



## Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

15 September 2022\*

(Reference for a preliminary ruling – Public procurement procedures – Directive 2014/24/EU – Point (d) of the first subparagraph of Article 57(4) – Optional grounds for exclusion – Agreements with other economic operators aimed at distorting competition – Directive 2014/25/EU – Article 36(1) – Principles of proportionality and equal treatment of tenderers – Article 80(1) – Use of exclusion grounds and selection criteria provided for under Directive 2014/24/EU – Tenderers which constitute an economic unit and have submitted separate tenders that were neither autonomous nor independent – Need for sufficiently plausible indications to establish an infringement of Article 101 TFEU)

In Case C-416/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bayerisches Oberstes Landesgericht (Bavarian Highest Regional Court, Germany), made by decision of 24 June 2021, received at the Court on 7 July 2021, in the proceedings

**Landkreis Aichach-Friedberg,**

v

**J. Sch. Omnibusunternehmen,**

**K. Reisen GmbH,**

intervener:

**E. GmbH & Co. KG,**

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, S. Rodin, J.-C. Bonichot, L.S. Rossi and O. Spineanu-Matei, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

\* Language of the case: German.

after considering the observations submitted on behalf of:

- the Landkreis Aichach-Friedberg, by R. Wiemann, Rechtsanwalt,
- J. Sch. Omnibusunternehmen and K. Reisen GmbH, by J.R. Eydner and A. Kafedžić, Rechtsanwälte,
- E. GmbH & Co. KG, by H. Holz, S. Janka and U.-D. Pape, Rechtsanwälte,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. Santini, avvocato dello Stato,
- the Lithuanian Government, by K. Dieninis, V. Kazlauskaitė-Švenčionienė and E. Kurelaitytė, acting as Agents,
- the European Commission, by P. Ondrůšek 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 Article 18(1) and Article 57(4) 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) 2017/2365 of 18 December 2017 (OJ 2017 L 337, p. 19) ('Directive 2014/24').
- 2 The request has been made in proceedings between the Landkreis Aichach-Friedberg (District of Aichach-Friedberg, Germany), on the one hand, and J. Sch. Omnibusunternehmen ('J') and K. Reisen GmbH, on the other, concerning the award by that district of a public contract for public transport bus services.

### **Legal context**

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

##### *Directive 93/37/EEC*

- 3 The first paragraph of Article 24 of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) contained a list of the optional grounds for exclusion of any contractor from participation in a procurement procedure.

*Directive 2014/24*

4 The first paragraph of recital 101 of Directive 2014/24 reads as follows:

‘Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. ...’

5 Point 10 of Article 2(1) of Directive 2014/24 provides that, for the purposes of that directive, ‘economic operator’ means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market.

6 According to Article 4(c) of Directive 2014/24, that directive applies to procurements with a value net of value added tax (VAT) estimated to be equal to or greater than EUR 221 000, inter alia, for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities.

7 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.’

8 Article 57 of Directive 2014/24, entitled ‘Exclusion grounds’, provides:

‘ ...

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

...

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;

(e) where a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures;

(f) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure, as referred to in Article 41, cannot be remedied by other, less intrusive measures;

...

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

...

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. ...'

*Directive 2014/25/EU*

9 Article 11 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), as amended by Commission Delegated Regulation (EU) 2017/2364 of 18 December 2017 (OJ 2017 L 337, p. 17) ('Directive 2014/25'), provides:

'This Directive shall apply to activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.'

10 Article 15(a) of Directive 2014/25 provides:

'Save where they are ruled out by the exclusions in Articles 18 to 23 or pursuant to Article 34, concerning the pursuit of the activity in question, this Directive shall apply to procurements with a value net of [VAT] estimated to be equal to or greater than the following thresholds:

(a) EUR 443 000 for supply and service contracts as well as for design contests'

11 Article 36(1) of that directive is worded as follows:

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

...'

- 12 Under the heading ‘Use of exclusion grounds and selection criteria provided for under Directive [2014/24]’, Article 80 of Directive 2014/25 states, in paragraph 1 thereof:

‘The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures, in competitive dialogues or in innovation partnerships may include the exclusion grounds listed in Article 57 of Directive [2014/24] on the terms and conditions set out therein.

