Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 11 May 2023[1]

Case C-66/22

Infraestruturas de Portugal, S. A,
Futrifer Indústrias Ferroviárias, S. A
v
Toscca – Equipamentos em Madeira Ld[a],
intervener:
Mota-Engil Railway Engineering, SA

(Request for a preliminary ruling from the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal))

(Reference for a preliminary ruling – Directive 2014/24/EU – Public procurement – Optional grounds for exclusion – Article 57(4)(d) – Exclusion of an economic operator from participation in a tendering procedure – Penalty for anticompetitive practices – Automatic exclusion based on a previous decision of a competition authority – Discretion of the contracting authority to assess the existence of the ground for exclusion – Article 57(6) – Suitability and reliability of the tenderer – Statement of reasons – Anticompetitive practices detected in the tendering procedure itself)

1. In this reference for a preliminary ruling, the Court is called upon to interpret Article 57(4)(d) of Directive 2014/24/EU,[2] under which a contracting authority may exclude an economic operator from participation in a procurement procedure where that operator has entered into agreements with other operators to distort competition.

2. The request for a preliminary ruling has been made in proceedings concerning the award of a contract to an undertaking which had previously been penalised for having colluded with other undertakings to engage in anticompetitive conduct (price and market-sharing agreements).

[1] Original language: Spanish.

[2] Directive 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).

I. Legal framework

A. European Union law

1. Directive 2014/24

3. Article 56 ('General principles') provides:

'1. Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 59 to 61 that all of the following conditions are fulfilled:

…

(b) the tender comes from a tenderer that is not excluded in accordance with Article 57 …'

4. Article 57 ('Exclusion grounds') states:

'…

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

…

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

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

…

5. …

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

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

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.'

2. Directive 2014/25/EU[3]

5. Under Article 80 ('Use of exclusion grounds and selection criteria provided for under Directive 2014/24/EU'):

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

Where the contracting entity is a contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 57(1) and (2) of Directive 2014/24/EU on the terms and conditions set out in that Article.

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

…'

[3] Directive 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).

B. Portuguese law

1. Decreto-lei n.º 18/2008, Código dos Contratos Públicos [4]

6. Article 55 ('Impediments') provides:

'The following may not be candidates, tenderers or members of a group:

…

(c) natural persons who have received a penalty for grave professional misconduct and who, in the intervening period, have not been rehabilitated, and legal persons whose administrative, management or governing bodies have received such an administrative penalty and continue to perform their duties.

…

(f) entities which have received the ancillary penalty of prohibition from participating in public procurement procedures, provided for in special legislation, including in penalty systems relating to … competition …, during the period laid down in the decision imposing the penalty'.

7. Article 70 ('Evaluation of tenders') provides in paragraph 2:

'2. Tenders shall be excluded where their evaluation indicates:

…

(g) the existence of compelling evidence of acts, agreements, practices or information that may distort the competition rules.'

2. Lei n.º 19/2012 da Concorrência (Law on competition) [5]

8. Article 71 ('Ancillary penalties') provides in paragraph 1(b) that, if justified by the seriousness of the infringement and the degree of fault of the infringer, the Autoridade de Concorrência (the Competition Authority; 'AC') may impose, in addition to a fine, the ancillary penalty of deprivation of the right to participate in certain public procurement procedures, provided that the practice constituting the infringement punishable by a fine occurred during or as a result of the relevant procedure.

[4] Decree-Law No 18/2008, Public Procurement Code ('CCP') (Diário da República No 20/2008, Series I, of 29 January 2008), as amended by Decreto-lei n.º 111-B/2017 of 31 August 2017 ('Decree-Law No 111-B/2017') (Diário da República No 168/2017, 2nd Supplement, Series I, of 31 August 2017).

[5] Lei n.º 19/2012, de 8 de maio, aprova o novo regime jurídico da concorrência (Law No 19/2012 of 8 May approving new legal rules governing competition) (Diário da República, Series I, No 89, of 8 May 2012).

