



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

10 November 2022*

(Reference for a preliminary ruling – Public system for the rental and shared use of electric cars – Distinction between the concepts of ‘services concessions’ and ‘public supply contracts’ – Directive 2014/23/EU – Article 5(1)(b) – Article 20(4) – Concept of ‘mixed contracts’ – Article 8 – Determining the value of a services concession – Criteria – Article 27 – Article 38 – Directive 2014/24/EU – Article 2(1), points 5 and 8 – Implementing Regulation (EU) 2015/1986 – Annex XXI – Possibility of imposing a condition concerning the registration of a specific professional activity under national law – Impossibility of imposing that condition on all members of a temporary business association – Regulation (EC) No 2195/2002 – Article 1(1) – Obligation to refer exclusively to the ‘Common Procurement Vocabulary’ in concession documents – Regulation (EC) No 1893/2006 – Article 1(2) – Impossibility of referring to the ‘NACE Rev. 2’ nomenclature in the concession documents)

In Case C-486/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the Review of Public Procurement Procedures, Slovenia), made by decision of 2 August 2021, received at the Court on 9 August 2021, in the proceedings

SHARENGO najem in zakup vozil d.o.o.

v

Mestna občina Ljubljana,

THE COURT (Eighth Chamber),

composed of N. Piçarra, acting for the President of the Chamber, 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: Slovenian.

after considering the observations submitted on behalf of:

- Mestna občina Ljubljana, by R. Kokalj, odvetnik,
- the Czech Government, by L. Halajová, M. Smolek and J. Vlácil, acting as Agents,
- the Austrian Government, by A. Posch, acting as Agent,
- the European Commission, by U. Babovič, M. Kocjan, A. Kraner, 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 3(1), Article 5(1)(b), Article 8(1) and (2) and Article 38(1) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), as amended by Commission Delegated Regulation (EU) 2019/1827 of 30 October 2019 (OJ 2019 L 279, p. 23) ('Directive 2014/23'), of Article 2(1), points 5 and 9, the third subparagraph of Article 3(4), Article 4(b) and (c), Article 18(1) and Article 58(1) and (2) 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) 2019/1828 of 30 October 2019 (OJ 2019 L 279, p. 25) ('Directive 2014/24'), of Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (OJ 2002 L 340, p. 1), of Annex I to Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains (OJ 2006 L 393, p. 1), as well as of Annex XXI to Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011 (OJ 2015 L 296, p. 1 and corrigendum OJ 2017 L 172, p. 36).
- 2 The request has been made in proceedings between SHARENGO najem in zakup vozil d.o.o. ('Sharengo') and Mestna občina Ljubljana (Urban municipality of Ljubljana, Slovenia) ('Municipality of Ljubljana') concerning the publication by the latter of a call for tenders intended to select a concessionaire with a view to implementing a project for the establishment and management of a public system for the rental and sharing of electric vehicles in the territory of that municipality.

Legal context

European Union law

Directive 2014/23

3 Recitals 1, 4, 8, 18, 20 and 52 of Directive 2014/23 state:

‘(1) The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the internal market. As a result, economic operators, in particular small and medium-sized enterprises (SMEs), are being deprived of their rights within the internal market and miss out on important business opportunities, while public authorities may not find the best use of public money so that Union citizens benefit from quality services at best prices. An adequate, balanced and flexible legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen. Such a legal framework would also afford greater legal certainty to economic operators and could be a basis for and means of further opening up international public procurement markets and boosting world trade. Particular importance should be given to improving the access opportunities of SMEs throughout the Union concession markets.

...

(4) The award of public works concessions is presently subject to the basic rules of Directive 2004/18/EC of the European Parliament and of the Council [of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)]; while the award of services concessions with a cross-border interest is subject to the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the principles of free movement of goods, freedom of establishment and freedom to provide services, as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. There is a risk of legal uncertainty related to divergent interpretations of the principles of the Treaty by national legislators and of wide disparities among the legislations of various Member States. Such risk has been confirmed by the extensive case-law of the Court of Justice of the European Union which has, nevertheless, only partially addressed certain aspects of the award of concession contracts.

...

(8) For concessions equal to or above a certain value, it is appropriate to provide for a minimum coordination of national procedures for the award of such contracts based on the principles of the TFEU so as to guarantee the opening-up of concessions to competition and adequate legal certainty. Those coordinating provisions should not go beyond what is necessary in order to achieve the aforementioned objectives and to ensure a certain degree of flexibility. Member States should be allowed to complete and develop further those provisions if they find it appropriate, in particular to better ensure compliance with the principles set out above.

...

- (18) Difficulties related to the interpretation of the concepts of concession and public contract have generated continued legal uncertainty among stakeholders and have given rise to numerous judgments of the Court of Justice of the European Union. Therefore, the definition of concession should be clarified, in particular by referring to the concept of operating risk. The main feature of a concession, the right to exploit the works or services, always implies the transfer to the concessionaire of an operating risk of economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded under normal operating conditions even if a part of the risk remains with the contracting authority or contracting entity. The application of specific rules governing the award of concessions would not be justified if the contracting authority or contracting entity relieved the economic operator of any potential loss, by guaranteeing a minimal revenue, equal or higher to the investments made and the costs that the economic operator has to incur in relation with the performance of the contract. At the same time it should be made clear that certain arrangements which are exclusively remunerated by a contracting authority or a contracting entity should qualify as concessions where the recoupment of the investments and costs incurred by the operator for executing the work or providing the service depends on the actual demand for or the supply of the service or asset.

...

- (20) An operating risk should stem from factors which are outside the control of the parties. Risks such as those linked to bad management, contractual defaults by the economic operator or to instances of *force majeure* are not decisive for the purpose of classification as a concession, since those risks are inherent in every contract, whether it be a public procurement contract or a concession. An operating risk should be understood as the risk of exposure to the vagaries of the market, which may consist of either a demand risk or a supply risk, or both a demand and supply risk. Demand risk is to be understood as the risk on actual demand for the works or services which are the object of the contract. Supply risk is to be understood as the risk on the provision of the works or services which are the object of the contract, in particular the risk that the provision of the services will not match demand. For the purpose of assessment of the operating risk the net present value of all the investment, costs and revenues of the concessionaire should be taken into account in a consistent and uniform manner.

...

- (52) The duration of a concession should be limited in order to avoid market foreclosure and restriction of competition. In addition, concessions of a very long duration are likely to result in the foreclosure of the market, and may thereby hinder the free movement of services and the freedom of establishment. However, such a duration may be justified if it is indispensable to enable the concessionaire to recoup investments planned to perform the concession, as well as to obtain a return on the invested capital. Consequently, for concessions with a duration greater than five years the duration should be limited to the period in which the concessionaire could reasonably be expected to recoup the investment made for operating the works and services together with a return on invested capital under normal operating conditions, taking into account specific contractual objectives undertaken by the concessionaire in order to deliver requirements relating to, for example,

quality or price for users. The estimation should be valid at the moment of the award of the concession. It should be possible to include initial and further investments deemed necessary for the operating of the concession in particular expenditure on infrastructure, copyrights, patents, equipment, logistics, hiring, training of personnel and initial expenses. The maximum duration of the concession should be indicated in the concession documents unless duration is used as an award criterion of the contract. Contracting authorities and contracting entities should always be able to award a concession for a period shorter than the time necessary to recoup the investments, provided that the related compensation does not eliminate the operating risk.’

