



## Reports of Cases

### JUDGMENT OF THE COURT (Third Chamber)

26 January 2023 \*

(Reference for a preliminary ruling – Article 267 TFEU – Definition of ‘court or tribunal of a Member State’ – Criteria – Independence and compulsory nature of the jurisdiction of the national body concerned – Stability of the members of that body – Directive 2014/24/EU – Public procurement procedures – Article 58 – Selection criteria – Possibility of including, amongst those criteria, obligations under special laws applicable to the activities connected with the contract in question and not set out as a criterion for selection in the procurement documents – Article 63(1) – Tenderer relying on the capacities of another entity in order to meet the requirements of the contracting authority – Not possible to require recourse to subcontracting)

In Case C-403/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes, Romania), made by decision of 22 June 2021, received at the Court on 29 June 2021, in the proceedings

**SC NV Construct SRL**

v

**Județul Timiș**

intervening party:

**SC Proiect – Construct Regiunea Transilvania SRL,**

THE COURT (Third Chamber),

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

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

\* Language of the case: Romanian.

after considering the observations submitted on behalf of:

- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the European Commission, by P. Ondrůšek, E.A. Stamate and G. Wils, acting as Agents,

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 58 and 63 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), and the principles of proportionality, liability and transparency.
- 2 The request has been made in proceedings between SC NV Construct SRL and Județul Timiș (District of Timiș, Romania) concerning the public procurement of a feasibility study for the construction of a road.

### **Legal context**

#### ***European Union law***

##### *Directive 89/665/EEC*

- 3 Headed ‘Requirements for review procedures’, Article 2 of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31; ‘Directive 89/665’), provides in paragraph 9:

‘Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article [267 TFEU] and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.’

*Directive 2014/24*

4 Entitled ‘Principles of procurement’, Article 18 of Directive 2014/24 provides in paragraph 1:

‘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.’

5 Article 42 of that directive relates to ‘technical specifications’.

6 Entitled ‘Selection criteria’, Article 58 of that directive states:

‘1. Selection criteria may relate to:

- (a) suitability to pursue the professional activity;
- (b) economic and financial standing;
- (c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.

2. With regard to suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment, as described in Annex XI, or to comply with any other request set out in that Annex.

In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

...

4. With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. ...

...

5. Contracting authorities shall indicate the required conditions of participation which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest.’

- 7 Entitled ‘Reliance on the capacities of other entities’, Article 63 of that directive provides in paragraph 1:

‘With regard to criteria relating to economic and financial standing as set out pursuant to Article 58(3), and to criteria relating to technical and professional ability as set out pursuant to Article 58(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria relating to the educational and professional qualifications as set out in point (f) of Annex XII Part II, or to the relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.

The contracting authority shall, in accordance with Articles 59, 60 and 61, verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion pursuant to Article 57. The contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.

Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

Under the same conditions, a group of economic operators as referred to in Article 19(2) may rely on the capacities of participants in the group or of other entities.’

- 8 Entitled ‘Contract award criteria’, Article 67 of Directive 2014/24 provides in paragraph 3:

‘Award criteria shall be considered to be linked to the subject matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

- (a) the specific process of production, provision or trading of those works, supplies or services; or
- (b) a specific process for another stage of their life cycle,

even where such factors do not form part of their material substance.’

- 9 Entitled ‘Conditions for performance of contracts’, Article 70 of that directive states:

‘Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.’

## ***Romanian law***

### *Law No 101/2016*

- 10 The Legea nr. 101/2016 privind remediile și căile de atac în materie de atribuire a contractelor de achiziție publică, a contractelor sectoriale și a contractelor de concesiune de lucrări și concesiune de servicii, precum și pentru organizarea și funcționarea Consiliului Național de Soluționare a Contestațiilor (Law No 101/2016 on remedies and appeals relating to the award of public contracts, sectoral contracts and work concession and service concession contracts, as well as the organisation and functioning of the National Council for the Resolution of Disputes), of 19 May 2016 (*Monitorul Oficial al României*, Part I, No 393 of 23 May 2016), in the version applicable to the dispute in the main proceedings ('Law No 101/2016'), provides in Article 2(1):

'Any person who considers that one of his or her rights or legitimate interests has been breached by an act of an contracting authority or by a failure to rule on a claim within the period prescribed by law may seek the annulment of that act, an injunction that the contracting authority issue an act or take remedial measures, or the recognition of the right or legitimate interest claimed, by means of administrative and judicial or court action.'

