/24, which is fixed in Article 4(c) thereof at EUR 209 000 for supply contracts awarded by sub-central contracting authorities, such as the municipality of Razlog, the provisions of Directive 2014/24 have been made applicable, directly and unconditionally, by national law to situations which, like that of the contract at issue in the main proceedings, normally fall outside its scope. It follows from Article 49(2) of the Law on the European structural and investment funds that the Law on public procurement, which faithfully transposed Directive 2014/24 into the Bulgarian legal system, applies to all public procurement procedures subsidised by the European Structural and Investment Funds, irrespective of the value of the contracts concerned.
- 55 Where, in regulating situations outside the scope of an act of EU law, national legislation seeks to adopt, directly and unconditionally, the same solutions as those adopted in that act, it is clearly in the interest of the European Union that provisions taken from that act be given a uniform interpretation. This means that future differences of interpretation can be forestalled and identical treatment of internal situations and situations falling within the scope of those provisions can be ensured (see, to that effect, judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraphs 36 and 37; of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, paragraphs 33 and 34; and of 31 March 2022, *Smetna palata na Republika Bulgaria*, C-195/21, EU:C:2022:239, paragraph 43).
- 56 Moreover, since the second question concerns a negotiated procedure without prior publication for public works contracts, public supply contracts and public service contracts, it should be noted that Article 32(2) of Directive 2014/24, which lists, in points (a) to (c) thereof, ‘any of the ... cases’ in which it is permitted to use such a procedure, is relevant for the answer to that second question. That list is exhaustive, since Article 26(6) of that directive specifies that Member States must not allow the application of the negotiated procedure without prior publication of a call for competition in any other cases than those referred to in Article 32 of that directive (see, by analogy, judgments of 8 April 2008, *Commission v Italy*, C-337/05, EU:C:2008:203, paragraphs 56 and 57, and of 15 October 2009, *Commission v Germany*, C-275/08, not published, EU:C:2009:632, paragraph 54).
- 57 In those circumstances, Article 32(2)(a) of that directive, read in conjunction with Article 18(1) of that directive, must be interpreted as meaning that a contracting authority may, in a negotiated procedure without prior publication, approach a single economic operator where that procedure reproduces, without substantial alterations, the initial conditions of the contract that were referred to in a prior open procedure which was discontinued on the ground that the only tender submitted was unsuitable, even if the subject matter of the contract in question does not have special characteristics which objectively justify its performance being entrusted exclusively to that economic operator.
- 58 Under the first subparagraph of Article 32(2)(a) of Directive 2014/24, use of that procedure is allowed, inter alia, for public supply contracts where no tenders or no suitable tenders have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests.
- 59 Accordingly, it is clear from the wording of that provision that a contracting authority may use a negotiated procedure without prior publication where three cumulative conditions are satisfied. In the first place, it must demonstrate that it did not receive any tender or, at the very least, any

suitable tender in a prior open or restricted procurement procedure which it discontinued on that ground. In the second place, the subsequent negotiated procedure without prior publication must not substantially alter the initial conditions of the contract, as set out in the contract notice published in the prior open or restricted procedure. In the third and last place, the contracting authority must be able to send a status report to the Commission if the latter so requests.