...

If so required by Member States, those criteria and rules shall, in addition, include the exclusion grounds listed in Article 57(4) of Directive [2014/24] on the terms and conditions set out in that Article.’

### ***German law***

- 13 Paragraph 1 of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition) of 26 June 2013 (BGBl. 2013 I, p. 1750), in the version applicable to the dispute in the main proceedings (‘the GWB’), provides:

‘All agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition are prohibited.’

- 14 Paragraph 124(1) of the GWB, which transposes Article 57(4) of Directive 2014/24 into German law, provides, in point 4 thereof:

‘Contracting authorities may, acting with due regard for the principle of proportionality, exclude an undertaking from participation in a public procurement procedure at any time during that procedure where:

...

4. the contracting authority has sufficient indications to support the conclusion that the undertaking has concluded with other undertakings agreements or arrangements having the object or effect of impeding, restricting or distorting competition;

...’

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

- 15 On 19 December 2019, the District of Aichach-Friedberg published a contract notice for the award, by open procedure, of a public contract for public transport bus services, the estimated value of which exceeds the threshold laid down in Article 4(c) of Directive 2014/24.
- 16 J is a trader operating under his company name and K. Reisen is a bus transport company with limited liability of which J is the managing director and sole shareholder.

- 17 On 27 February 2020, both J and K. Reisen submitted tenders relating to the contract notice through the same person, namely J. Insolvency proceedings were opened in respect of the assets of J on 1 November 2019 and, by decision of 1 December 2019, the insolvency administrator released from the insolvency proceedings the self-employed activity of J. In his tender, J declared that insolvency proceedings had neither been applied for nor opened in respect of his undertaking.
- 18 On 2 April 2020, J and K. Reisen were informed, first, that their tenders had been excluded for breach of competition rules in so far as they had been prepared by the same person, and, second, that the contract in question would be awarded to E. GmbH & Co. KG.
- 19 After unsuccessfully lodging a complaint, J and K. Reisen brought an action before the Vergabekammer Südbayern (Public Procurement Board, Southern Bavaria, Germany). By decision of 12 January 2021, the latter upheld that action and ordered the District of Aichach-Friedberg to reinstate the tenders submitted by those tenderers in the procedure for the award of the contract in question. In particular, according to that board, having regard to the judgment of 17 May 2018, *Specializuotas transportas* (C-531/16, EU:C:2018:324), the conduct of J and K. Reisen does not fall within Article 101 TFEU since they constitute an economic unit.
- 20 The District of Aichach-Friedberg brought an appeal against that decision before the Bayerisches Oberstes Landesgericht (Bavarian Highest Regional Court, Germany). According to that district, allowing two tenderers that constitute an economic unit to participate in the procurement procedure is not compatible with the interests of the other tenderers and infringes the principle of equal treatment as well as competition rules, in particular in so far as those tenderers are in a position to concert their respective tenders.
- 21 J and K. Reisen consider that, in the light of the judgment of 17 May 2018, *Specializuotas transportas* (C-531/16, EU:C:2018:324), the exclusion of a tenderer on the ground of infringement of the competition rules is possible only if the situation concerned falls within Article 101 TFEU. Furthermore, they submit that the exhaustive nature of the grounds for exclusion provided for in Directive 2014/24 precludes recourse to the principle of equal treatment of tenderers.
- 22 In that regard, the referring court states that J and K. Reisen constitute an economic unit within the meaning of the case-law of the Court on Article 101 TFEU. That court asks whether point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 must be understood as requiring, for the application of the optional ground for exclusion provided for therein, that the contracting authority have sufficiently plausible indications of an infringement of Article 101 TFEU. It considers that that question should be answered in the affirmative, since an exclusion under that provision of Directive 2014/24 presupposes an infringement of a rule of competition law. In its view, such an infringement cannot be envisaged where the undertakings concerned constitute an economic unit and may therefore rely on ‘group privilege’.
- 23 Furthermore, the referring court asks whether the listing of optional grounds for exclusion in Article 57(4) of Directive 2014/24 precludes reliance on the principle of equal treatment in order to justify the failure to take into account tenders submitted by two tenderers constituting an economic unit.
- 24 Specifically, it should be stated whether the case-law stemming from the judgment of 16 December 2008, *Michaniki* (C-213/07, EU:C:2008:731, paragraph 44 et seq.) is capable of being applied to Article 57(4) of Directive 2014/24. In that regard, the referring court considers

that, irrespective of the differences between the list of the optional grounds for exclusion provided for in Article 57(4) of Directive 2014/24 and those that are set out in earlier directives relating to public procurement, the principle of equal treatment continues to preclude taking into account tenders that are neither autonomous nor independent submitted by related undertakings.