- 11 Under Article 4(1) of that law:

'For the resolution of the dispute, the person making the claim may pursue it:

- (a) through administration and judicial proceedings, before the National Council for the Resolution of Disputes; or
- (b) through legal proceedings, before a court.'

- 12 Article 15(1) of that law provides:

'Proceedings for the resolution of disputes shall comply with the principles of legality, expedition, adversarial proceedings, guarantees of the rights of the defence, impartiality and independence of the administrative and judicial activity.'

- 13 Under Article 28(1) of that law:

'The decision of the Council shall be binding on the parties to the case.'

- 14 Article 37 of Law No 101/2016 provides:

'1. The National Council for the Resolution of Disputes ... is an independent tribunal with administrative and judicial functions.

...

3. In the context of its functions, the Council shall be subject only to the law, and hearings of the full formation of the Council are legally constituted when the majority of its members are present.

4. As regards its decisions, the Council is independent and is not subordinate to any authority or public institution.'

15 Article 44(4) of that law provides:

‘In the exercise of its jurisdiction, the Council shall comply with the principles of independence and stability of its members.’

16 Article 45 of that law provides:

‘1. Members of the Council shall be selected on the basis of a competition, and are appointed by decision of the Prime Minister under the conditions provided for by law.

2. Members of the Council are selected on the basis of their professional suitability and good character. The candidates must have [undertaken] university studies, 10 years’ professional experience in a legal, economic or technical field and at least 3 years in the field of public procurement.

...

4. The President of the Council shall submit to the Prime Minister the proposals for appointment of Members of the Council, for candidates who have been declared to be admitted to the competition.’

17 Article 47(1) to (3) of that law provides:

‘1. It is prohibited for Members of the Council:

(a) to undertake commercial activities, directly or through intermediaries;

(b) to be associates or members of the management, administration or controlling bodies of private companies, companies governed by the *Legea societăților nr. 31/1990* [Law No 31/1990 on companies], republished, as amended and supplemented, including of banks or other credit institutions, insurance or financial companies, national companies, or autonomous corporations;

(c) to be members of an economic interest grouping;

(d) to be members of a political party and carry out political activities or participate in such activities;

(e) to exercise any public or private function/activity, with the exception of higher education teaching or literary/artistic creation;

(f) to exercise any other professional or council activity.

2. Members of the Council shall be required to make declarations of their assets and interests ...

3. Members of the Council are not permitted to participate in the resolution of a dispute if they are in one of the situations provided for below, on pain of the invalidity of the decision delivered:

- (a) where those members, their spouse, their ascendants or their descendants have an interest in the outcome of the dispute, or where they are spouses, parents or associates to the fourth degree inclusive of one of the parties;
- (b) where there has been a criminal procedure between them and one of the parties within the five years preceding the resolution of the case;
- (c) where they have made public statements on the issue on which they are ruling;
- (d) where they have received from one of the parties material goods or promises of material goods or other advantages.'

18 Article 48a of Law No 101/2016 provides:

'1. Findings of misconduct committed by the members of the Council shall fall within the remit of the Disciplinary Committee that shall be created within the Council.

2. The Disciplinary Committee shall be composed of three members, of which one shall be nominated by the President of the Council, one shall be elected by the members of the Council by simple majority, and one is a representative of the National Agency of Public Officials.

3. On a proposal of the Disciplinary Committee, disciplinary sanctions shall be applied by the President of the Council, except for the sanction of removal from public office, which is applied by the person who has legal competence to make appointments to that office.'

*The Rules of Procedure of the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes, Romania)*

19 Article 39(1) of the Rules of Procedure of the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) sets out the disciplinary sanctions that may be imposed where an official is guilty of misconduct, under, in particular, the Ordonanța de urgență a Guvernului nr. 57/2019 privind Codul administrativ (Emergency government order No 57/2019 on the Administrative code) of 3 July 2019 (*Monitorul Oficial al României*, Part I, No 555 of 5 July 2019; 'the Administrative code').

*The Administrative code*

20 Article 492 of the Administrative code, entitled 'Administrative disciplinary liability', provides:

'1. Culpable breach, by public officials, of the duties of a public office which they hold and of the rules of civil and professional conduct laid down by law shall constitute misconduct and give rise to their administrative disciplinary liability.