- 60 Since that last condition is not at issue in this case, it is necessary to clarify the content of the first two conditions for the application of the first subparagraph of Article 32(2)(a) of Directive 2014/24.
- 61 As regards the first condition, it is apparent from the second subparagraph of Article 32(2)(a) of that directive that a tender will be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents.
- 62 A tender must be considered not to be suitable where it is 'unacceptable' within the meaning of the second subparagraph of Article 26(4)(b) of that directive, which covers, inter alia, competitive procedures with negotiation. Under that provision, tenders submitted by tenderers whose price exceeds the contracting authority's budget as determined and documented before the launching of the procurement procedure are to be considered unacceptable.
- 63 That is clearly the case for a tender which, like that referred to in paragraph 25 of this judgment, had proposed an amount more than twice the estimated value of the contract declared by the contracting authority.
- 64 As regards the second condition for the application of that provision, it seems to follow from the request for a preliminary ruling that, in the negotiated procedure at issue in the main proceedings, the contracting authority did not substantially alter the initial conditions of the contract, which it is, however, for the referring court to verify.
- 65 Moreover, neither recital 50 nor Article 18(1) of Directive 2014/24 can invalidate that literal interpretation of Article 32(2)(a) of that directive.
- 66 As is apparent from its general scheme, recital 50 of Directive 2014/24 refers to cases in which a negotiated procedure without prior publication may be used which do not correspond to that referred to in Article 32(2)(a) of that directive.
- 67 Furthermore, where a contracting authority decides to approach a single economic operator in a negotiated procedure without prior publication, which is organised following the failure of an open or restricted procedure and which reproduces, without substantial alterations, the conditions which initially appeared in the contract notice published in the prior open or restricted procedure, such conduct remains compatible with the principles of procurement set out in the first subparagraph of Article 18(1) of Directive 2014/24, even if the subject matter of the contract in question does not objectively require that contracting authority to approach that operator. In such a situation, both the prior open or restricted procedure and the subsequent negotiated procedure without prior publication form an indivisible whole, with the result that the fact that the economic operators potentially interested in the contract concerned have had the opportunity to come forward and to compete cannot be overlooked.

- 68 In those circumstances, economic operators who have failed to act diligently by not submitting a suitable tender during an open or restricted procedure cannot compel the contracting authority, in the subsequent negotiated procedure without prior publication, to enter into negotiations with them. It was open to them to submit a tender in the prior open or restricted procedure and, therefore, to benefit fully, in that procedure, from the principles of equality, non-discrimination, transparency and proportionality.
- 69 Nevertheless, in order to be able to demonstrate that the contract in question was not designed with the intention of excluding it from the scope of Directive 2014/24 or of artificially narrowing competition, as required by the second subparagraph of Article 18(1) thereof, the contracting authority must be able to prove that the price on which it has agreed with the successful tenderer corresponds to the market price and that it does not exceed the estimated value of the contract, calculated in accordance with the requirements of Article 5 of that directive. In so doing, the contracting authority complies with the principle that the burden of proving the actual existence of exceptional circumstances justifying a derogation under Article 32 of that directive lies on the person seeking to rely on that derogation (see, to that effect, judgments of 10 March 1987, *Commission v Italy*, 199/85, EU:C:1987:115, paragraph 14, and of 8 April 2008, *Commission v Italy*, C-337/05, EU:C:2008:203, paragraph 58).
- 70 Furthermore, by establishing that the price of the contract concluded at the end of the negotiated procedure without prior publication corresponds to the market price, the contracting authority demonstrates that it has made the best possible use of public funds, as provided for in recital 2 of the same directive, and therefore that no irregularity within the meaning of the EU rules on the European structural and investment funds has been committed (see, by analogy, judgments of 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, paragraph 46, and of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraph 51).
- 71 In the light of the foregoing considerations, the answer to the second question is that Article 32(2)(a) of Directive 2014/24, read in conjunction with Article 18(1) of that directive, must be interpreted as meaning that a contracting authority may, in a negotiated procedure without prior publication, approach a single economic operator where that procedure reproduces, without substantial alteration, the initial conditions of the contract that were mentioned in a prior open procedure which was discontinued on the ground that the only tender submitted was unsuitable, even if the subject matter of the contract in question does not have special characteristics which objectively justify its performance being entrusted exclusively to that economic operator.

Costs

- 72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

- 1. Article 160(1) and (2) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, as well as Article 102(1) and (2) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, as amended by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015, must be interpreted as not applying to procedures for the award of public contracts organised by contracting authorities of the Member States, even where those contracts are financed by resources from the European Structural and Investment Funds.**
- 2. Article 32(2)(a) 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, as amended by Commission Delegated Regulation (EU) 2015/2170 of 24 November 2015, read in conjunction with Article 18(1) of that directive, as amended by Delegated Regulation 2015/2170, must be interpreted as meaning that a contracting authority may, in a negotiated procedure without prior publication, approach a single economic operator where that procedure reproduces, without substantial alteration, the initial conditions of the contract that were mentioned in a prior open procedure which was discontinued on the ground that the only tender submitted was unsuitable, even if the subject matter of the contract in question does not have special characteristics which objectively justify its performance being entrusted exclusively to that economic operator.**

[Signatures]