4 Entitled ‘Subject matter and scope’, Article 1 of that directive provides:

‘1. This Directive establishes rules on the procedures for procurement by contracting authorities and contracting entities by means of a concession, whose value is estimated to be not less than the threshold laid down in Article 8.

2. This Directive applies to the award of works or services concessions, to economic operators by:

(a) Contracting authorities; ...

...’

5 Under Article 3 of that directive, entitled ‘Principle of equal treatment, non-discrimination and transparency’:

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

The design of the concession award procedure, including the estimate of the value, shall not be made with the intention of excluding it from the scope of this Directive or of unduly favouring or disadvantaging certain economic operators or certain works, supplies or services.

...’

6 Headed ‘Definitions’, Article 5 of Directive 2014/23 provides:

‘For the purposes of this Directive the following definitions apply:

(1) “concessions” means works or services concessions, as defined in points (a) and (b):

...

(b) “services concession” means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible;

...'

- 7 Entitled 'Threshold and methods for calculating the estimated value of concessions', Article 8 of that directive states:

1. This Directive shall apply to concessions the value of which is equal to or greater than EUR 5 350 000.

2. The value of a concession shall be the total turnover of the concessionaire generated over the duration of the contract, net of [value-added tax (VAT)], as estimated by the contracting authority or the contracting entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services.

...

3. The estimated value of the concession shall be calculated using an objective method specified in the concession documents. When calculating the estimated value of the concession, contracting authorities and contracting entities shall, where applicable, take into account in particular:

- (a) the value of any form of option and any extension of the duration of the concession;
- (b) revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority or contracting entity;
- (c) payments or any financial advantage in any form whatsoever made by the contracting authority or contracting entity or any other public authority to the concessionaire, including compensation for compliance with a public service obligation and public investment subsidies;

...'

- 8 According to Article 18 of that directive, entitled 'Duration of the concession':

1. The duration of concessions shall be limited. The contracting authority or contracting entity shall estimate the duration on the basis of the works or services requested.

2. For concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives.

The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession.’

- 9 Entitled ‘Mixed contracts’, Article 20 of that directive provides:

‘ ...

2. Where the different parts of a given contract are objectively separable, paragraphs 3 and 4 shall apply. Where the different parts of a given contract are objectively not separable, paragraph 5 shall apply.

...

In the case of contracts intended to cover several activities, one of them being subject either to Annex II of this Directive or to 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)], the applicable provisions shall be established in accordance with Article 22 of this Directive and Article 6 of Directive [2014/25], respectively.

...

4. In the case of mixed contracts containing elements of concessions as well as elements of public contracts covered by Directive [2014/24] or contracts covered by Directive [2014/25], the mixed contract shall be awarded in accordance with Directive [2014/24] or Directive [2014/25], respectively.

...’

- 10 Entitled ‘Economic operators’, Article 26 of Directive 2014/23 provides, in paragraph 2 thereof:

‘Groups of economic operators, including temporary associations, may participate in concession award procedures. They shall not be required by contracting authorities or contracting entities to have a specific legal form in order to submit a tender or a request to participate.

Where necessary, contracting authorities or contracting entities may clarify in the concession documents how groups of economic operators shall meet the requirements as to economic and financial standing or technical and professional ability referred to in Article 38 provided that this is justified by objective reasons and is proportionate. Member States may establish standard terms for how groups of economic operators are to meet those requirements. Any conditions for the performance of a concession by such groups of economic operators, which are different from those imposed on individual participants, shall also be justified by objective reasons and shall be proportionate.’

- 11 Entitled ‘Nomenclatures’, Article 27 of that directive provides, in paragraph 1 thereof:

‘Any references to nomenclatures in the context of the award of concessions shall be made using the “Common Procurement Vocabulary (CPV)” as adopted by Regulation [No 2195/2002].’

12 Entitled ‘Concession notices’, Article 31 of that directive states, in paragraph 2 thereof:

‘Concession notices shall contain the information referred to in Annex V and, where appropriate, any other information deemed useful by the contracting authority or entity, in accordance with the format of standard forms.’

13 Entitled ‘Information to be included in concession notices referred to in Article 31’, Annex V to the same directive provides:

‘...

4. Description of the concession: nature and extent of works, nature and extent of services, order of magnitude or indicative value and, where possible, duration of the contract. Where the concession is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.

5. CPV codes. Where the concession is divided into lots, this information shall be provided for each lot.

...

7. Conditions for participation, including:

...

(b) where appropriate, indication whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession; reference to the relevant law, regulation or administrative provision;

(c) a list and brief description of selection criteria where applicable; minimum level(s) of standards possibly required; indication of required information (self-declarations, documentation).

...’

14 Entitled ‘Procedural guarantees’, Article 37 of Directive 2014/23 provides:

‘...

2. The contracting authority or contracting entity shall provide:

(a) in the concession notice, a description of the concession and of the conditions of participation;

(b) in the concession notice, in the invitation to submit a tender or in other concession documents, a description of the award criteria and, where applicable, the minimum requirements to be met.

...

4. The contracting authority or contracting entity shall communicate the description of the envisaged organisation of the procedure and an indicative completion deadline to all participants. Any modification shall be communicated to all participants and, to the extent that they concern elements disclosed in the concession notice, advertised to all economic operators.

...'

15 Entitled 'Selection and qualitative assessment of candidates', Article 38 of that directive provides:

'1. Contracting authorities and contracting entities shall verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of the candidates or tenderers, on the basis of self-declarations, reference or references to be submitted as proof in accordance with the requirements specified in the concession notice that shall be non-discriminatory and proportionate to the subject matter of the concession. The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject matter of the concession and the purpose of ensuring genuine competition.

2. With a view to meeting the conditions for participation laid down in paragraph 1, an economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority or the contracting entity that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing a commitment by those entities to that effect. With regard to financial standing, the contracting authority or the contracting entity may require that the economic operator and those entities are jointly liable for the execution of the contract.

3. Under the same conditions, a group of economic operators as referred to in Article 26 may rely on the capacities of participants in the group or of other entities.

...'

Directive 2014/24

16 Entitled 'Subject matter and scope', Article 1 of Directive 2014/24 provides:

'1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.

...'

17 Entitled ‘Definitions’, Article 2 of that directive provides:

‘1. For the purposes of this Directive, the following definitions apply:

...

(5) “public contracts” means contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services;

...

(8) “public supply contracts” means public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations;

(9) “public service contracts” means public contracts having as their object the provision of services other than those referred to in point 6;

...’

18 Under the heading ‘Mixed procurement’, Article 3 of Directive 2014/24 states:

‘...

4. In the case of contracts which have as their subject matter procurement covered by this Directive as well as procurement not covered by this Directive, contracting authorities may choose to award separate contracts for the separate parts or to award a single contract. Where contracting authorities choose to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

Where contracting authorities choose to award a single contract, this Directive shall, unless otherwise provided in Article 16, apply to the ensuing mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

In the case of mixed contracts containing elements of supply, works and service contracts and of concessions, the mixed contract shall be awarded in accordance with this Directive, provided that the estimated value of the part of the contract which constitutes a contract covered by this Directive, calculated in accordance with Article 5, is equal to or greater than the relevant threshold set out in Article 4.

...’

19 Under the heading ‘Threshold amounts’, Article 4 of that directive provides, in paragraph 1 thereof:

‘This Directive shall apply to procurements with a value net of [VAT] estimated to be equal to or greater than the following thresholds:

...

(b) EUR 139 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;

(c) EUR 214 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities ...

...’