II. Facts, dispute and questions referred for a preliminary ruling

9. On 18 January 2019, Infraestruturas de Portugal, S. A ('Infraestruturas') launched a procedure for the award of a contract for the supply of creosoted pine sleepers and rods for a base price of EUR 2 979 200. [6]

10. The undertakings Toscca – Equipamentos em Madeira, Lda. ('Toscca') and Futrifer, Indústrias Ferroviárias, S. A. ('Futrifer') participated in the procedure, each submitting a tender.

11. On 12 June 2019, the AC ordered Futrifer to pay a fine for having infringed the competition rules in procurement procedures [7] in 2014 and 2015. [8]

12. In particular, the AC found that Futrifer and other undertakings in the sector had colluded to fix prices and share the market for rail network maintenance services, in breach of Article 9(1) of Law No 19/2012 and Article 101(1) TFEU.

13. In its decision, the AC considered it unnecessary, in view of the circumstances of the case and the settlement proposal submitted by Futrifer, to impose on it the ancillary penalty of prohibition from tendering, provided for in Article 71(1)(b) of Law No 19/2012. [9]

14. On 27 July 2019, Infraestruturas awarded the contract in question to Futrifer.

15. Toscca challenged that decision before the Tribunal administrativo e fiscal de Viseu (Administrative and Tax Court, Viseu, Portugal; 'the TAF Viseu'). It asked that court to annul the award decision, to exclude the tender submitted by Futrifer and to award the contract to Toscca itself. In support of its action, it relied, in particular, on the AC's decision to impose a penalty on Futrifer.

16. The first-instance court dismissed Toscca's action on the ground that Article 70(2)(g) of the CCP applies only where the evidence of distortion of competition arises in the procedure forming the subject matter of the dispute.

17. Toscca appealed against the judgment of the TAF Viseu before the Tribunal central administrativo norte (North Central Administrative Court, Portugal). By judgment of 29 May 2020, that court found that the first-instance court had misinterpreted Article 70(2)(g) of the CCP and, in consequence, it set aside the judgment under appeal and ordered Infraestruturas to award the contract to Toscca.

18. Infraestruturas and Futrifer brought an appeal against the judgment of 29 May 2020 before the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), which set that judgment aside on the ground of failure to state reasons and ordered the case to be referred back to the North Central Administrative Court.

6 Procedure 2019/S 015-030671, published in the Supplement to the OJEU of 22 January 2019 (OJ 2019 S 15, p. 1).

7 These were procedures conducted by a public undertaking leading to the award of equipment and track maintenance services on the Portuguese rail network.

8 File PRC/2016/6. So far as concerns Futrifer, the relevant decision is the 'Final decision in a settlement procedure (non-confidential version)'.

9 Paragraph 231 et seq. of the decision of 12 June 2019.

19. On 2 June 2021, the Tribunal central administrativo norte (North Central Administrative Court) delivered a judgment in which it again overturned the first-instance judgment and ordered Infraestruturas to award the contract to Toscca.

20. Infraestruturas and Futrifer brought an appeal against the judgment of 2 June 2021 before the Supremo Tribunal Administrativo (Supreme Administrative Court), which has submitted the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the ground for exclusion provided for in Article 57(4)(d) of Directive 2014/24/EU constitute a matter reserved for decision ["reserva de decisão"] by the contracting authority?

(2) May the national legislature fully replace the decision that should be taken by the contracting authority under Article 57(4)(d) of Directive 2014/24/EU with a generic decision (with the effects of a decision) from its national competition authority to impose an ancillary penalty consisting of prohibition from participating in public procurement procedures for a certain period, adopted in the context of the imposition of a fine for infringement of competition rules?

(3) Should the contracting authority's decision concerning the "reliability" of the economic operator in view of its compliance (or non-compliance) with the rules of competition law, beyond the scope of the specific tendering procedure, be interpreted as requiring an assessment based on the relative suitability of that economic operator, which constitutes a concrete expression of the right to good administration under Article 41(2)(c) of the Charter of Fundamental Rights of the European Union?