2. The following constitute misconduct:

- (a) systematic lateness in carrying out tasks;

- (b) repeated negligence in carrying out tasks;
- (c) unjustified absence from work;
- (d) non-compliance with working hours;
- (e) interventions or insistence on dealing with claims outside the legal framework;
- (f) failure to observe professional secrecy or confidentiality of work of that nature;
- (g) statements that harm the reputation of the authority or public institution in which the public official carries out his or her duties;
- (h) conduct of political activities during working hours;
- (i) unjustified refusal to carry out professional tasks;
- (j) unjustified refusal to be subject to work-related medical checks or examinations following the recommendations of a occupational health doctor, in accordance with provisions of law;
- (k) breach of provisions relating to duties and prohibitions laid down by law for public officials other than those relating to conflicts of interest and incompatibilities;
- (l) breach of provisions relating to incompatibilities where the public official fails to act to terminate them within a period of fifteen calendar days beginning from the date on which the incompatibility arose;
- (m) breach of the provisions on conflicts of interest;
- (n) other matters regarded as misconduct in the normative acts concerning public office and public officials or applicable to them.

3. The disciplinary sanctions shall be:

...

(f) Removal from public office.

4. Misconduct referred to in paragraph 2 is punishable by the following disciplinary sanctions:

- (a) one of the disciplinary sanctions referred to in paragraph 3(a) or (b) for misconduct referred to in paragraph 2(a), (b) and (d);
- (b) one of the disciplinary sanctions referred to in paragraph 3(b) to (f) for misconduct referred to in paragraph 2(c);
- (c) one of the disciplinary sanctions referred to in paragraph 3(c) to (f) for misconduct referred to in paragraph 2(e) to (h);



- (d) one of the disciplinary sanctions referred to in paragraph 3, for misconduct referred to in paragraph 2(i) to (k) and (m);
- (e) the disciplinary sanction referred to in paragraph 3(f) in the conditions laid down in Article 520, for misconduct referred to in paragraph 2(l);
- (f) one of the disciplinary sanctions referred to in paragraph 3, for misconduct referred to in paragraph 2(n).

...

6. In determining the individual disciplinary sanction in accordance with the provisions of paragraph 4, account is to be taken of the causes and seriousness of the misconduct, the circumstances under which it was committed, the degree of culpability and the consequences of the misconduct, the general conduct of the official during his or her service and whether there are, among his or her antecedents, other disciplinary sanctions which are not spent under the conditions laid down by this code.

...'

21 Article 568(2) of that code provides:

'Administrative disciplinary liability is established in compliance with the principle of adversarial proceedings and the rights of the defence and subject to review by the administrative tribunals under the conditions laid down by law.'

*The Law on public procurement*

22 Article 3 of the Legea nr. 98/2016 privind achizițiile publice (Law No 98/2016 on public procurement), of 19 May 2016 (*Monitorul Oficial al României*, Part I, No 390 of 23 May 2016; 'the Law on public procurement'), provides in points (w) and (yy):

'(w) supplier – entity which makes products available to the contractor, including services, where necessary, for the installation or placement thereof, or which provides services to the contractor, which does not have the status of a subcontractor.

...

(yy) subcontractor – any economic operator that is not party to a public contract and which carries out and/or provides certain parts or elements of works or the construction or performance of activities that are part of the subject of the public contract by being responsible, vis-a-vis the contractor, for the organisation or performance of all the necessary steps to that end.

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

- 23 On 6 April 2021, in the context of an open call for tenders organised with a view to awarding a contract for the purpose of ‘drafting technico-economic documents – feasibility study and technical design – relating to the investment: Construction of the departmental road connecting the international airport ‘Traian Vuia’ of Timișoara to the A1 motorway’, the District of Timiș, in its capacity as the contracting authority, ranked NV Construct in fourth position.
- 24 On 16 April 2021, NV Construct seised the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes), which is the referring body, seeking the disqualification of the three tenderers ranked above it, and a new assessment of their tenders.
- 25 NV Construct submits, in essence, that those three tenderers did not comply with the requirements which were not set out in the procurement documents but which are imposed on the basis of special laws governing various activities that must or are liable to be carried out during the performance of a contract. The contracting authority accordingly should have verified that those tenderers or their subcontractors were authorised by the Autoritatea Feroviară Română (Romanian railway authority, Romania). In addition, since the successful tenderer intended to rely on the capacities of third parties in order to perform the contract, it necessarily should have, in order to comply with Article 3(1)(yy) of the Law on public procurement, relied on subcontractors to the exclusion of any other form of cooperation. Finally, it should have been required to have designated a subcontractor for the activity of ‘Services for the drafting of documents for the purpose of the notice and approval of the [setting aside] of expropriated land and the change of category of use’ even if it is not certain that it would have to have recourse to those services, since the procurement documents specify that that activity is to be carried out ‘only if necessary’.
- 26 The contracting authority and the successful tenderer, for their part, submit that the procurement documents do not contain any indication relating to the need to refer in the offer exclusively to operators authorised by the Romanian railway authority and the Asociația Națională a Evaluatorilor Autorizați din România (Romanian national association of authorised assessors). In addition, according to the contracting authority, at the time at which tenders are submitted, it is impossible to know whether it will be necessary to rely on services for the drawing up of documents for the purpose of setting aside expropriated land and drafting a pedology study. That is why the successful tenderer stated in its tender that it would undertake, itself and ‘only if necessary’, to draw up that documentation. Furthermore, the fact that it did not refer at the outset to its intention to subcontract those services does not raise any difficulty, since it could seek new subcontractors after the contract is signed. Moreover, experts from the national association of authorised assessors would have been designated and would have produced declarations of availability.
- 27 As a preliminary matter, the referring body observes that the value of the contract to be awarded is estimated to be 1 970 967 Romanian lei (RON) (approximately EUR 421 553), such that it exceeds the threshold for Directive 2014/24 to apply.
- 28 That body states that the Romanian courts are divided on the issue of whether a contracting authority may exclude an economic operator whose offer does not comply with an obligation under the rules applicable to a profession, without even allowing it the possibility of rectifying the tender and despite that obligation not having been expressly referred to in the procurement documents in question.

