



## Reports of Cases

### JUDGMENT OF THE COURT (Eighth Chamber)

10 November 2022\*

(Reference for a preliminary ruling – Procedures for the award of public works contracts, public supply contracts and public service contracts – Directive 2014/24/EU – Award of contracts – Article 2(1)(10) – Concept of an ‘economic operator’ – Inclusion of a general partnership without legal personality – Article 19(2) and Article 63 – Joint undertaking or reliance on the capacities of other entities of persons linked with that undertaking – Article 59(1) – Obligation to submit one or several European Single Procurement Documents (ESPD) – Purpose of the ESPD)

In Case C-631/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the *Gerechtshof 's-Hertogenbosch* (Court of Appeal, 's-Hertogenbosch, Netherlands), made by decision of 5 October 2021, received at the Court on 14 October 2021, in the proceedings

**Taxi Horn Tours BV**

v

**gemeente Weert,**

**gemeente Nederweert,**

**Touringcars VOF,**

THE COURT (Eighth Chamber),

composed of M. Safjan, 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,

after considering the observations submitted on behalf of:

– Taxi Horn Tours BV, by L.C. van den Berg, advocaat,

\* Language of the case: Dutch.

- gemeente Weert and gemeente Nederweert, by N.A.D. Groot, advocaat,
- the Netherlands Government, by M.K. Bulterman and M.H.S. Gijzen, 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 Articles 2, 19, 59 and 63 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65) and of Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (OJ 2016 L 3, p. 16).
- 2 The request has been made in proceedings between, on the one hand, Taxi Horn Tours BV and, on the other hand, the gemeente Weert and the gemeente Nederweert (municipality of Weert and municipality of Nederweert, Netherlands) (together, ‘the municipalities’) and Touringcars VOF concerning the award by the municipalities of a public contract for bus transport to Touringcars VOF.

### **Legal context**

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

##### *Directive 2014/24*

- 3 Recitals 14, 15 and 21 of Directive 2014/24 are worded as follows:
  - ‘(14) It should be clarified that the notion of “economic operators” should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate. Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are “legal persons” in all circumstances.
  - (15) It should be clarified that groups of economic operators, including where they have come together in the form of a temporary association, may participate in award procedures without it being necessary for them to take on a specific legal form. To the extent this is necessary, for instance where joint and several liability is required, a specific form may be required when such groups are awarded the contract. ...

...

(21) Public contracts that are awarded by contracting authorities operating in the water, energy, transport and postal services sectors and that fall within the scope of those activities are covered by 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)]. However, contracts awarded by contracting authorities in the context of their operation of maritime, coastal or river transport services fall within the scope of this Directive.’

4 Article 2 of that directive, entitled ‘Definitions’, provides:

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

...

(10) “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;

...’

5 Article 18 of that directive, entitled ‘Principles of procurement’, provides, in the first subparagraph of paragraph 1:

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

6 Article 19 of that directive, entitled ‘Economic operators’, provides in paragraph 2:

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

Where necessary, contracting authorities may clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in Article 58 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.

...’

7 Article 59 of Directive 2014/24, entitled ‘European Single Procurement Document’, provides in paragraph 1:

‘At the time of submission of requests to participate or of tenders, contracting authorities shall accept the European Single Procurement Document (ESPD), consisting of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions:

- (a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;
- (b) it meets the relevant selection criteria that have been set out pursuant to Article 58;
- (c) where applicable, it fulfils the objective rules and criteria that have been set out pursuant to Article 65.

Where the economic operator relies on the capacities of other entities pursuant to Article 63, the ESPD shall also contain the information referred to in the first subparagraph of this paragraph in respect of such entities.

The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority. The ESPD shall further identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

Where the contracting authority can obtain the supporting documents directly by accessing a database pursuant to paragraph 5, the [ESPD] shall also contain the information required for this purpose, such as the internet address of the database, any identification data and, where applicable, the necessary declaration of consent.

Economic operators may reuse an ESPD which has already been used in a previous procurement procedure, provided that they confirm that the information contained therein continues to be correct.’

8 Article 63 of that directive, entitled ‘Reliance on the capacities of other entities’, provides in paragraph 1:

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

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

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

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

#### *Directive 2014/25*

- 9 Under Article 11 of Directive 2014/25, headed 'Transport services':

'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.'