20 Article 18 of Directive 2014/24 sets out the ‘principles of procurement’.

21 Entitled ‘Nomenclatures’, Article 23 of that directive provides, in paragraph 1 thereof:

‘Any references to nomenclatures in the context of public procurement shall be made using the Common Procurement Vocabulary (CPV) as adopted by Regulation [No 2195/2002].’

22 Under the heading ‘Form and manner of publication of notices’, Article 51 of Directive 2014/24 provides, in the first subparagraph of paragraph 1 thereof:

‘Notices referred to in Articles 48, 49 and 50 shall include the information set out in Annex V in the format of standard forms, including standard forms for corrigenda.’

23 Entitled ‘Information to be included in notices’, Annex V to that directive includes Part C relating to ‘information to be included in contract notices (as referred to in Article 49)’, which states:

‘...

7. Description of the procurement: nature and extent of works, nature and quantity or value of supplies, nature and extent of services. Where the contract is divided into lots, this information shall be provided for each lot. Where appropriate, description of any options.

...’

24 Under the heading ‘Selection criteria’, Article 58 of that directive provides, in paragraphs 1 and 2 thereof:

‘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.'

25 Under the heading 'Registers', Annex XI to that directive provides:

'The relevant professional and trade registers and corresponding declarations and certificates for each Member State are:

- ...
- in Slovenia, the "sodni register" and the "obrtni register";
- ...'

Implementing Regulation 2015/1986

26 Article 4 of Implementing Regulation 2015/1986 provides:

'Contracting authorities and contracting entities shall use, for the publication in the *Official Journal of the European Union* of the notices referred to in Articles 31, 32 and 43 of Directive [2014/23], the standard forms set out in Annexes XI, XVII, XX, XXI and XXII to this Regulation.'

27 The standard form set out in points II.1.1 to II.1.4, II.2.1, II.2.2 and II.2.4 of Annex II to that implementing regulation requires the contracting authority to specify, in the contract notice, the title of the contract, the main CPV code, the type of contract, a succinct description, the additional CPV code(s) and the description of the services, respectively.

28 Annex XXI to that implementing regulation contains a standard form relating to 'concession notice[s]' within the meaning of Directive 2014/23, point III.1.1 of which reads as follows:

'Suitability to pursue the professional activity, including requirements relating to enrolment on professional or trade registers[:]

List and brief description of conditions, indication of information and documentation required[.]'

Regulation No 2195/2002

29 Recitals 1 and 3 of Regulation No 2195/2002 state:

‘(1) The use of different classifications is detrimental to the openness and transparency of public procurement in Europe. Its impact on the quality of notices and the time needed to publish them is a de facto restriction on the access of economic operators to public contracts.

...

(3) There is a need to standardise, by means of a single classification system for public procurement, the references used by the contracting authorities and entities to describe the subject of contracts.’

30 Article 1 of Regulation No 2195/2002 lays down, in paragraphs 1 and 2 thereof:

‘1. A single classification system applicable to public procurement, known as the “Common Procurement Vocabulary” or “CPV” is hereby established.

2. The text of the CPV is set out in Annex I.’

Regulation No 1893/2006

31 Under the heading ‘Subject matter and scope’, Article 1 of Regulation No 1893/2006 provides:

‘1. This Regulation establishes a common statistical classification of economic activities in the [European Union], hereinafter referred to as “NACE Rev. 2”. This classification ensures that [EU] classifications are relevant to the economic reality and enhances the comparability of national, [EU] and international classifications and, hence, of national, [EU] and international statistics.

2. This Regulation shall apply only to the use of the classification for statistical purposes.’

Slovenian law

32 The *Zakon o nekaterih koncesijskih pogodbah* (Law on certain concession contracts) (Uradni list RS, No 9/2019), in the version applicable to the dispute in the main proceedings, governs certain works and services concession contracts with an estimated value net of VAT equal to or greater than that provided for in Article 8(1) of Directive 2014/23.

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

33 In 2020, the Municipality of Ljubljana decided to initiate a procedure for the award of a concession for the establishment and management, in its territory, of a rental and sharing service for electric vehicles. The total value of the project was estimated at EUR 14 989 000 net of VAT, the financial contribution of the private partner being assessed at EUR 14 570 000 net of VAT and that of the municipality being assessed at EUR 36 000 net of VAT.

- 34 The financial contribution of the private partner was to be broken down as follows: existing fleet of electric vehicles: EUR 5 000 000; existing technology: EUR 1 500 000; staff and development: EUR 1 400 000; acquisition of new electric vehicles during the concession: EUR 6 250 000; construction of parking spaces: EUR 180 000; creation of charging stations: EUR 240 000.
- 35 The documents relating to the project at issue use the main CPV code 60100000. In addition, under the heading ‘Contributions of the grantor and the concessionaire’, it is provided that ‘the proceeds of the taxes for the parking spaces and charging stations as well as the parking taxes are to be considered as the contribution of the grantor for the implementation of the project’.
- 36 Furthermore, in its ‘Instructions for submitting a tender’, in order to describe the ‘subject matter of the concession relationship’, the Municipality of Ljubljana indicated that the implementation of the project for the establishment and management of a public system for the hiring and sharing of electric vehicles covered:
- ‘(a) the realisation of the investments necessary for the establishment of a public system of rental and sharing of electric vehicles in the territory of [the Municipality of Ljubljana] and which includes:
- the setting up of a fund of at least 200 electric vehicles for the establishment of a public system for the hiring and sharing of electric vehicles ...,
 - the design of a public network of spaces for the use of vehicles and charging centres for electric vehicles ...,
 - the creation of a modern and user-friendly IT solution for the user to provide the service of renting and sharing electric vehicles,
- (b) the provision of the electric vehicle rental and sharing service ..., including the creation of a centralised electric vehicle rental and sharing system which allows for the monitoring and supervision of the conduct of the project and in particular:
- the obligation to guarantee and manage a fleet of vehicles in perfect working order, which includes in particular regular services and repairs, especially in the event of traffic accidents, registration, insurance and other operating expenses for the normal use of vehicles. ... The concessionaire also assumes the obligation to modernise the fleet of vehicles on a regular basis at the pace specified in the contract,
 - the obligation to ensure and manage a network of spaces to borrow vehicles and charging points to charge electric vehicles, the obligation to maintain them on a regular basis and the obligation to guarantee charging points in working order on the ground under the conditions and according to the regime to be defined in the contract,
 - the guarantee of an adequate system of support for users.
- ...

Main obligations of the concessionaire:

– ...

- the concessionaire assumes, during the period covered by the contract, all the technical, technological and financial risks arising from the implementation of the investment and other measures and in respect of the provision of the electric vehicle rental and sharing service, including the risk as to the profitability of the investments made. The concessionaire also assumes the risk as to the accessibility and availability of the system created, as well as the risk linked to demand;
- ...'