(4) May the solution adopted in Portuguese law under Article 55(1)(f) of the CCP, whereby the exclusion of an economic operator from a tendering procedure on grounds of infringement of competition rules unrelated to that specific procurement procedure is subject to a decision from the competition authority in the context of an application of an ancillary penalty consisting of a prohibition from tendering, a procedure in which it is the competition authority itself that assesses the relevance of the corrective measures taken, be regarded as consistent with EU law, specifically, Article 57(4)(d) of Directive 2014/24/EU?

(5) Furthermore, may the solution adopted under Portuguese law in Article 70(2)(g) of the CCP, which limits the possibility of excluding a tender due to significant evidence of acts, agreements, practices or information that are liable to distort competition rules in the specific procurement procedure in which such practices are detected, be regarded as consistent with EU law, and in particular with Article 57(4)(d) of Directive 2014/24/EU?'

III. Procedure before the Court

21. The request for a preliminary ruling was received at the Court on 2 February 2022.

22. Written observations were submitted by Futrifer, Toscca, the Czech, Hungarian and Portuguese Governments and the European Commission.

23. All of them, with the exception of the Czech and Hungarian Governments, took part in the hearing held on 7 March 2023.

IV. Assessment

A. Preliminary remarks

1. The applicable directive

24. The referring court seeks an interpretation only of Directive 2014/24 and does not refer to Directive 2014/25. The latter directive governs public contracts awarded by contracting authorities operating in the water, energy, *transport* and postal services sectors.

25. The subject matter of the contract whose award is at issue here is the supply of infrastructure components in the rail sector, that is to say, in a transport sector. In reply to a question put by the Court, the parties which took part in the hearing unanimously considered that that contract fell within the scope of Directive 2014/25, which applies specifically to 'activities relating to the provision or operation of networks providing a service to the public in the field of transport by railway' (Article 11).

26. In any event, it is for the referring court to determine whether, in the light of its wording, the contract at issue is governed by Directive 2014/24 or, as everything seems to indicate, by Directive 2014/25.

27. It is true that, in practical terms, there is no appreciable difference in the effect of those directives as regards the point at issue: even if Directive 2014/25 were applicable, Article 80 thereof refers to 'the exclusion grounds listed in Article 57 of Directive 2014/24/EU on the terms and conditions set out therein'. [10]

28. However, the application of Directive 2014/25 might have some bearing on the (contested) 'discretion' of Member States to incorporate the optional grounds for exclusion into domestic law, as I will explain below. [11]

29. Having clarified that matter, I will refer below to Article 57 of Directive 2014/24.

2. Incorporation of Article 57(4)(d) of Directive 2014/24 into Portuguese law

30. The Commission's written observations triggered a debate, which continued at the hearing, concerning Member States' discretion not to transpose the optional grounds for exclusion set out in Article 57(4) of Directive 2014/24.

31. The Commission's arguments are as follows:

– Article 57(4) and recital 101 of Directive 2014/24 indicate that the legislature's intention was not to give Member States a free choice in whether or not to transpose the nine exclusion grounds contained in that provision. That choice is given to the contracting authorities, unless Member States require them to apply the exclusion grounds. Conversely, Member States cannot circumvent the transposition of one or more of those grounds.

[10] See, by analogy, judgment of 10 November 2022, *Taxi Horn Tours* (C-631/21, EU:C:2022:869, paragraphs 39 and 40).

[11] Point 46 of this Opinion.

– The optional ground for exclusion relating to the existence of agreements with other economic operators aimed at distorting competition has not been incorporated into Portuguese law.

32. The issues raised by the Commission could be dealt with in this reference for a preliminary ruling if the second of those assertions were correct: without the transposition into domestic law of an optional ground for exclusion, it would be necessary to reconsider whether the case-law of the Court thus far [12] on Member States' discretion to transpose or not to transpose that category of exclusion grounds requires adjustment or even correction.

33. For the reasons I will set out below, my view is that the Commission's second assertion (supported by some of the written observations submitted in the preliminary ruling procedure) is at variance with the facts.