#### *Implementing Regulation 2016/7*

- 10 Recital 1 of Implementing Regulation 2016/7 states:

'One of the major objectives of Directives [2014/24] and [2014/25] is [to reduce] the administrative burdens of contracting authorities, contracting entities and economic operators, not least small and medium-sized enterprises. A key element of that effort is the European single procurement document (ESPD). The standard form for the ESPD should consequently be drafted in such a manner that the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria is obviated. With the same objective in mind, the standard form should also provide the relevant information in respect of entities on whose capacities an economic operator relies, so that the verification of that information can be carried out together with the verification in respect of the main economic operator and on the same conditions.'

- 11 Annex 1 to that regulation, entitled 'Instructions', provides:

'The ESPD is a self-declaration by economic operators providing preliminary evidence replacing the certificates issued by public authorities or third parties. As provided in Article 59 of Directive [2014/24], it is a formal statement by the economic operator that it is not in one of the situations in which economic operators shall or may be excluded; that it meets the relevant selection criteria and that, where applicable, it fulfils the objective rules and criteria that have been set out for the

purpose of limiting the number of otherwise qualified candidates to be invited to participate. Its objective is to reduce the administrative burden arising from the requirement to produce a substantial number of certificates or other documents related to exclusion and selection criteria.

...

Economic operators may be excluded from the procurement procedure or be subject to prosecution under national law in cases of serious misrepresentation in filling in the ESPD or, generally, in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, or where such information is withheld or the economic operators are unable to submit the supporting documents.

Economic operators may reuse the information that has been provided in an ESPD which has already been used in a previous procurement procedure as long as the information remains correct and continues to be pertinent. The easiest way to do so is by inserting the information in the new ESPD through use of the appropriate functionalities that are provided to that effect in the abovementioned electronic ESPD-service. Of course, reuse of information through other forms of copy-paste of information, for instance information stored in the economic operator's IT-equipment (PCs, tablets, servers ...), will also be possible.

...

As mentioned earlier, the ESPD consists of a formal statement by the economic operator that the relevant grounds for exclusion do not apply, that the relevant selection criteria are fulfilled and that it will provide the relevant information as required by the contracting authority or contracting entity.

...

An economic operator participating on its own and which does not rely on the capacities of other entities in order to meet the selection criteria, must fill out one ESPD.

An economic operator participating on its own but relying on the capacities of one or more other entities must ensure that the contracting authority or contracting entity receives its own ESPD together with a separate ESPD setting out the relevant information ... for each of the entities it relies on.

Finally, where groups of economic operators, including temporary associations, participate together in the procurement procedure, a separate ESPD setting out the information required under Parts II to V must be given for each of the participating economic operators.

In all cases where more than one person is [a] member of the administrative, management or supervisory body of an economic operator or has powers of representation, decision or control therein, each may have to sign the same ESPD, depending on national rules, including those governing data protection.

...'

*Netherlands law*

*The Law on Public Procurement*

- 12 The Aanbestedingswet (Law on Public Procurement) of 1 November 2012 (Stb. 2012, No 542), in the version applicable to the dispute in the main proceedings ('the Law on Public Procurement'), transposes, into Netherlands law, Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114). Certain entities to which that legislation applies are governed by the Besluit van 11 februari 2013, houdende de regeling van enkele onderwerpen van de Aanbestedingswet 2012 (Aanbestedingsbesluit) (Decree of 11 February 2013 governing certain entities to which the Law of 2012 on Public Procurement applies), which provides in Article 2:

'1. The self-declaration referred to in Article 2.84 of the Law [on Public Procurement] shall include at least the following information:

- a. information on the contracting authority or special-sector firm and on the procurement procedure;
- b. information on the economic operator;
- c. a statement concerning the grounds for exclusion;
- d. a statement concerning the suitability requirements and a statement concerning the technical specifications and the performance requirements relating to the environment;
- e. a statement as to how the selection criteria have been met;
- f. a statement concerning the correctness of the completed self-declaration and signing powers of the signatory;
- g. date and signature.

...

3. One or more model self-declaration forms shall be issued by ministerial order.'

- 13 It follows from Article 2.52 of that law:

'...