- 37 It also follows from those instructions that the project at issue in the main proceedings is intended to protect the environment and to enhance sustainable development, in particular by adopting concepts of sustainable mobility. Finally, under the heading of 'grounds for exclusion', the said instructions include the obligation for an applicant to be registered to pursue, in the national standard classification of activities, activity 77.110 (Renting and leasing of cars and light motor vehicles) ('activity 77.110'), it being specified that, in the case of a tender submitted in partnership, the condition must be met by each of the partners.
- 38 On 17, 18 and 19 February 2021, Sharengo raised various questions related to the call for tenders through the public procurement portal and indicated that some of the requirements of the Municipality of Ljubljana were not in line with the Slovenian legislation on public-private partnerships and public procurement.
- 39 As early as 19 February 2021, and thus even before the expiry of the period available to that municipality to respond to those questions, Sharengo filed a request for review before that municipality. In particular, it argued that, since the subject matter of the contract includes the execution of investments not directly related to the rental and sharing of electric vehicles, the requirement that all partners be registered for activity 77.110 was disproportionate and discriminatory. In Sharengo's view, such a requirement restricts competition and prevents cooperation with partners established abroad. Sharengo therefore sought annulment of the various conditions, criteria and requirements and, in the alternative, annulment of the entire tendering procedure.
- 40 By decision of 2 March 2021, the Municipality of Ljubljana rejected that application for review on the ground that it was premature.
- 41 Sharengo's questions nevertheless led the Municipality of Ljubljana to specify that the requirement to be registered for activity 77.110 must be met by the candidate and that, in the case of a tender submitted in partnership, it must be met by each of the partners because the conclusion of the partnership contract establishes joint and several liability between them. By contrast, the other economic operators involved in the candidate's declaration do not need to satisfy the condition. In addition, if the economic operators are not enrolled on the trade or professional register of the Republic of Slovenia, the grantor should take into account the classification which, according to its description, corresponds to the subject matter of the contract.
- 42 Having rejected Sharengo's application for review, the Municipality of Ljubljana was required to forward it for examination to the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the review of procedures for the award of public contracts, Slovenia), which it did on 8 March 2021.

- 43 At the latter's invitation, the Municipality of Ljubljana stated, in a letter of 7 April 2021, first, that the Law on certain concession agreements did not apply because the threshold for its application had not been reached, the estimated value of the concession being EUR 3 108 103 net of VAT. Furthermore, according to the municipality, it does not pay consideration directly for the operation of the concession. It confines itself, on the one hand, to waiving the rights to parking on the parking spaces to be used for the service at issue in the main proceedings, the amount of which is EUR 3 430 328 net of VAT and, on the other hand, to covering the costs of the regular maintenance of those spaces, up to an estimated value of EUR 84 375 net of VAT. Finally, according to the municipality, it has revenue in respect of the annual taxes for the parking spaces up to an estimated value of EUR 345 000 net of VAT, and taxes for the charging stations amounting to an estimated value of EUR 62 000 net of VAT. Secondly, according to the Municipality of Ljubljana, its objective is to create a rental and sharing service for electric vehicles and not to acquire goods. Thirdly, that municipality took the view that, having regard to the proposed risk allocation, the CPV code chosen, which concerns the rental of goods, might be misleading. According to the municipality, an electric vehicle sharing system goes beyond the mere rental of an electric vehicle and includes a complete service for the operation of the sharing system which is, in content and conceptually, broader than the mere rental of a vehicle.
- 44 As a preliminary point, the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the review of procedures for the award of public contracts) notes that, in the judgments of 8 June 2017, *Medisanus* (C-296/15, EU:C:2017:431, paragraphs 34 to 38), and of 10 September 2020, *Tax-Fin-Lex* (C-367/19, EU:C:2020:685), the Court of Justice recognised it as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU. It adds that, where, as in the main proceedings, the application for review relates to the tender specifications, which cover, in addition to the tender specifications themselves, the documentation relating to the award of the contract or concession, it acts as a 'court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' within the meaning of the third paragraph of Article 267 TFEU.
- 45 In the present case, the jurisdiction of the referring court to resolve the dispute in the main proceedings depends on whether the future contractual relationship between the municipality and the economic operator may be classified as a 'services concession', within the meaning of Article 5(1)(b) of Directive 2014/23, or as a 'public contract', within the meaning of Article 2(1)(5) of Directive 2014/24.
- 46 From that point of view, the referring court considers that it is faced with three difficulties in interpreting EU law.
- 47 In the first place, the referring court raises the question of the detailed rules for determining the estimated value of a services concession. It notes, in that regard, that the Municipality of Ljubljana took the view that the private partner's financial contribution amounts to EUR 14 570 000 net of VAT, whereas its own contribution amounts to EUR 36 000 net of VAT. According to the referring court, that estimate is, however, incorrect since, as is apparent from paragraph 43 of this judgment, the Municipality of Ljubljana accepted that its contribution will amount to EUR 3 108 103 net of VAT. The investment of that municipality therefore exceeds the thresholds laid down in Article 4(b) and (c) of Directive 2014/24, but not the threshold of EUR 5 350 000 set by Article 8(1) of Directive 2014/23.

- 48 The referring court submits that, that being so, since the estimated value of the private partner's financial contribution is EUR 14 570 000 net of VAT, it is logical that the revenues of that partner, which seeks to make a profit with the implementation of the project, should amount to at least EUR 14 977 000 net of VAT, in order to cover all investments and the payment of the annual taxes for the parking spaces and the annual taxes for the charging stations. As the case may be, even if it were necessary to exclude from that calculation the investment of EUR 5 000 000 net of VAT in the existing fleet of electric vehicles, the contribution of the private partner would remain above the threshold of EUR 5 350 000 net of VAT.
- 49 In the second place, the referring court asks (i) whether the project at issue in the main proceedings is intended to provide the Municipality of Ljubljana with supplies or to entrust to its contractor the provision and management of services and (ii) whether the CPV code selected by the contracting authority in the contract or concession documentation may have an influence on the classification as a contract.
- 50 Since the future contractual relationship between the municipality and the economic operator appears to involve both elements of a public supply contract within the meaning of Article 2(1)(8) of Directive 2014/24 and elements of a services concession within the meaning of Article 5(1)(b) of Directive 2014/23, the referring court asks whether that future contractual relationship should not be classified as a 'mixed contract' within the meaning of the third subparagraph of Article 3(4) of Directive 2014/24.
- 51 In the third place, that court raises the question whether the Municipality of Ljubljana may require each of the partners to meet the condition of registration of activity 77.110 without infringing Article 38(1) of Directive 2014/23 or Article 58(1) and (2) of Directive 2014/24, read in conjunction with the principles of proportionality, equal treatment and non-discrimination. The consequence of that requirement is, in particular, that a trader cannot commence its activity until it has enrolled with the Agencija Republike Slovenije za javnopravne evidence in storitve (Agency of the Republic of Slovenia responsible for the management of public registers and associated services) on the trade register of the Republic of Slovenia.
- 52 The referring court notes, in that regard, that, while Article 58(1) and (2) of Directive 2014/24 allows the contracting authority to require economic operators to be enrolled in one of the professional and trade registers which are kept in the Member State of establishment, the concept of 'professional activity' does not appear in Directive 2014/23. That silence in Article 38(1) of that directive could just as easily be interpreted as a prohibition for the contracting authority to set a condition concerning professional activity as a tacit authorisation to include such a condition. Moreover, the latter interpretation appears to be supported by point 7(c) of Annex V to that directive and by point III.1.1 of Annex XXI to Implementing Regulation 2015/1986.
- 53 The referring court also observes that the Municipality of Ljubljana did not require that the condition of participation linked to 'professional activity' be satisfied by economic operators which are in a relationship of subordination, such as subcontractors, but only by economic operators which are in a relationship of coordination with other economic operators, in the same way as the members of a group of economic operators on the ground that they are bound by joint and several liability. However, according to the referring court, such a requirement is dissuasive for economic operators which are not registered to pursue activity 77.110 or the equivalent

activities falling within NACE Rev. 2 nomenclature in Class 77.11, as provided for in Regulation No 1893/2006, but which wish to be associated with one or more other economic operators entitled to carry out that activity.