- 29 The present case therefore provides the opportunity to clarify whether, first, special rules relating to each activity concerned by a contract, whatever the importance of those activities to the contract, must be deemed to supplement the procurement documents and, second, whether the tenderers must necessarily designate in their tender, on pain of it being rejected, the subcontractors on which they will entrust those activities which are not of significant importance to that contract.
- 30 The Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) observes that it follows inter alia from the judgment of 2 June 2016, *Pizzo* (C-27/15, EU:C:2016:404), that an economic operator cannot be excluded from the procedure on the ground that it has not complied with requirements that were not set out in the procurement documents.
- 31 In the case in the main proceedings, rules relating to construction, modernisation, maintenance and repair of the railway infrastructure, which did not appear in the procurement documents, are binding on the tenderer only at the stage of the performance of the contract in question. In addition, the number of economic operators authorised for certain activities under that contract is limited. Therefore, the obligation to designate them as subcontractors would drastically reduce the competition, whilst increasing the administrative burden on participants in the call for tenders at issue in the main proceedings, which could be contrary to the principle of proportionality. The referring body wonders, therefore, whether it is necessary systematically to require tenderers to designate their potential subcontractors at the time when the tender is submitted, irrespective of the importance of the activities that would be entrusted to them under that contract, the time at which those subcontractors would act in the performance of that same contract, or yet the probability that they would be requested to act.
- 32 Furthermore, according to that body, those procurement documents are not supplemented by certain criteria which are binding as a result of special laws that are not relevant in the matter of public procurement. The fact of automatically supplementing procurement documents with such criteria would infringe the principle of proportionality and call into question the discretion that a contracting authority has under the second subparagraph of Article 58(1) of Directive 2014/24 as to the setting of selection criteria.
- 33 Likewise, in the context of their possible appeals, adversely affected economic operators may only contest the procurement documents that they consider to be too restrictive, without being able to claim that they are too permissive and should include additional criteria that may restrict the access of other operators to the procedure in question.
- 34 Moreover, the economic operators which are ranked lower cannot call into question an assessment of the tenders carried out in accordance with the requirements as set out in the procurement documents. On the contrary, they must establish that that assessment did not comply with those documents, such that the principle of transparency was breached.
- 35 Finally, to require subcontracting as the only form of carrying out an activity of a contract would infringe the freedom of contract, the right of economic operators to decide how to organise themselves and Article 63 of Directive 2014/24. To the extent that it follows from Article 63 of that directive that the production of an undertaking suffices to demonstrate compliance with the selection criteria, a mere statement of availability should a fortiori suffice where, as regards activities of minor importance to the contract, the satisfaction of those criteria has not been required.