3. Associations of economic operators may submit tenders or put themselves forward as candidates.

4. Associations of economic operators shall not be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate.’

14 Article 2.84 of the Law on Public Procurement provides as follows:

‘1. A self-declaration is a declaration by an economic operator in which it indicates:

- a. whether any grounds for exclusion apply to it;
- b. whether it meets the suitability requirements set out in the notice or in the procurement documents;
- c. whether it complies or will comply with the technical specifications and implementing conditions relating to the environment and animal welfare or based on social considerations;
- d. whether and how it meets the selection criteria.

2. The data and information that may be requested in a declaration and model declaration form(s) shall be laid down by or pursuant to a general administrative order.’

15 Under Article 2.85 of that law:

‘1. The contracting authority shall require the economic operator to provide, in support of its request to participate or its tender, a self-declaration in accordance with the model form that is provided for that purpose, and shall specify in that regard the data and information to be included.

2. The contracting authority shall not require the economic operator to provide, in support of its request to participate or its tender, data and information by any means other than the self-declaration, if they may be requested in that declaration.

3. The contracting authority may only request the economic operator to attach to its self-declaration supporting documents which do not relate to the data and information that may be requested in the self-declaration, except where they are supporting documents referred to in Article 2.93(1)(a), to the extent that they are listed in that provision or in Article 2.93(1)(b).

4. An economic operator as referred to in paragraph 1 of this Article may submit a self-declaration that has already been used, provided that it confirms that the information contained therein is still correct.’

#### *Civil Code*

16 According to Article 7A:1655 of the Burgerlijk Wetboek (Civil Code):

‘A partnership is an agreement by which two or more persons agree to join something together with the aim of sharing the resulting benefit.’



*Commercial Code*

17 Article 16 of the Wetboek van Koophandel (Commercial Code) provides:

‘A general partnership is a partnership entered into for the purpose of carrying on a commercial activity under a common name.’

18 Under Article 17(1) of that code:

‘Unless otherwise precluded from doing so, each partner is authorised to act in the name of the partnership, to spend and receive money and to bind the partnership to third parties and third parties to the partnership.’

19 Under Article 18 of that code:

‘In general partnerships, each partner is jointly and severally liable for the obligations of the partnership.’

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

20 Up to 1 August 2019, Taxi Horn Tours transported primary school pupils for physical education classes (‘transport of the PE class’) in performance of a public contract awarded to it by the municipalities.

21 Having decided not to extend that contract, the municipalities initiated a European public procurement procedure for the transport of the PE class in the period from 1 January 2020 to the end of the 2027/2028 school year. The award criterion was that of the most economically advantageous tender.

22 The tender instructions drawn up by the municipalities provided, inter alia, that, in order to guarantee the correctness and validity of the tender, an officer authorised to represent and bind the undertaking was required to sign the ESPD, tender and annexes. In addition, groups of transport undertakings submitting tenders were required to designate a contact person. Each member of such a group was to be jointly and severally liable for the performance of the transport contract. Lastly, those instructions specified that the tender was required to be complete and to contain, inter alia, a duly completed and validly signed ESPD.

23 The municipalities, which had received two tenders, one from Touringcars and the other from Taxi Horn Tours, informed the latter that they intended to award the contract to Touringcars.

24 Taxi Horn Tours then applied to the Rechtbank Limburg (District Court, Limburg, Netherlands) for interim measures seeking, first, rejection of the tender submitted by Touringcars and, secondly, the award of the contract to Taxi Horn Tours.

25 After that application had been dismissed by decision of 12 February 2020, the municipalities concluded contracts with Touringcars for the transport of the PE class from 1 March 2020.

26 Taxi Horn Tours brought an appeal against that decision before the Gerechtshof ’s-Hertogenbosch (Court of Appeal, ’s-Hertogenbosch, Netherlands), which is the referring court. That court notes that the tender proposed by Touringcars was submitted by F, who also

submitted an ESPD in the name of that firm. The question therefore arose, in its view, as to whether Touringcars was authorised to supply one single ESPD for that general partnership or whether each partner was required to provide its own ESPD.