- 25 Lastly, it is necessary to determine whether the Court’s case-law on tenders which are neither autonomous nor independent submitted by related tenderers (judgment of 17 May 2018, *Specializuotas transportas*, C-531/16, EU:C:2018:324), is applicable to the tenders submitted by tenderers that constitute an economic unit. The referring court considers that, in the light of that judgment, the principle of equal treatment precludes, a fortiori, a contract from being awarded to tenderers that constitute an economic unit and are unable to submit autonomous or independent tenders.
- 26 In those circumstances, the Bayerisches Oberstes Landesgericht (Bavarian Highest Regional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is [point (d) of the first subparagraph of Article 57(4)] of [Directive 2014/24] to be interpreted as meaning that the contracting authority must have sufficiently plausible indications to conclude that the economic operator has infringed Article 101 TFEU?

[If the answer is in the affirmative:]

- (2) Is Article 57(4) of [Directive 2014/24] to be interpreted as exhaustively regulating the optional grounds for exclusion in the sense that the principle of equal treatment (Article 18(1) of that directive) cannot preclude the award of a contract where tenders are submitted that are neither independent nor autonomous?
- (3) Is Article 18(1) of [Directive 2014/24] to be interpreted as precluding the award of a contract to undertakings which constitute an economic unit and have each submitted a tender?’

## **Consideration of the questions referred**

### ***Preliminary observations***

- 27 By its questions, the referring court seeks an interpretation of Article 18(1) and point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 in the context of a procedure for the award of a public contract for public transport bus services.
- 28 It must be recalled in that regard that, in accordance with settled case-law, in the context of the cooperation procedure between the national courts and the Court of Justice established in Article 267 TFEU, it is for the Court to provide the national court with an answer which will be of use to it and enable it to decide the case before it. With that in mind, it is for the Court, where appropriate, to reformulate the questions submitted to it. In addition, the Court may be prompted to consider rules of EU law to which the national court has not referred in the wording of its questions (see, to that effect, judgment of 14 May 2020, *T-Systems Magyarország*, C-263/19, EU:C:2020:373, paragraph 45 and the case-law cited).

- 29 In the present case, the provision or operation of networks providing a service to the public in the field of transport by bus is expressly referred to in Article 11 of Directive 2014/25 among the fields to which that directive applies. Accordingly, in so far as, by the public contract at issue in the main proceedings, the contracting entity seeks such provision or operation of networks, and that contract exceeds the threshold referred to in Article 15(a) of that directive – which it is for the referring court to ascertain – it must be considered that, in view of its subject matter, that contract falls within the scope of that directive.
- 30 In that regard, taking into account the provisions cited by the referring court in its request for a preliminary ruling, it should be noted, first, that the Court must interpret Article 36(1) of Directive 2014/25, according to which contracting entities are to treat economic operators equally and without discrimination and are to act in a transparent and proportionate manner, and which corresponds, in essence, to the provisions of Article 18(1) of Directive 2014/24.
- 31 Second, as regards the optional grounds for exclusion, Directive 2014/25 does not contain any rules of its own but refers in that regard to Directive 2014/24.
- 32 In particular, the third subparagraph of Article 80(1) of Directive 2014/25 provides that, if Member States so request, the objective rules and criteria for the exclusion and selection of candidates and tenderers, inter alia in open, restricted or negotiated procedures, are to include the exclusion grounds listed in Article 57(4) of Directive 2014/24 ‘on the terms and conditions set out in that Article’.
- 33 It should be noted that the words ‘on the terms and conditions set out in that Article’ refer to the terms and conditions mentioned in that Article 57(4) (see, by analogy, judgment of 13 December 2012, *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, paragraph 33).
- 34 Consequently, should the investigations carried out by the referring court show that Directive 2014/25 applies to the procurement procedure at issue in the main proceedings, in order to provide an answer to the questions referred that will be of use the Court must interpret Article 57(4) of Directive 2014/24 and, in particular, point (d) of the first subparagraph of that provision, to which the request for a preliminary ruling specifically refers, since the third subparagraph of Article 80(1) of Directive 2014/25 allows Member States to make Article 57(4) of Directive 2014/24 applicable in such procedures.