54 It is against that background that the Državna revizijska komisija za revizijo postopkov oddaje javnih naročil (National Commission for the review of procedures for the award of public contracts) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, it being specified that the second to seventh questions are based on the premiss that Directive 2014/23 is applicable to the dispute in the main proceedings and that the eighth, tenth and eleventh questions are put only in the alternative, in the event that the Court should conclude that Directive 2014/24 is applicable:

- ‘(1) Is Regulation [No 2195/2002] to be interpreted as meaning that the hire of passenger cars without a driver falls not within Group 601 of the Common Procurement Vocabulary (CPV), but instead within Group 341 of the CPV, with the addition of code PA01-7 Hire, from the Supplementary Vocabulary, completing the description, which is unaffected by code PB04-7 Without driver from the Supplementary Vocabulary, the combination of the codes from Group 341 of the CPV with the code PA01-7 Hire from the Supplementary Vocabulary meaning that the hire of passenger cars without a driver should be considered a supply contract, not a service contract and, consequently, where the bulk of the investment from the economic operator in the execution of a project – one to create a public system for the hire and sharing of electric vehicles – consists in the supply of electric vehicles, and where that investment is even greater than the contracting authority’s investment in the project, the “services” element referred to in Article 5(1)(b) of Directive [2014/23] is not fulfilled and, therefore, the contract for the execution of such a project is not a “services concession” within the meaning of Article 5(1)(b) of Directive [2014/23]?’
- (2) Is the concept of “the provision and management of services” in Article 5(1)(b) of Directive [2014/23] to be interpreted as meaning that:
- (a) the concept of “the provision of services” in Article 5(1)(b) of Directive [2014/23] has the same meaning as the concept of “the provision of services” in Article 2(1)(9) of Directive [2014/24], such that the concept of “the provision of services” in Article 5(1)(b) of Directive [2014/23] means that, in the case of the creation of a public system for the hire and sharing of electric vehicles, the economic operator provides services ancillary to the hire and sharing of electric vehicles, and carries on activities which go beyond the hire and sharing of electric vehicles,
- and
- (b) the concept of “the management of services” in Article 5(1)(b) of Directive [2014/23] means that the economic operator exercises the “right to exploit the services”, as mentioned further on in Article 5(1)(b) of Directive [2014/23], in order to generate revenue, and therefore the concept of “the management of services” in Article 5(1)(b) of Directive [2014/23] means that, in the case of the creation of a public system for the hire and sharing of electric vehicles, an economic operator, by reason of the provision of services falling within the scope of the hire and sharing of electric vehicles and activities going beyond the hire and sharing of electronic vehicles, has the right to charge users for the provision of the services and is not required to pay parking fees to the municipality or to bear the costs of regular maintenance of parking spaces, such that it is legitimate for it to generate revenue on that basis?’

- (3) Is the concept of the “total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority or the contracting entity, in consideration for the ... services being the object of the concession”, in the first subparagraph of Article 8(2) of Directive [2014/23], to be interpreted as meaning that the “total turnover of the concessionaire” also includes payments made to the concessionaire by users and that, consequently, such payments also constitute “consideration for the ... services being the object of the concession”?
- (4) Is Article 8(1) of Directive [2014/23] to be interpreted as meaning that Directive [2014/23] applies where the value of the investments or the value of the investments and costs borne by the economic operator in connection with a services concession, or borne by the economic operator and by the contracting authority in connection with a services concession (manifestly) exceeds EUR 5 350 000, excluding VAT?
- (5) Is Article 38(1) of Directive [2014/23] to be interpreted as permitting a contracting authority to impose a condition of participation relating to professional activity, and to require economic operators to provide evidence of the fulfilment of that condition, including in accordance with [Implementing Regulation 2015/1986], which sets out, in Annex XXI, the concession notice (standard form 24), which contains a Section III.1.1. Suitability to pursue the professional activity, including requirements relating to enrolment on professional or trade registers?
- (6) If [the fifth question] is answered in the affirmative, is Article 38(1) of Directive [2014/23], in the light of the principles of equal treatment and non-discrimination mentioned in Article 3(1) of [that directive], to be interpreted as meaning that, in setting the condition of participation relating to professional activity, a contracting authority may use the national item NACE 77.110 for the description of the activity of Renting and leasing of cars and light motor vehicles, which has the same meaning as in Regulation [No 1893/2006] in Annex I, NACE [Rev.] 2, Class 77.11 Renting and leasing of cars and light motor vehicles?
- (7) If [the fifth question] is answered in the affirmative, is Article 38(1) of Directive [2014/23], in particular in so far as it refers to the requirement of proportionality and in the light of the principles of equal treatment and non-discrimination mentioned in Article 3(1) of [that directive], to be interpreted as meaning that a contracting authority may require that the condition of registration for the pursuit of the activity of renting and leasing of cars and light motor vehicles is fulfilled by each of the partners?
- (8) Is Article 2(1)(8) of Directive [2014/24] to be interpreted as meaning that it is a “public supply contract” when (in relation to the economic operator’s investment) an essential part of the future contractual relationship between the municipality and the economic operator relates to the hire and sharing of electronic vehicles intended for users of a public electronic vehicle hire and sharing system, where the municipality does not invest directly in the implementation of the project for the creation of a public system for the hire and sharing of electronic vehicles by paying money to the economic operator, but instead invests indirectly, through the waiving of parking fees for a period of 20 years and through the provision of regular maintenance of parking spaces, and where the value of that investment exceeds, in aggregate, the value indicated in Article 4(b) or (c) of Directive [2014/24], and where the investment from the municipality is, however, (substantially) less than both the economic operator’s investment as a whole in the project for the creation of a public system for the hire and sharing of electric vehicles, and the economic operator’s investment in the part of

the project which relates to electronic vehicles, notwithstanding that users will pay the economic operator for the use of the electronic vehicles and that the economic operator's success in generating revenue will depend on user demand, which will be indicative of the financial success of the public system for the hire and sharing of electronic vehicles, for which reason the economic operator bears the operating risk in the implementation of the project, which is a characteristic of a "services concession", within the meaning of Article 5(1)(b) of Directive [2014/23], rather than of a "public contract" within the meaning of Article 2(1)(5) of Directive [2014/24]?

- (9) Is the third subparagraph of Article 3(4) of Directive [2014/24] to be interpreted as constituting the legal basis for the application of the regime established by Directive [2014/24] for the purposes of the award of a future contract between the municipality and the economic operator for the project to create a public system for the hire and sharing of electric vehicles, inasmuch as that contract must be considered a mixed contract, containing elements of a public supply and service contract and of a services concession, given that the municipality's investment in the implementation of the project exceeds the threshold set in Article 4(c) of Directive [2014/24]?
- (10) Are Article 58(1) and Article 58(2) of Directive [2014/24], in the light of the principles of equal treatment and non-discrimination mentioned in Article 18(1) of Directive [2014/24], to be interpreted as meaning that, in setting a condition of participation relating to professional activity, a contracting authority may use the national item NACE 77.110 for the description of the activity of Renting and leasing of cars and light motor vehicles, which has the same meaning as in Regulation 1893/2006, in Annex I, NACE Rev. 2, Class 77.11 Renting and leasing of cars and light motor vehicles?
- (11) Are Article 58(1) of Directive [2014/24], in particular in so far as it refers to the requirement of proportionality, and Article 58(2) of Directive [2014/24], in the light of the principles of equal treatment and non-discrimination mentioned in Article 18(1) of Directive [2014/24], to be interpreted as meaning that a contracting authority may require the condition of registration for the pursuit of the activity of [r]enting and leasing of cars and light motor vehicles to be fulfilled by each of the partners?