- 27 In that regard, Taxi Horn Tours claims that Touringcars is a permanent association between the undertakings of its two partners and, therefore, a group of undertakings. The conduct and statements of the two partners must therefore, it submits, be assessed in the light of their own ESPD.
- 28 The municipalities submit, by contrast, that a distinction should be drawn between temporary associations and permanent associations. The concept of a ‘group of economic operators’, within the meaning of EU public procurement law, refers to a temporary association. A general partnership, however, is a partnership as referred to in recital 14 of Directive 2014/24 and is therefore, in its entirety, a single economic operator and not a group of economic operators. Furthermore, according to the municipalities, the assessment of partners can be made on the basis of Part III(A) of the ESPD relating to the grounds for exclusion, which requires economic operators to mention grounds relating to criminal convictions.
- 29 The referring court states that Touringcars is a general partnership appearing in the commercial register and formed on 1 January 2011 for an indefinite period. It employs 82 people and its activities are ‘the occasional carriage of passengers by road, transport by taxi and the trade in and repair of passenger cars and light commercial vehicles’. The partners of Touringcars are K BV, which employs 39 people, and F Touringcars BV, which, for its part, does not employ any staff. F is the managing director of Touringcars and has a general mandate. Each partner operates its own transport undertaking. K is the managing director of K BV, while F is the authorised representative of K BV and holds the title of commercial director. Lastly, the sole director and shareholder of F Touringcars BV is F Beheer BV, whose sole director and shareholder is F.
- 30 In a letter dated 27 January 2020, K stated that in January 2011 he had given F a general mandate, as a director authorised to act alone and autonomously, to represent K BV. Since then, it was stated, F has been responsible for the management of that firm in its entirety. At the same time, K BV, together with F Touringcars BV, formed a general partnership under the name ‘Touringcars VOF’. Within that partnership, F and K consult one another regularly, but F effectively directs the undertaking.
- 31 The referring court notes that, having regard to the combined provisions of Article 16 of the Commercial Code and Article 7A:1655 of the Civil Code, a general partnership is an agreement by which two or more persons agree to join something together with the aim of carrying on a commercial activity under a common name and achieving a common benefit.
- 32 That court also refers to a judgment of 19 April 2019 in which the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) held, first, that a general partnership is a contractual legal relationship entered into for the purpose of carrying on a commercial activity under a common name in a long-term association. Although a general partnership does not have legal personality, Netherlands law and case-law grant it, to some extent, an independent position vis-à-vis the individual partners when it acts in legal relations. Thus, a general partnership can institute legal proceedings in its own name or be declared insolvent in its own name. Secondly, the absence of legal personality means that the general partnership does not have individual rights and obligations in its own right. When a partner acts in the name of the general partnership, that partner acts on behalf of all the joint partners of that partnership (‘the joint partners’) and binds

the joint partners. An agreement with a general partnership must therefore be regarded as an agreement with the joint partners in their capacity as partners. Thirdly, since Article 18 of the Commercial Code stipulates that each of the partners is jointly and severally liable for the obligations of the partnership, each partner is liable for the entirety of the obligations of the joint partners. Fourthly, a creditor of the joint partners can enforce his or her claim both against the joint partners and against each partner individually. A creditor of the partnership thus has two concurrent rights of action against each partner: one against the joint partners, which is recoverable from the separated assets of the general partnership, and the other against the partner personally, which may be satisfied by the private assets of that partner.

33 Taxi Horn Tours argues that Touringcars has recourse to resources which are made available to it from the joint partners' own undertakings.

34 The referring court is therefore uncertain whether the assessment of the application for a public procurement procedure for entities which cooperate on a long-term basis in a separate joint undertaking may be limited to the joint undertaking alone or whether it must also be carried out in relation to each person linked with that undertaking. Therefore, in its view, it is necessary to determine whether an economic operator may limit itself to providing one single ESPD in the case where it is made up of the natural and/or legal persons involved.

35 In those circumstances, the *Gerechtshof 's-Hertogenbosch* (Court of Appeal, 's-Hertogenbosch) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling on the interpretation of Articles 2, 19, 59 and 63 of Directive 2014/24 and of Implementing Regulation 2016/7:

'(1) Where (natural and/or legal) persons operate a joint undertaking (in this case in the form of a general partnership):

- must each person linked with that undertaking submit a separate European Single Procurement Document, or
- must each person linked with the joint undertaking and their joint undertaking submit a separate European Single Procurement Document, or
- does only the joint undertaking need to submit a European Single Procurement Document?