36 In those circumstances, the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Must Article 58 of Directive [2014/24], the principle of proportionality and the principle of liability be interpreted as meaning that the contracting authority has the right to lay down the criteria relating to technical capacity, that is to say, to determine whether or not it is necessary to include in the procurement documents criteria relating to technical and professional capacity and the capacity to carry out the technical and professional activity arising from the provisions of special laws, in respect of activities that do not have significant importance in the contract?
- (2) Do the principles of transparency and proportionality preclude the automatic supplementation of the procurement documents with qualification criteria arising from special laws applicable to activities relating to the contract to be awarded which were not set out in the procurement documents and which the contracting authority decided not to impose on the economic operators?
- (3) (a) Do Article 63 of the directive and the principle of proportionality preclude the exclusion from the [tendering] procedure of a tenderer who has not named an operator as a subcontractor for the purpose of demonstrating compliance with certain criteria relating to technical and professional capacity and the capacity to carry out the technical and professional activity arising from the provisions of special laws not set out in the procurement documents in the case where the tenderer in question has chosen a different contractual form of involving specialists in the contract, that is to say [a] contract for the supply/provision of services, or has submitted [a] declaration of willingness on their part?
- (b) Does the right to determine its organisation and contractual relations within the group lie with the economic operator and is it possible also to involve certain providers/suppliers in the contract in the case where the provider is not one of the entities on whose capacity the tenderer intends to rely in order to demonstrate compliance with the relevant criteria?’

### **Admissibility of the request for a preliminary ruling**

37 As a preliminary matter, it must be ascertained whether the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) may be regarded as a ‘court or tribunal of a Member State’, within the meaning of Article 267 TFEU.

38 Although the referring body considers that it was recognised as having that status by the Court of Justice in the order of 17 October 2018, *Beny Alex* (C-353/18, not published, EU:C:2018:829), it must be observed that, in that order, the Court merely rejected the reference for a preliminary ruling made to it by that body as being manifestly inadmissible, within the meaning of Article 53(2) of the Rules of Procedure of the Court of Justice, without deciding that that body was a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU.

39 According to the Court’s settled case-law, in order to determine whether a body making a reference is a ‘court or tribunal’ for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory,

whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, to that effect, judgments of 30 June 1966, *Vaassen-Göbbels*, 61/65, EU:C:1966:39, p. 395, and of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 51).

- 40 In the light of the information that the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) provided to the Court on 6 July 2022, in response to a request that the latter had sent to it on 16 May 2022, there is no doubt that that body satisfies the criteria relating to its being established by law, its permanence, the *inter partes* nature of its procedure and the application, by that body, of rules of law. However, there is a question as to whether that body meets the criterion, first, of the compulsory nature of its jurisdiction and, second, of independence.
- 41 As regards, in the first place, the compulsory nature of the referring body's jurisdiction, it is true that Article 4(1) of Law No 101/2016, read in conjunction with Article 2(1) of that law, that any person who considers that one of his or her rights or legitimate interests has been breached by an act or an omission of a contracting authority may choose either to bring administration and judicial proceedings before the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes), or to bring legal proceedings before a court with a section that deals with administrative disputes. It is clear from the case file available to the Court that the Romanian legislature thus chose, in order to transpose Article 2(9) of Directive 89/665, as amended by Directive 2007/66, to attribute competence to hear this type of dispute concurrently to the referring body, on the one hand, and courts with a section for administrative disputes, on the other hand.
- 42 That being so, it must be observed that the decisions of the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes), whose jurisdiction does not depend on the parties' agreement, are binding on the parties (see, by analogy, judgment of 6 October 2015, *Consorti Sanitari del Maresme*, C-203/14, EU:C:2015:664, paragraph 23).
- 43 In those circumstances, the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) satisfies the criterion of the compulsory nature of its jurisdiction.
- 44 In the second place, as regards the criterion of independence, the external aspect of the principle of independence of national courts requires that the body concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever. In that regard, it is critical that the irremovability of the members of the body concerned is guaranteed, such that dismissals of members of that body should be determined by specific rules, by means of express legislative provisions offering safeguards that go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal (see, to that effect, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraphs 56 to 60).
- 45 As regards the internal aspect of the principle of independence of national courts, that principle is linked to 'impartiality' and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. Thus, the concept of 'independence' requires above all that the body in question act as a third party in relation to the authority which adopted the contested decision (see, to that effect, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraphs 61 and 62).