Consideration of the questions referred

The first, second, eighth and ninth questions

- 55 By its first, second, eighth and ninth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 5(1)(b) of Directive 2014/23 must be interpreted as meaning that an operation whereby a contracting authority intends to entrust the establishment and operation of a service consisting of the hire and sharing of electric vehicles to an economic operator whose financial contribution is mostly allocated for the purchase of those vehicles, and in which the revenue of that economic operator will derive essentially from the fees paid by the users of that service constitutes a 'services concession'.
- 56 By those questions, the referring court seeks clarification as to the distinction between the concepts of concession and public contract, since their respective scopes are likely to overlap. Moreover, that is one of the objectives pursued by Directive 2014/23, recital 18 of which states that it seeks to clarify the definition of concession.

- 57 In that regard, both the concept of ‘public contract’ within the meaning of Article 2(1)(5) of Directive 2014/24 and that of ‘concession’ within the meaning of Article 5(1)(b) of Directive 2014/23 are autonomous concepts of EU law and must, on that basis, be interpreted uniformly throughout the territory of the European Union. It follows that the legal classification given to a contract by the law of a Member State is irrelevant for the purpose of determining whether that contract falls within the scope of one or other of those directives and that the question of whether a contract is to be classified as a concession or a public contract must be assessed exclusively in the light of EU law (see, to that effect, judgments of 18 January 2007, *Auroux and Others*, C-220/05, EU:C:2007:31, paragraph 40; of 18 July 2007, *Commission v Italy*, C-382/05, EU:C:2007:445, paragraph 31; and of 10 November 2011, *Norma-A and Dekom*, C-348/10, EU:C:2011:721, paragraph 40).
- 58 Article 2(1)(5) of Directive 2014/24 defines ‘public contracts’ as ‘contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services’. In addition, Article 1(2) of that directive provides that ‘procurement ... is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose’.
- 59 The concept of a ‘services concession’ is defined in Article 5(1)(b) of Directive 2014/23 as ‘a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment’. Consequently, and as stated in the second paragraph of that point, ‘the award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible’.
- 60 It follows from a comparison of those definitions that a services concession is distinguished from a public contract by the grant to the concessionaire of the right, possibly together with a price, to operate the services which are the subject matter of the concession, the concessionaire enjoying, in the framework of the contract which has been concluded, a certain economic freedom to determine the conditions for the operation of the services which are granted to it and assuming, at the same time, the risk associated with operating those services (see, to that effect, judgment of 14 July 2016, *Promoimpresa and Others*, C-458/14 and C-67/15, EU:C:2016:558, paragraph 46).
- 61 Therefore, as stipulated in Article 1(1) of Directive 2014/23, provided that the estimated value of a concession is not less than the threshold laid down in Article 8 of that directive, the mere transfer to the concessionaire of the risk linked to the operation of services is sufficient to constitute a services concession within the meaning of Article 5(1)(b) of that directive. In that regard, it is irrelevant that the financial contribution of the economic operator is not the same as that of the contracting authority.

- 62 In the present case, as is apparent from the order for reference, the Municipality of Ljubljana does not seek to protect the concessionaire against any risk of losses. It is true that that municipality stated (i) that it would not receive the sum corresponding to the parking fees for the parking spaces to be used for the hire and sharing service for electric vehicles and (ii) that it would bear the costs of regular maintenance of the parking spaces made available to the economic operator.
- 63 That said, it is apparent from the order for reference that the contribution of the contracting authority referred to in the preceding paragraph cannot eliminate the operating risk for the economic operator. It follows that the operator will be able to recoup the investments made and the costs incurred in operating the service at issue in the main proceedings only if it derives significant revenue from the payment of charges by the users of the service.
- 64 Moreover, the fact that the financial contribution of the economic operator is predominantly allocated to the purchase of electric vehicles cannot lead to the project of a public system for the hire and sharing of electric vehicles envisaged by the Municipality of Ljubljana being regarded as a ‘mixed contract’ within the meaning of Article 20 of Directive 2014/23.
- 65 It is true that Article 20(4) of Directive 2014/23, read in conjunction with Article 20(2) of that directive, provides that, in the case of mixed contracts containing elements of concessions and other elements, which are separable, falling within the scope of public contracts covered by Directive 2014/24, the mixed contract must be awarded in accordance with the provisions of Directive 2014/24. However, for Article 20(4) of Directive 2014/23 to apply, it is still necessary to establish the existence of a public contract within the meaning of Directive 2014/24.
- 66 As has been observed in paragraph 58 of the present judgment, it follows from Article 1(2) of Directive 2014/24 that a procurement procedure is intended to lead to ‘the acquisition[,] by means of a public contract[,] of works, supplies or services by one or more contracting authorities’. Article 2(1)(8) of that directive defines ‘public supply contracts’ as ‘public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products’.
- 67 It follows that a contracting authority which organises a public supply contract intends itself to benefit from the products which it has purchased, leased or rented.
- 68 However, that is not so in the present case. As is apparent from the order for reference, in the dispute in the main proceedings, the Municipality of Ljubljana does not wish to acquire electric vehicles for its benefit. On the contrary, that municipality intends to entrust an economic operator with the operation of a service enabling third parties to hire vehicles, without seeking to take over it itself or to hire vehicles for its own use. More broadly, as stated in the instructions referred to in paragraph 36 above, the objective of that system is to contribute to reducing the environmental damage caused by motor traffic and to promote the sustainable development of the Municipality of Ljubljana, in particular by adopting the concept of sustainable mobility. Furthermore, in so far as the electric vehicles appear to be inseparable from the services concession itself, it follows from Article 8(2) of Directive 2014/23 that those vehicles must be regarded as supplies linked to the services under concession.
- 69 In those circumstances, and subject to the checks to be carried out by the referring court, it does not appear possible to characterise the existence of a public supply contract, within the meaning of Article 2(1)(8) of Directive 2014/24.

- 70 Finally, it should be noted that the classification of a contract as a concession, within the meaning of Article 5(1) of Directive 2014/23, or as a public contract, within the meaning of Article 2(1)(5) of Directive 2014/24, cannot result from the contracting authority's choice of the CPV codes mentioned in the contract or concession documentation, in particular in Annex V to those two directives. The obligation to use CPV codes under Regulation No 2195/2002 is merely a consequence of the applicability of Directive 2014/23 or of Directive 2014/24, as is apparent from Article 27 of the former directive and Article 23 of the latter directive, respectively.
- 71 Consequently, it is only after establishing that a concession award procedure falls within the scope of Directive 2014/23 or that a procurement procedure falls within the scope of Directive 2014/24 that a contracting authority is required to identify the relevant CPV code or codes.
- 72 That being so, although they are intended to make it easier for economic operators to take cognisance of contract notices in their sector of activity, CPV codes represent only one of the elements of the description of the subject matter of the contract, especially since the classification provided by Regulation No 2195/2002 may prove incomplete or outdated, having regard in particular to technological progress.
- 73 Thus, as a matter of principle, the reference to an incorrect CPV code is of no consequence. The position would be different, however, if such an error were evidence of the contracting authority's intention to undermine the interests of one or more economic operators and, therefore, to distort competition. Such a situation would fall within the scope of the second subparagraph of Article 3(1) of Directive 2014/23.
- 74 In the light of the foregoing considerations, the answer to the first, second, eighth and ninth questions is that Article 5(1)(b) of Directive 2014/23 must be interpreted as meaning that an operation whereby a contracting authority intends to entrust the establishment and operation of a service consisting of the hire and sharing of electric vehicles to an economic operator whose financial contribution is mostly allocated for the purchase of those vehicles, and in which the revenue of that economic operator will derive essentially from the fees paid by the users of that service constitutes a 'services concession', since such characteristics are such as to establish that the risk linked to the operation of the services under concession has been transferred to that economic operator.