(2) Does the answer to that question vary depending on whether:

- the joint undertaking is temporary or non-temporary (long-term);
- the persons linked with the joint undertaking are themselves economic operators;
- the persons linked with the joint undertaking operate their own undertakings which are similar to the joint undertaking, or are at least active in the same market;
- the joint undertaking is not a legal person;
- the joint undertaking may in fact have its own (recoverable) assets (separate from the partners' assets);

- the joint undertaking is authorised under national law to represent persons linked with the joint undertaking for the purpose of answering questions relating to the European Single Procurement Document;
  - under national law, in the case of a general partnership, the partners are responsible for the obligations arising from the contract and are jointly and severally liable for their proper performance (and not, therefore, the general partnership itself)?
- (3) If several of the factors mentioned in the second question are significant, how are they related to each other? Are certain factors more significant than other factors, or are they decisive?
- (4) Is it correct that, in the case of a joint undertaking, a separate European Single Procurement Document is in any event required from a person linked with that joint undertaking if the execution of the contract will (also) involve the use of resources that belong to that person's own undertaking (such as staff and business assets)?
- (5) Must the joint undertaking meet certain requirements in order to be considered a single economic operator? If so, what are those requirements?

## **Consideration of the questions referred**

### *Admissibility*

- 36 As is apparent from recital 21 of Directive 2014/24, public contracts that are awarded by contracting authorities operating in the water, energy, transport and postal services sectors and that fall within the scope of those activities are covered by Directive 2014/25.
- 37 Under its Article 11, Directive 2014/25 also applies to, inter alia, 'activities relating to the provision or operation of networks providing a service to the public in the field of transport by ... bus ...'.
- 38 In that regard, it should be noted that neither the order for reference nor the written observations submitted to the Court make it possible to determine whether the conditions thus imposed by that provision are met and, therefore, whether that directive is applicable to the dispute in the main proceedings.
- 39 The request for a preliminary ruling must nevertheless be declared admissible since the answer to the questions referred could be formulated identically on the basis of Directive 2014/24 or on that of Directive 2014/25 (see, to that effect, judgment of 20 September 2018, *Rudigier*, C-518/17, EU:C:2018:757, paragraph 44). Recitals 17 and 18 and Article 2(6), Article 37(2), Article 79 and Article 80(3) of Directive 2014/25 correspond, in essence, to recitals 14 and 15 and Article 2(1)(10), Article 19(2), Article 56(3), Article 59(1) and Article 63 of Directive 2014/24.
- 40 In those circumstances, the fact that the referring court did not determine, before making the reference to the Court for a preliminary ruling, which of Directives 2014/24 or 2014/25 was applicable to the dispute in the main proceedings cannot call into question the presumption that questions referred by national courts for a preliminary ruling are relevant, which may be rebutted only in exceptional cases, in particular where it is quite obvious that the interpretation sought of the provisions of EU law referred to in those questions bears no relation to the actual facts of the

main action or to its purpose (see, to that effect, judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 61, and of 28 November 2018, *Amt Azienda Trasporti e Mobilità and Others*, C-328/17, EU:C:2018:958, paragraph 33).

### **Substance**

41 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 59(1) of Directive 2014/24, read in conjunction with Article 2(1)(10) and Article 63 of that directive, and with Annex 1 to Implementing Regulation 2016/7, must be interpreted as meaning that a joint undertaking which, although not a legal person, has the form of a firm governed by the national legislation of a Member State, which appears on the commercial register of that Member State, which may have been set up on either a temporary or a permanent basis and whose joint partners are active on the same market as that joint undertaking and are jointly and severally liable for the proper performance of the obligations which it has entered into, must provide the contracting authority with its own ESPD and/or the ESPD of each of the joint partners.

42 It should be noted at the outset that, under the seventeenth to the nineteenth paragraphs of Annex 1 to Implementing Regulation 2016/7:

‘An economic operator participating on its own and which does not rely on the capacities of other entities in order to meet the selection criteria, must fill out one ESPD.

An economic operator participating on its own but relying on the capacities of one or more other entities must ensure that the contracting authority or contracting entity receives its own ESPD together with a separate ESPD setting out the relevant information for each of the entities it relies on.

Finally, where groups of economic operators, including temporary associations, participate together in the procurement procedure, a separate ESPD setting out the information required under Parts II to V must be given for each of the participating economic operators.’