### ***The first question***

- 35 In those circumstances, it must be considered that, by its first question, the referring court asks, in essence, whether point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25, must be interpreted as meaning that the optional ground for exclusion provided for in point (d) of the first subparagraph of Article 57(4) covers only cases where there are sufficiently plausible indications to conclude that economic operators have infringed Article 101 TFEU.
- 36 It is apparent from the request for a preliminary ruling that the referring court’s questions as to the scope of the optional ground for exclusion provided for in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 are based on the fact that point 4 of Paragraph 124(1) of the GWB, which transposes point (d) of the first subparagraph of Article 57(4) into German law, reproduces the wording of the prohibition of agreements restricting competition in Paragraph 1 of the GWB, which, in essence, reproduces Article 101 TFEU in German law. The referring court



recalls that it is apparent from the case-law of the Court (judgment of 17 May 2018, *Specializuotas transportas*, C-531/16, EU:C:2018:324, paragraph 28 and the case-law cited), that that article does not apply where the agreements it prohibits are carried out by undertakings which, as in the present case, constitute an economic unit.

- 37 First of all, it must be recalled that, in accordance with point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, contracting authorities may exclude or may be required by Member States to exclude any economic operator from participation in a procurement procedure where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.
- 38 That provision covers, in general terms, ‘agreements [entered into] with other economic operators aimed at distorting competition’. Its wording does not mention Article 101 TFEU and, in particular, unlike the latter, does not include the requirement that those agreements be concluded ‘between undertakings’, within the meaning of that provision, and ‘may affect trade between Member States’.
- 39 It follows that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 covers cases in which economic operators enter into any anticompetitive agreement and cannot be limited solely to the agreements between undertakings referred to in Article 101 TFEU.
- 40 Next, the objective underlying point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 confirms that interpretation.
- 41 The Court has held that the option, or even the obligation, for the contracting authority to exclude an economic operator from participating in a procurement procedure is intended in particular to enable it to assess the integrity and reliability of each of the economic operators. In particular, the optional ground for exclusion mentioned in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in conjunction with recital 101 of that directive, is based on an essential element of the relationship between the successful tenderer in question and the contracting authority, namely the reliability of the successful tenderer, on which the contracting authority’s trust is founded (see, to that effect, judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 41).
- 42 Accordingly, point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 is intended to enable contracting authorities to assess and take into account the integrity and reliability of each of the economic operators, so that they may exclude from procurement procedures unreliable tenderers with whom they cannot maintain a relationship of trust in order to complete the supply of the services concerned when performing the contract in question.
- 43 Such an objective appears to be different from that referred to in Article 101 TFEU. The latter is intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct (judgment of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 37).