The third and fourth questions

- 75 By its third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 8 of Directive 2014/23 must be interpreted as meaning that, in order to determine whether the threshold for applicability of that directive is reached, the contracting authority must estimate the 'total turnover of the concessionaire generated over the duration of the contract, net of VAT', taking into account the fees which users will pay to the concessionaire, together with contributions and costs borne by the concessionaire and/or the contracting authority.
- 76 Under Article 8(1) and (2) thereof, that directive applies to concessions the value of which is equal to or greater than EUR 5 350 000, it being specified that the value of a concession is to be the total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority or the contracting entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services.

- 77 Since turnover corresponds to the amount resulting from the sale of products and the provision of services, the ‘total turnover of the concessionaire generated over the duration of the contract, net of VAT’, within the meaning of Article 8(2) of Directive 2014/23, necessarily includes the fees paid to the concessionaire by users in consideration for the use of the services which were granted to it. Article 8(3)(b) of that directive also clearly provides that, ‘when calculating the estimated value of the concession, contracting authorities and contracting entities shall, where applicable, take into account in particular ... revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority or contracting entity’.
- 78 Furthermore, it is apparent from Article 8(3)(c) of Directive 2014/23 that that calculation must also take into consideration ‘payments or any financial advantage in any form whatsoever made by the contracting authority ... to the concessionaire’. Such payments or financial advantages reduce the investment required of the concessionaire.
- 79 Nevertheless, the ‘total turnover of the concessionaire generated over the duration of the contract, net of VAT’, is necessarily, as such, prospective and, by definition, uncertain.
- 80 Thus, the contracting authority may also take the view that the threshold laid down for the application of Directive 2014/23 is reached where the investments and costs to be borne by the concessionaire, alone or with the contracting authority, throughout the period of application of the concession contract manifestly exceed that threshold of applicability. The taking into account of those investments and of those costs indeed contributes to attributing an objective character to the estimate of the value of a concession which the contracting authority must make, as required by Article 8(3) of Directive 2014/23.
- 81 That interpretation is supported by Article 18(2) of Directive 2014/23. Under that provision, for concessions which, as in the case in the main proceedings, were provided for a period ‘lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives. The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession’.
- 82 In addition, according to the last sentence of recital 52 of that directive, which clarifies the scope of the latter provision, contracting authorities ‘should always be able to award a concession for a period shorter than the time necessary to recoup the investments, provided [that compensation is provided for and] that the related compensation does not eliminate the operating risk’.
- 83 It follows that the concessionaire’s contribution, namely the investment it has made, and the costs which it will have to bear throughout the period of application of the concession contract may be taken into consideration in order to calculate the estimated value of the concession.
- 84 It follows from the foregoing considerations that Article 8 of Directive 2014/23 must be interpreted as meaning that, in order to determine whether the threshold for applicability of that directive is reached, the contracting authority must estimate the ‘total turnover of the concessionaire generated over the duration of the contract, net of VAT’, taking into account the fees which users will pay to the concessionaire, together with contributions and costs borne by the contracting authority. However, the contracting authority may also take the view that the threshold laid down for the application of Directive 2014/23 is reached where the investments

and costs to be borne by the concessionaire, alone or with the contracting authority, throughout the period of application of the concession contract manifestly exceed that threshold of applicability.

The fifth question

- 85 By its fifth question, the referring court asks, in essence, whether Article 38(1) of Directive 2014/23, read in conjunction with point 7(b) of Annex V to and recital 4 of that directive, and with Article 4 and point III.1.1 of Annex XXI to Implementing Regulation 2015/1986, must be interpreted as meaning that a contracting authority may require, as criteria for the selection and qualitative assessment of candidates, that economic operators be enrolled on a trade register or on a professional register.
- 86 It should be noted that, unlike Article 58(1) of Directive 2014/24, Article 38(1) of Directive 2014/23 does not expressly provide that the contracting authority may impose, as a criterion for participation in a procedure for the award of a concession, selection criteria relating to suitability to pursue a professional activity.
- 87 The silence observed on that point by Article 38(1) of Directive 2014/23 cannot, however, preclude the contracting authority from imposing, as a criterion for participation in a procedure for the award of a concession, selection criteria relating to suitability to pursue a professional activity.
- 88 First, the objective of flexibility and adaptability underlying that directive, which is recalled in recitals 1 and 8 thereof, makes it possible to adopt a broad interpretation of the concept of ‘professional ... ability’, as referred to in Article 38(1) of that directive, and to consider that it includes the suitability to pursue a professional activity.
- 89 Secondly, Annex V to the same directive, which is entitled ‘Information to be included in concession notices referred to in Article 31’, provides, in point 7(b) thereof, that the contracting authority must, where appropriate, indicate, as a condition of participation, ‘whether the provision of the service is reserved by law, regulation or administrative provision to a particular profession’. It must be inferred from that provision that, where the provision of a service is reserved to a particular profession, the contracting authority is entitled to require that the economic operator be enrolled on a trade register or on a professional register.
- 90 Thirdly, point III.1 of Annex XXI to Implementing Regulation 2015/1986 provides that, in respect of ‘Legal, economic, financial and technical information’, the contracting authority may impose a condition of participation based on the ‘suitability to pursue the professional activity, including requirements relating to enrolment on professional or trade registers’.
- 91 Nevertheless, in accordance with the principle of mutual recognition, which is referred to in recital 4 of Directive 2014/23, an economic operator must be able to prove its suitability to carry out a concession by means of documents, such as proof of enrolment on one of the professional or trade registers, issued by the competent authorities of the Member State in which it is established. That principle therefore precludes a contracting authority from requiring, as a qualitative selection criterion, that an economic operator be enrolled on the trade or professional register in the Member State in which the concession is performed where that economic operator has

already been enrolled on a similar register in the Member State in which it is established (see, by analogy, judgment of 20 May 2021, *Riigi Tugiteenuste Keskus*, C-6/20, EU:C:2021:402, paragraphs 49 and 55).

- 92 In the light of the foregoing considerations, the answer to the fifth question is that Article 38(1) of Directive 2014/23, read in conjunction with point 7(b) of Annex V to and recital 4 of that directive, and with Article 4 and point III.1.1 of Annex XXI to Implementing Regulation 2015/1986, must be interpreted as meaning that a contracting authority may require, as criteria for the selection and qualitative assessment of candidates, that economic operators be enrolled on a trade register or on a professional register, provided that an economic operator can rely on being enrolled on a similar register in the Member State in which it is established.