43 In that regard, it follows from Article 2(1)(10) of Directive 2014/24, read in conjunction with recital 14 thereof, that the concept of an ‘economic operator’ must be interpreted broadly so as to include, inter alia, any person or entity offering services on the market, regardless of the legal form in which that person or entity has chosen to operate and whether or not that person or entity is a legal person.

44 It follows that a general partnership, within the meaning of Netherlands law, may be regarded as an ‘economic operator’, as that term is defined in Article 2(1)(10) of that directive.

45 That said, that directive also adopts a broad interpretation of the concept of a ‘group of economic operators’. Under the first subparagraph of Article 19(2) of that directive, groups of economic operators, including temporary associations, may participate in public procurement procedures and are not required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate.

46 It is therefore necessary to determine whether a general partnership, within the meaning of Netherlands law, must be regarded as an economic operator or as a group of economic operators within the meaning of Article 2(1)(10) and Article 19(2) of Directive 2014/24, respectively.

- 47 In that regard, contrary to the claims made by the municipalities, the Netherlands Government and the European Commission in their written observations, the concept of a ‘group of economic operators’ within the meaning of Article 19(2) of that directive cannot be restricted solely to temporary associations, to the exclusion of permanent associations or associations of undertakings. That provision refers to ‘groups of economic operators, including temporary associations’. It follows clearly from that wording that temporary associations are mentioned only by way of illustration. Therefore, the concept of a ‘group of economic operators’ cannot be interpreted as applying solely to temporary associations. There is therefore no need to distinguish between groups of economic operators according to whether they are temporary or permanent.
- 48 In addition, it follows from Article 59(1) of Directive 2014/24 that an ESPD pursues three aims. That document is a self-declaration updated as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming (i) that the economic operator concerned is not in one of the situations referred to in Article 57 of that directive in which economic operators must or may be excluded, (ii) that it meets the relevant selection criteria that have been set out pursuant to Article 58 of that directive, and, (iii), where applicable, that it fulfils the objective rules and criteria that have been set out pursuant to Article 65 of that directive.
- 49 An ESPD is thus intended to give the contracting authority a precise and accurate picture of the situation of each economic operator which requests to participate in a public procurement procedure or which intends to submit a tender. In so doing, the ESPD gives concrete expression to the objective pursued by Articles 57 and 63 of Directive 2014/24, which is to enable the contracting authority to satisfy itself that each of the tenderers has integrity and is reliable and, consequently, that the relationship of trust with the economic operator concerned will not be broken (see, to that effect, judgments of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraph 29, and of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 35).
- 50 In that regard, it should be noted that the information which an economic operator is required to indicate in the ESPD does not include the resources of the partners in a joint undertaking. Furthermore, it is not relevant that the partners in a general partnership, within the meaning of Netherlands law, operate in the same business area or on the same market as the general partnership, since that information cannot be brought to the attention of the contracting authority by means of the ESPD of the joint undertaking.
- 51 Furthermore, the existence of joint and several liability between the general partnership and the joint partners is not sufficient to enable the contracting authority to satisfy itself that the qualitative selection criteria are met. When examining the admissibility of applications, the contracting authority carries out a retrospective assessment into whether a tenderer has qualities that indicate that the contract in question can be performed effectively. In those circumstances, the absence of those qualities cannot be overcome by the prospective legal relationship under which the members of a general partnership are legally required to assume joint and several liability for the obligations of that partnership (order of 30 September 2022, *ĒDIENS & KM.LV*, C-592/21, not published, EU:C:2022:746, paragraph 33).