- 44 The objective of point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 therefore leads to a broad interpretation of that provision to the effect that, inter alia, agreements between economic operators which do not affect trade between Member States are to be taken into account by the contracting authorities in connection with the optional ground for exclusion provided for therein.
- 45 Lastly, as regards the context of that provision, it should be noted that, in connection with the optional ground for exclusion provided for in point (c) of the first subparagraph of Article 57(4) of Directive 2014/24, the concept of ‘professional misconduct’, which covers all wrongful conduct which has an impact on the credibility, integrity or professional reliability of the economic operator in question, must be interpreted broadly (see, to that effect, order of 4 June 2019, *Consorzio Nazionale Servizi*, C-425/18, EU:C:2019:476, paragraphs 29 and 30).
- 46 In those circumstances, since, as is apparent from recital 101 of Directive 2014/24, the infringement of the competition rules may, in the light of the objective of Article 57(4) of that directive set out in paragraph 39 above, be regarded as a type of grave professional misconduct, it would be inconsistent to give the concept of ‘agreements’, provided for in point (d) of the first subparagraph of that provision, a narrow interpretation that would be limited solely to the agreements between undertakings referred to in Article 101 TFEU.
- 47 That is all the more so since the concept of ‘economic operator’, defined in point 10 of Article 2(1) of Directive 2014/24, does not refer to the concept of ‘undertaking’ within the meaning of Article 101 TFEU.
- 48 Consequently, it must be concluded that, although the existence of an agreement within the meaning of Article 101 TFEU must be regarded as falling within the optional ground for exclusion set out in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, the fact remains that the latter provision has a broader scope, which also covers economic operators which have entered into anticompetitive agreements that do not fall within Article 101 TFEU. Therefore, the mere fact that such an agreement between two economic operators does not fall within that article does not prevent it from being covered by that optional ground of exclusion.
- 49 However, in order to give an answer that will be of use to the referring court, the Court emphasises that that provision of Directive 2014/24 covers the case where there is sufficient evidence to enable the contracting authority to consider that two or more economic operators have entered into an agreement aimed at distorting competition, which necessarily presupposes that there is a common intention on the part of at least two different economic operators.
- 50 In the present case, it should be noted, as the European Commission states, that in a case such as that at issue in the main proceedings, it cannot be considered that two economic operators who, in substance, pass through the same natural person to take their decisions, may enter into ‘agreements’ between them, in so far as there do not appear to be two separate intentions that are capable of converging. It is, however, for the referring court to determine whether, having regard to the link between J and K. Reisen, it is possible for them to enter into such agreements aimed at distorting competition. If that is not the case, the optional ground for exclusion provided for in point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 cannot apply to their situation.

51 In the light of the foregoing considerations, the answer to the first question is that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25, must be interpreted as meaning that the optional ground for exclusion provided for in point (d) of the first subparagraph of Article 57(4) covers cases where there are sufficiently plausible indications to conclude that economic operators have entered into an agreement prohibited by Article 101 TFEU, but is not limited solely to the agreements provided for in that article.

### *The second and third questions*

52 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 57(4) of Directive 2014/24, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25, must be interpreted as meaning that Article 57(4) exhaustively regulates the optional grounds for exclusion, which prevents the principle of equal treatment, provided for in Article 36(1) of Directive 2014/25, from precluding the award of the contract in question to economic operators which constitute a separate economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.

53 In the analogous context of Directive 93/37, the Court held that the first paragraph of Article 24 of that directive, which, like Article 57(4) of Directive 2014/24, contained a list of the optional grounds for exclusion, must be read as listing exhaustively the grounds capable of justifying the exclusion of a contractor from participation in a procurement procedure for reasons based on objective factors that relate to its professional qualities. That provision therefore precludes Member States or contracting authorities from adding to the list contained in that provision other grounds for exclusion based on criteria relating to professional qualities (judgment of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 43).

54 Likewise, Article 57(4) of Directive 2014/24 lists exhaustively the optional grounds for exclusion capable of justifying the exclusion of an economic operator from participation in a procurement procedure for reasons based on objective factors relating to its professional qualities, to a conflict of interest or to a distortion of competition that would arise from its involvement in the preparation of that procedure.

55 In that regard, the fact, raised by the referring court, that that provision now includes a greater number of optional grounds for exclusion than the earlier EU directives on the award of public contracts has no bearing on whether the list provided for in that provision is exhaustive.

56 In the light of the nature of the grounds for exclusion set out in Article 57(4) of Directive 2014/24, it must be held that the EU legislature adopted the same approach with regard to the various grounds for exclusion set out in the successive EU directives on the award of public contracts, which is, as the Court held in paragraph 42 of the judgment of 16 December 2008, *Michaniki* (C-213/07, EU:C:2008:731), to adopt only grounds for exclusion based on the objective finding of facts or conduct specific to the contractor concerned, such as to discredit its professional reputation or call into question its economic or financial ability to complete the works covered by the public contract for which it is tendering, or, as regards contracts covered by Directive 2014/24, to create a situation which, in connection with the procurement procedure in question, qualifies as a conflict of interest or a distortion of competition, which are covered, respectively, in points (e) and (f) of the first subparagraph of Article 57(4) of that directive.