- 46 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 63).
- 47 In the present case, as is clear from the information available to the Court, Law No 101/2016 emphasises, in several places, the external aspect of the independence of the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes). Thus, paragraphs 1, 3 and 4 of Article 37 of that law provide, respectively, that the Council ‘is an independent tribunal with administrative and judicial functions’, and that it is ‘subject only to the law’ and that it ‘is independent and is not subordinate to any authority or public institution’. It is also clear from Article 15(1) of that law that the procedure for the resolution of disputes complies, inter alia, with the principle of independence of administrative and judicial activity. In the same vein, Article 44(4) of the same law provides that the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes), ‘in the exercise of its jurisdiction, ... shall comply with the principles of independence and stability of its members’.
- 48 As regards the appointment of the members of that body, it is clear from Article 45 of Law No 101/2016 that those members are selected by competition, on the basis of their professional suitability and their good character, from candidates with a university education and professional experience of 10 years’ duration in the fields covered by that article, and experience of at least 3 years in the field of public procurement. They are appointed by decision of the Prime Minister, upon a proposal by the President of that body, from candidates who have been declared to be admitted to the competition.
- 49 In addition, it is clear from Article 48a of Law No 101/2016 that misconduct committed by the members of the referring body can only be found by a Disciplinary Committee established within that body. On a proposal by the Disciplinary Committee, disciplinary sanctions are to be applied by the President of that body, except for the sanction of removal from public office, which is applied only by the person who has legal competence to make appointments to that body, namely the Romanian Prime Minister.
- 50 Furthermore, Article 39(1) of the Rules of Procedure of the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) lays down a proportionate scale of sanctions, in accordance with Article 492(6) of the Administrative code.
- 51 Finally, the fact that Article 39 refers to the Administrative code in order to identify the cases in which a member of the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) incurs a sanction of removal from public office is such as to guarantee legal certainty.
- 52 Thus, that sanction may be pronounced, inter alia, against a member of the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) who is unable to justify his or her absence from work or who has failed to comply with the rules relating to professional secrecy or conflicts of interest. Such situations, referred to in Article 492(2) of the Administrative code, read in conjunction with paragraph (4) of that article, correspond to the exceptional cases reflecting legitimate and compelling grounds that warrant the adoption of such a measure, subject to the principle of proportionality and to the appropriate procedures being

followed (see, by analogy, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraphs 59, 60 and 67). Therefore, members of the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) benefit throughout their mandate from a guarantee of stability which may only be derogated from for reasons expressly set out in law. (see, by analogy, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 70).

- 53 It should however be pointed out that the principle of stability that the members of the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) benefit from under Article 44(4) of Law No 101/2016 must be interpreted consistently with the criterion of independence, as defined in paragraph 44 of this judgment, with which every national body must comply in order to have the status of a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU, in order to comply with the principle of irremovability.
- 54 It should also be observed that, in the response referred to in paragraph 40 of this judgment, that the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) stated that its members are the subject of incompatibilities and prohibitions analogous to those imposed on the judiciary, and that those members are removed only in the event of serious misconduct. In addition, in the event that that sanction is pronounced against one of those members, the latter has a right of appeal before the administrative courts, pursuant to Article 568(2) of the Administrative code.
- 55 The referring body has furthermore indicated that, in practice, no member of the council had been removed since its creation in 2006.
- 56 As to the internal aspect of the principle of independence of a ‘court or tribunal of a Member State’, within the meaning of Article 267 TFEU, that appears to be guaranteed by Article 47 of Law No 101/2016, which seeks to avoid situations liable to give rise to conflicts of interest. Thus, the members of the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) must not carry out commercial activities, be members of an economic operator’s decision-making body, be involved in political activities, or exercise a public or private activity, with the exception of teaching duties within higher education. Those incompatibilities are moreover the same as those to which the judiciary is subject under Romanian law. In addition, the members of the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) are subject to rules concerning the grounds for recusal, laid down in Article 47(3) of that law, pursuant to which they are not authorised to participate in the resolution of a dispute, on pain of the decision given being invalid, where they are in one of the situations listed in that provision.
- 57 Moreover, it is clear from Article 15(1) of that law that the procedure for the resolution of disputes before the referring body complies, *inter alia*, with the principles of adversarial proceedings, of the guarantee of rights of the defence and of impartiality.
- 58 Having regard to all the foregoing considerations, it must be held that the Consiliul Național de Soluționare a Contestațiilor (National Council for the Resolution of Disputes) may be classified as a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU and that, consequently, the present request for a preliminary ruling is admissible.