- 52 Therefore, in order to enable the contracting authority to satisfy itself as to its integrity, a joint undertaking such as a general partnership, within the meaning of Netherlands law, is required to mention any ground for exclusion of any joint partner or any person employed by one of its joint partners who is a member of the administrative, management or supervisory body of the joint undertaking or who has powers of representation, decision or control therein.
- 53 Furthermore, in order to demonstrate its reliability, a joint undertaking, such as a general partnership, within the meaning of Netherlands law, must be regarded as intending to participate, on an individual basis, in a public procurement procedure or to submit a tender only if it shows that it is capable of performing the contract in question using only its own personnel and materials, in other words, the resources which its joint partners transferred to it in accordance with the partnership agreement and which are freely available to it. In such a case, it is sufficient for that firm to supply its own ESPD to the contracting authority.
- 54 In that regard, it is for the referring court to ascertain to what extent such a firm may, having regard to the particular features of its legal form as a partnership and the links between itself and the joint partners, be covered by that situation.
- 55 By contrast, if, for the performance of a public contract, such a firm considers that it needs to call on the resources of the joint partners, it must be regarded as relying on the capacities of other entities, within the meaning of Article 63 of Directive 2014/24. In such a case, the firm must submit not only its own ESPD, but also that of each of the joint partners whose capacities it intends to use.
- 56 It is true, as the municipalities, the Netherlands Government and the Commission have argued, that recital 1 of Implementing Regulation 2016/7 states that ‘one of the major objectives of Directives [2014/24] and [2014/25] is [to reduce] the administrative burdens of contracting authorities, contracting entities and economic operators, not least small and medium-sized enterprises. A key element of that effort is the [ESPD]. ...’.
- 57 That objective of reducing the administrative burden is, however, only one of the objectives of those directives. In that respect, it must in particular be reconciled with the objective of promoting the development of healthy and effective competition between economic operators taking part in a public procurement procedure, which lies at the very heart of the EU rules on public procurement procedures and is protected in particular by the principle of equal treatment of tenderers (see, to that effect, judgments of 11 May 2017, *Archus and Gama*, C-131/16, EU:C:2017:358, paragraph 25, and of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 43).
- 58 The obligation for a joint undertaking, such as a general partnership, within the meaning of Netherlands law, to submit to the contracting authority an ESPD for itself and an ESPD for each of its joint partners, in the event that, for the performance of a public contract, it considers that it needs to call on the resources of those joint partners, also does not run counter to the principle of proportionality, which is guaranteed by Article 18(1) of Directive 2014/24, particularly since, as is apparent from both the last subparagraph of Article 59(1) of Directive 2014/24 and Annex 1 to Implementing Regulation 2016/7, economic operators may provide an ESPD which has already been used in a previous procurement procedure, provided that they confirm that the information contained therein continues to be correct and remains relevant.

- 59 Finally, the obligation for a joint undertaking, such as a general partnership, within the meaning of Netherlands law, to submit an ESPD for itself and an ESPD for each of the joint partners whose capacities it intends to use does indeed constitute an administrative burden, but cannot in any event be treated in the same way as an obligation to alter its legal structure.
- 60 In the light of the foregoing, the answer to the questions referred is that Article 59(1) of Directive 2014/24, read in conjunction with Article 2(1)(10) and Article 63 of that directive, and with Annex 1 to Implementing Regulation 2016/7, must be interpreted as meaning that a joint undertaking which, although not a legal person, has the form of a firm governed by the national legislation of a Member State, which appears on the commercial register of that Member State, which may have been set up on either a temporary or a permanent basis and all the joint partners of which are active on the same market as that joint undertaking and are jointly and severally liable for the proper performance of the obligations which it has entered into, must provide the contracting authority with only its own ESPD when it intends to participate, on an individual basis, in a public procurement procedure or to submit a tender if it shows that it can perform the contract in question using only its own personnel and materials. If, on the other hand, for the performance of a public contract, that joint undertaking considers that it must seek the own resources of certain partners, it must be regarded as having recourse to the capacities of other entities, within the meaning of Article 63 of Directive 2014/24, and must then submit not only an ESPD for itself, but also an ESPD for each of the partners whose capacities it intends to use.

### Costs

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

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

**Article 59(1) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, read in conjunction with Article 2(1)(10) and Article 63 of that directive, and with Annex 1 to Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document,**

**must be interpreted as meaning that a joint undertaking which, although not a legal person, has the form of a firm governed by the national legislation of a Member State, which appears on the commercial register of that Member State, which may have been set up on either a temporary or a permanent basis and all the joint partners of which are active on the same market as that joint undertaking and are jointly and severally liable for the proper performance of the obligations which it has entered into, must provide the contracting authority with only its own European Single Procurement Document (ESPD) when it intends to participate, on an individual basis, in a public procurement procedure or to submit a tender if it shows that it can perform the contract in question using only its own personnel and materials. If, on the other hand, for the performance of a public contract, that joint undertaking considers that it must seek the own resources of certain partners, it must be regarded as having recourse to the capacities of other entities, within the meaning of Article 63 of Directive 2014/24, and must then submit not only an ESPD for itself, but also an ESPD for each of the partners whose capacities it intends to use.**



[Signatures]