The sixth question

- 93 By its sixth question, the referring court asks, in essence, whether Article 38(1) of Directive 2014/23, read in conjunction with Article 27 of that directive and Article 1 of Regulation No 2195/2002, must be interpreted as meaning that a contracting authority, which requires economic operators to be enrolled on the trade register or the professional register of a Member State of the European Union, may refer not to the Common Procurement Vocabulary made up of CPV codes, but to the NACE Rev. 2 nomenclature, as established by Regulation No 1893/2006.
- 94 It should be noted that Article 27 of Directive 2014/23 provides that ‘any references to nomenclatures in the context of the award of concessions shall be made using the “Common Procurement Vocabulary (CPV)” as adopted by Regulation [No 2195/2002]’.
- 95 In addition, under Article 1 of Regulation No 2195/2002, ‘a single classification system applicable to public procurement, known as the “Common Procurement Vocabulary” or “CPV” is hereby established’. In that regard, recitals 1 and 3 of that regulation state that ‘the use of different classifications is detrimental to the openness and transparency of public procurement in Europe’, so that ‘there is a need to standardise, by means of a single classification system for public procurement, the references used by the contracting authorities and entities to describe the subject of contracts’.
- 96 It follows from the combination of the provisions referred to in paragraphs 94 and 95 above that the contracting authority is required to refer exclusively to the Common Procurement Vocabulary. Furthermore, it is apparent from Article 1(2) of Regulation No 1893/2006 that that regulation is to apply only to the use of the NACE Rev. 2 nomenclature for statistical purposes.
- 97 Consequently, the answer to the sixth question is that Article 38(1) of Directive 2014/23, read in conjunction with Article 27 of that directive and Article 1 of Regulation No 2195/2002, must be interpreted as precluding a contracting authority, which requires economic operators to be enrolled on the trade register or the professional register of a Member State of the European Union, from referring not to the Common Procurement Vocabulary made up of CPV codes, but to the NACE Rev. 2 nomenclature, as established by Regulation No 1893/2006.

The seventh question

- 98 By its seventh question, the referring court asks, in essence, whether Article 38(1) and (2) of Directive 2014/23, read in conjunction with Article 26(2) of that directive, must be interpreted as meaning that a contracting authority may, without infringing the principle of proportionality guaranteed by the first subparagraph of Article 3(1) of that directive, require each of the members of a temporary business association to be enrolled, in a Member State, on the trade register or the professional register with a view to the pursuit of the activity of renting and leasing of cars and light motor vehicles.
- 99 The first sentence of Article 38(2) of Directive 2014/23 provides for the right of an economic operator to rely on the capacities of other entities, regardless of the legal nature of the links which bind it to those entities, with a view to satisfying the conditions for participation relating both to professional and technical ability and to economic and financial standing set out in paragraph 1 of that provision (see, by analogy, in the field of public procurement, 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). In addition, under the second sentence of that second paragraph, ‘where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority or the contracting entity that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing a commitment by those entities to that effect’.
- 100 It is thus apparent that Article 38 of that directive gives an economic operator great latitude to associate itself with other entities which will, in particular, enable it to have at its disposal the abilities which it lacks. On that basis, that provision cannot be interpreted as requiring an economic operator to seek assistance only from entities each of which is capable of pursuing the same professional activity. By definition, an economic operator having recourse to the abilities of other entities seeks either to increase the abilities which it already has but, possibly, in insufficient quantity or quality, or to acquire abilities or skills which it lacks.
- 101 It would thus be disproportionate, particularly in the latter case, to require that all the members of a temporary business association be capable of pursuing the professional activity under concession. The principle of proportionality, which is guaranteed in particular in the first subparagraph of Article 3(1) of Directive 2014/23 and which is a general principle of EU law, requires that the rules laid down by the Member States or the contracting authorities in implementing the provisions of that directive not go beyond what is necessary to achieve the objectives of that directive (see, by analogy, in the field of public procurement, judgments of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 48, and of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras*, C-927/19, EU:C:2021:700, paragraph 155).
- 102 From that point of view, the second subparagraph of Article 26(2) of Directive 2014/23 provides, inter alia, that, ‘where necessary, contracting authorities or contracting entities may clarify in the concession documents how groups of economic operators shall meet the requirements as to economic and financial standing or technical and professional ability referred to in Article 38 provided that this is justified by objective reasons and is proportionate’.

103 However, in the present case, the request for a preliminary ruling contains no evidence to suggest that, in accordance with the second subparagraph of Article 26(2) of Directive 2014/23, it would be necessary and justified on objective and proportionate grounds to require each of the members of a temporary business association to be enrolled, in a Member State, on the trade register or the professional register with a view to the pursuit of the activity of renting and leasing of cars and light motor vehicles.

104 In those circumstances, the answer to the seventh question is that Article 38(1) and (2) of Directive 2014/23, read in conjunction with Article 26(2) of that directive, must be interpreted as meaning that a contracting authority may not, without infringing the principle of proportionality guaranteed by the first subparagraph of Article 3(1) of that directive, require each of the members of a temporary business association to be enrolled, in a Member State, on the trade register or the professional register with a view to the pursuit of the activity of renting and leasing of cars and light motor vehicles.

The tenth and eleventh questions

105 In view of the answer given to the first, second, eighth and ninth questions, there is no need to examine the tenth and eleventh questions.

Costs

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

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

1. Article 5(1)(b) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, as amended by Commission Delegated Regulation (EU) 2019/1827 of 30 October 2019,

must be interpreted as meaning that an operation whereby a contracting authority intends to entrust the establishment and operation of a service consisting of the hire and sharing of electric vehicles to an economic operator whose financial contribution is mostly allocated for the purchase of those vehicles, and in which the revenue of that economic operator will derive essentially from the fees paid by the users of that service constitutes a ‘services concession’, since such characteristics are such as to establish that the risk linked to the operation of the services under concession has been transferred to that economic operator.

2. Article 8 of Directive 2014/23, as amended by Delegated Regulation 2019/1827,

must be interpreted as meaning that in order to determine whether the threshold for applicability of that directive is reached, the contracting authority must estimate the ‘total turnover of the concessionaire generated over the duration of the contract, net of [value-added tax (VAT)]’, taking into account the fees which users will pay to the concessionaire, together with contributions and costs borne by the contracting authority. However, the contracting authority may also take the view that the threshold

laid down for the application of Directive 2014/23, as amended by Delegated Regulation 2019/1827, is reached where the investments and costs to be borne by the concessionaire, alone or with the contracting authority, throughout the period of application of the concession contract manifestly exceed that threshold of applicability.

- 3. Article 38(1) of Directive 2014/23, as amended by Delegated Regulation 2019/1827, read in conjunction with point 7(b) of Annex V to and recital 4 of that directive, and with Article 4 and point III.1.1 of Annex XXI to Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011,**

must be interpreted as meaning that a contracting authority may require, as criteria for the selection and qualitative assessment of candidates, that economic operators be enrolled on a trade register or on a professional register, provided that an economic operator can rely on being enrolled on a similar register in the Member State in which it is established.

- 4. Article 38(1) of Directive 2014/23, as amended by Delegated Regulation 2019/1827, read in conjunction with Article 27 of that directive and Article 1 of Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV),**

must be interpreted as precluding a contracting authority, which requires economic operators to be enrolled on the trade register or the professional register of a Member State of the European Union, from referring not to the Common Procurement Vocabulary (CPV) made up of CPV codes, but to the NACE Rev. 2 nomenclature, as established by Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains.

- 5. Article 38(1) to (2) of Directive 2014/23, as amended by Delegated Regulation 2019/1827, read in conjunction with Article 26(2) of that directive,**

must be interpreted as meaning that a contracting authority may not, without infringing the principle of proportionality guaranteed by the first subparagraph of Article 3(1) of that directive, require each of the members of a temporary business association to be enrolled, in a Member State, on the trade register or the professional register with a view to the pursuit of the activity of renting and leasing of cars and light motor vehicles.

[Signatures]