## Consideration of the questions referred

### *The first question*

- 59 By its first question, the referring court asks, in essence, whether Article 58 of Directive 2014/24, read in conjunction with the principles of proportionality and of transparency, guaranteed in the first subparagraph of Article 18(1) of that directive, must be interpreted as meaning that the contracting authority has the option of imposing as selection criteria obligations under special laws applicable to the activities that may be required to be carried out in the context of performing the public contract and are not of significant importance.
- 60 As it is best placed to assess its own needs, the contracting authority is granted a broad discretion by the EU legislature when determining selection criteria, as can be seen inter alia from the recurring use of the term ‘may’ in Article 58 of Directive 2014/24. Thus, in accordance with paragraph 1 of that article, it has some flexibility in setting those requirements for participation in a procurement procedure which it considers to be related and proportionate to the subject matter of the contract and appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities required to perform the contract to be awarded. More specifically, according to paragraph 4 of that article, the contracting authority is free to determine which requirements for participation it considers appropriate, from its point of view, to ensure inter alia the performance of the contract to a quality standard which it considers appropriate (judgment of 31 March 2022, *Smetna palata na Republika Bulgaria*, C-195/21, EU:C:2022:239, paragraph 50).
- 61 In the exercise of that broad discretion, the contracting authority may decide to include, amongst the selection criteria referred to in the contract notice or tender specifications, obligations under special laws applicable to the activities that may be required to be carried out in the context of performing the public contract and which are not of significant importance.
- 62 Conversely, the contracting authority may equally, in the exercise of that broad discretion, consider that it is not necessary to include those obligations amongst the selection criteria. That choice may inter alia be explained by the fact that those obligations do not have significant importance or by the contingent nature of the activities to be carried out to which the obligations at issue apply. The contracting authority may equally prefer to refer to those same obligations as part of the conditions for performance of contracts in order to require compliance with them from a single tenderer only (see, by analogy, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraphs 88 and 89).
- 63 Directive 2014/24 does not preclude the consideration of technical requirements simultaneously as selection criteria relating to technical and professional ability, as technical specifications and/or as conditions for the performance of the contract, within the meaning of Article 58(4), Article 42 and Article 70 of that directive, respectively (judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 84). Conversely, a contracting authority may decide to opt for only one of those classifications.
- 64 In that regard, a contracting authority may, pursuant to Article 70 of Directive 2014/24, lay down special conditions relating to the performance of a contract provided that they are linked to the subject matter of the contract, within the meaning of Article 67(3) of that directive, and indicated in the call for competition or in the procurement documents.



- 65 Furthermore, to oblige tenderers to satisfy all the conditions of performance of the contract at the time of submission of their tenders would be to impose an excessive requirement – one which might dissuade economic operators from participating in procurement procedures – and would thus infringe the principles of proportionality and transparency guaranteed by Article 18(1) of that directive (judgment of 8 July 2021, *Sanresa*, C-295/20, EU:C:2021:556, paragraph 62).
- 66 Therefore, the answer to the first question is that Article 58 of Directive 2014/24, read in conjunction with the principles of proportionality and of transparency, guaranteed in the first subparagraph of Article 18(1) of that directive, must be interpreted as meaning that the contracting authority has the option of imposing as selection criteria obligations under special laws applicable to the activities that may be required to be carried out in the context of performing the public contract and are not of significant importance.

### ***The second question***

- 67 By its second question, the referring court asks, in essence, whether the principles of proportionality and of transparency guaranteed by the first subparagraph of Article 18(1) of Directive 2014/24 must be interpreted as precluding procurement documents from being automatically supplemented with qualification criteria arising under special laws applicable to activities relating to the contract to be awarded which were not set out in the procurement documents and which the contracting authority decided not to impose on the economic operators concerned.
- 68 As is clear from the answer to the first question, obligations under special laws applicable to activities connected with the public contract to be awarded cannot automatically be added as selection criteria to the criteria expressly referred to in the procurement documents, otherwise the broad discretion that the contracting authority has in determining the selection criteria that it wishes to impose on economic operators as conditions for participating in a procurement procedure would be rendered devoid of any substance.
- 69 Accordingly, the answer to the second question is that the principles of proportionality and of transparency guaranteed by the first subparagraph of Article 18(1) of Directive 2014/24 must be interpreted as precluding procurement documents from being automatically supplemented with qualification criteria arising under special laws applicable to activities relating to the contract to be awarded which were not set out in the procurement documents and which the contracting authority decided not to impose on the economic operators concerned.

### ***The third question, point (a)***

- 70 By point (a) of its third question, the referring court asks, in essence, whether Article 63(1) of Directive 2014/24 must be interpreted as precluding a tenderer from being excluded from a procurement procedure on the ground that it has not designated the subcontractor to which it intends to entrust the performance of obligations under special laws applicable to the activities related to the contract in question and not provided for in the procurement documents, where that tenderer has stated in its offer that it would perform those obligations by relying on the capacities of another entity without however having a subcontract agreement with that entity.