- 57 However, the fact that the optional grounds for exclusion set out in Article 57(4) of Directive 2014/24, to which the third subparagraph of Article 80(1) of Directive 2014/25 refers, are listed exhaustively does not prevent the principle of equal treatment, provided for in Article 36(1) of that directive, from precluding the award of the contract in question to economic operators which constitute an economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.
- 58 Such an exhaustive list does not preclude the option for Member States to maintain or adopt substantive rules designed, in particular, to ensure, as regards public contracts, observance of the principle of equal treatment and of the principle of transparency entailed by the latter, principles which are binding on contracting entities in any procedure for the award of a public contract and which constitute the basis of the EU directives on procedures for the award of public contracts, provided that the principle of proportionality is observed (see, by analogy, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 21, and of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 30).
- 59 In particular, in the case of related tenderers, the principle of equal treatment provided for in Article 36(1) of Directive 2014/25 would be infringed if those tenderers were allowed submit coordinated or concerted tenders, that is to say, tenders that are neither autonomous nor independent, which would be likely to give them unjustified advantages in relation to the other tenderers (see, by analogy, judgment of 17 May 2018, *Specializuotas transportas*, C-531/16, EU:C:2018:324, paragraph 29).
- 60 In that context, observance of the principle of proportionality requires the contracting authority to examine and assess the facts, in order to determine whether the relationship between two entities has actually influenced the respective content of the tenders submitted in the same tendering procedure, a finding of such influence, in any form, being sufficient for those undertakings to be excluded from the procedure (see, to that effect, judgments of 19 May 2009, *Assitur*, C-538/07, EU:C:2009:317, paragraph 32, and of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 38).
- 61 The finding that the links between tenderers had a bearing on the content of the tenders they submitted during the same procedure suffices for those tenders not to be taken into consideration by the contracting authority, as tenders by related undertakings must be submitted completely autonomously and independently (see, to that effect, judgment of 17 May 2018, *Specializuotas transportas*, C-531/16, EU:C:2018:324, paragraph 38).
- 62 Those considerations apply a fortiori to the situation of tenderers which are not merely related but which constitute an economic unit.
- 63 Accordingly, should the referring court reach the conclusion, following the necessary checks and assessments, that the tenders at issue in the main proceedings were not submitted autonomously and independently, Article 36(1) of Directive 2014/25 precludes the award of the contract at issue to tenderers that have submitted such tenders.
- 64 In the light of the foregoing considerations, the answer to the second and third questions is that Article 57(4) of Directive 2014/24, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25, must be interpreted as meaning that Article 57(4) exhaustively regulates the optional grounds for exclusion capable of justifying the exclusion of an economic operator from participation in a procurement procedure for reasons based on objective factors

relating to its professional qualities, to a conflict of interest or to a distortion of competition that would arise from its involvement in that procedure. However, Article 57(4) does not prevent the principle of equal treatment, provided for in Article 36(1) of Directive 2014/25, from precluding the award of the contract in question to economic operators which constitute an economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.

## Costs

- 65 Since these proceedings are, for the parties to the main proceedings, a step in the action brought 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 (Fourth Chamber) hereby rules:

- 1. Point (d) of the first subparagraph of Article 57(4) 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) 2017/2365 of 18 December 2017, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, as amended by Commission Delegated Regulation (EU) 2017/2364 of 18 December 2017,**

**must be interpreted as meaning that the optional ground for exclusion provided for in point (d) of the first subparagraph of Article 57(4) covers cases where there are sufficiently plausible indications to conclude that economic operators have entered into an agreement prohibited by Article 101 TFEU, but is not limited solely to the agreements provided for in that article.**

- 2. Article 57(4) of Directive 2014/24, as amended by Delegated Regulation 2017/2365, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25, as amended by Delegated Regulation 2017/2364,**

**must be interpreted as meaning that Article 57(4) exhaustively regulates the optional grounds for exclusion capable of justifying the exclusion of an economic operator from participation in a procurement procedure for reasons based on objective factors relating to its professional qualities, to a conflict of interest or to a distortion of competition that would arise from its involvement in that procedure. However, Article 57(4) does not prevent the principle of equal treatment, provided for in Article 36(1) of Directive 2014/25, as amended by Delegated Regulation 2017/2364, from precluding the award of the contract in question to economic operators which constitute an economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.**

[Signatures]