- 71 As is clear from paragraph 62 of this judgment, if the obligations under special laws applicable to activities related to the contract in question and not provided for, as selection criteria, in the procurement documents were classified as a condition for performance of the contract, and if the successful tenderer did not satisfy it when the public contract was awarded to it, the non-compliance with that condition would have no effect on the question of whether the award of the contract was compatible with the provisions of Directive 2014/24 (see, to that effect, judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 89).
- 72 In a situation where the obligations under special laws applicable to activities related to the contract in question and which were not provided for in the procurement documents in fact constitute selection criteria within the meaning of Article 58 of Directive 2014/24, it suffices to recall that Article 63(1) of that directive confers the right for any economic operator to rely, for a particular contract, on the capacities of other entities, regardless of the legal nature of the links which it has with them, with a view to satisfying the various categories of selection criteria set out in Article 58(1) of that directive and specified in paragraphs (2) and (4) of that article (see, to that effect, judgments of 10 October 2013, *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, EU:C:2013:646, paragraphs 29 and 33, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 150).
- 73 Furthermore, it is clear from the last sentence of Article 63(1) of Directive 2014/24 that, where an economic operator wants to rely on the capacities of other entities, it suffices for it to prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect.
- 74 Consequently, it is clear that subcontracting constitutes only one of the means by which an economic operator may rely on the capacities of other entities and it cannot, therefore, be required of it by the contracting authority.
- 75 Having regard to the forgoing considerations, the answer to point (a) of the third question is that Article 63(1) of Directive 2014/24 must be interpreted as precluding the exclusion of a tenderer from a procurement procedure on the ground that it has not designated the subcontractor to which it intends to entrust the performance of obligations under special laws applicable to the activities related to the contract in question and not provided for in the procurement documents, where that tenderer has stated in its offer that it would perform those obligations by relying on the capacities of another entity without however having a subcontract agreement with that entity.

***The third question, point (b)***

- 76 By point (b) of its third question, the referring court asks, in essence, whether Article 63(1) of Directive 2014/24, read in conjunction with the principle of proportionality set out in the first subparagraph of Article 18(1) of that directive, must be interpreted as meaning that an economic operator has the right to organise itself and its contractual relations within a group and whether it may also rely on suppliers or service providers in a contract if the supplier concerned was not among the entities whose capacities the tenderer intends to rely on in order to demonstrate its compliance with the relevant criteria.
- 77 In that regard, it is true that, as the settled case-law of the Court of Justice states, questions on the interpretation of EU law referred by a national court in the factual and legal context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to

determine, enjoy a presumption of relevance (see, to that effect, judgments of 7 September 1999, *Beck and Bergdorf*, C-355/97, EU:C:1999:391, paragraph 22, and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 43).

- 78 However, it has also been consistently held that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them, such that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see, to that effect, judgments of 16 December 1981, *Foglia*, 244/80, EU:C:1981:302, paragraph 18, and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 44).
- 79 From that point of view and since the request for a preliminary ruling is the basis for the proceedings before the Court, it is essential that, in that request, the national court should, in particular, set out the factual and legal background to the dispute in the main proceedings, most particularly in certain areas characterised by complex factual and legal situations, such as that of public procurement (see, to that effect, judgment of 26 January 1993, *Telemarsicabruzzo and Others*, C-320/90 to C-322/90, EU:C:1993:26, paragraphs 6 and 7, and order of 25 April 2018, *Secretaria Regional de Saúde dos Açores*, C-102/17, EU:C:2018:294, paragraphs 28 and 29).
- 80 In the present case, it must be observed that the order for reference does not contain a description of the factual and legal context of the dispute in the main proceedings that is sufficient to enable the Court to provide a useful answer to point (b) of the third question.
- 81 Consequently point (b) of the third question must be declared to be inadmissible.

## Costs

- 82 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 (Third Chamber) hereby rules:

- 1. Article 58 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, read in conjunction with the principles of proportionality and of transparency guaranteed by the first subparagraph of Article 18(1) of that directive**

**must be interpreted as meaning that the contracting authority has the option of imposing as selection criteria obligations under special laws applicable to the activities that may be required to be carried out in the context of performing the public contract and are not of significant importance**

- 2. The principles of proportionality and of transparency guaranteed by the first subparagraph of Article 18(1) of Directive 2014/24**

**must be interpreted as precluding procurement documents from being automatically supplemented with qualification criteria arising under special laws applicable to activities relating to the contract to be awarded which were not set out in the procurement documents and which the contracting authority decided not to impose on the economic operators concerned.**

**3. Article 63(1) of Directive 2014/24**

**must be interpreted as precluding the exclusion of a tenderer from a procurement procedure on the ground that it has not designated the subcontractor to which it intends to entrust the performance of obligations under special laws applicable to the activities related to the contract in question and not provided for in the procurement documents, where that tenderer has stated in its offer that it would perform those obligations by relying on the capacities of another entity without however having a subcontract agreement with that entity.**

[Signatures]