34. Decree-Law No 111-B/2017 amended the CCP in order to transpose Directives 2014/24 and 2014/25. In Article 1, the Portuguese legislature expressly states that the decree-law 'transposes', inter alia, Directives 2014/24 and 2014/25. [13]

35. The exclusion grounds ('impediments') contained in the CCP as amended are listed in Article 55(1)(a) to (l) thereof and they mirror, with some nuances, the corresponding grounds set out in Article 57(1) and (4) of Directive 2014/24.

36. As regards the exclusion ground at issue, Article 55(1)(f) of the CCP provides: 'The following may not be candidates[;] … entities which have received the ancillary penalty of prohibition from participating in public procurement procedures, provided for in special legislation, including in penalty systems relating to … competition …, during the period laid down in the decision imposing the penalty'.

37. The CCP also contains another provision (Article 70(2)(g)) under which tenders must be excluded where their evaluation reveals 'the existence of compelling evidence of acts, agreements, practices or information that may distort the competition rules'. [14]

38. In view of those two provisions, I have difficulty in understanding some of the statements made in the written observations of Futrifer and in those of the Portuguese Government itself (the latter in ambiguous terms which it did not clarify at the hearing) [15] on the non-transposition of Article 57(4)(d) of Directive 2014/24 into the CCP.

[12] The prevailing view expressed in the judgments of 19 June 2019, *Meca* (C-41/18, EU:C:2019:507; 'judgment in *Meca*'), paragraph 33, and of 30 January 2020, *Tim* (C-395/18, EU:C:2020:58, paragraph 34), was confirmed in the judgment of 3 June 2021, *Rad Service and Others* (C-210/20, EU:C:2021:445, paragraph 28), as follows: 'In accordance with Article 57(4) and (7) of Directive 2014/24, the Member States are free not to apply the facultative grounds for exclusion set out in that directive or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level'.

[13] The fact that Decree-Law No 111-B/2017 did not amend some of the CCP's provisions hitherto in force is irrelevant for the present purposes.

[14] Toscca relies on that provision in its written observations to argue that 'the Portuguese legislature *transposed* Article 57(4)(d) of Directive 2014/24, *retaining* the wording of Article 70(2)(g) of the CCP (currently in the version resulting from the 2017 reform)'. Emphasis added.

[15] Paragraphs 80 to 84 of its written observations. Read alongside the preceding paragraphs, those paragraphs ultimately show that, by means of Article 70 of the CCP in conjunction with Article 55(1)(f) thereof, the Portuguese legislature incorporated the exclusion ground at issue. The Portuguese Government made this very clear in paragraph 71 of its observations: 'the provisions of Article 55(1)(f) and Article 70(2)(g) of the CCP are fully in line with Directive 2014/24, in particular Article 57(4)(d) thereof'.

39. The wording of those two provisions of the CCP demonstrates, in my view, that the Portuguese legislature unequivocally intended to introduce into (or to maintain in) [16] its legal order the content of Article 57(4)(d) of Directive 2014/24. Both that provision and the two national provisions mentioned seek to combat, in the field of public procurement, agreements by economic operators designed to distort competition.

40. Quite a different matter is whether, in regulating that exclusion ground in the way it did, the Portuguese legislature strictly complied with Article 57(4)(d) of Directive 2014/24 or whether, on the contrary, its approach distorted that provision, departed from its basic principles or improperly reduced its scope.

41. The Court has recalled that '… once a Member State decides to incorporate one of the optional grounds for exclusion provided for in Directive 2014/24, it must respect the essential characteristics thereof, as expressed in that directive. By stipulating that the Member States are to specify "the implementing conditions for this Article" "having regard to Union law", Article 57(7) of Directive 2014/24 prevents Member States from distorting the grounds for exclusion laid down in that provision or ignoring the objectives or principles underlying each of those grounds'. [17]

42. For the reasons I will set out below, I consider that, when incorporating the content of Article 57(4)(d) of Directive 2014/24 into domestic law, the transposition effected by the Portuguese provisions was not entirely consistent with that directive: in particular, Article 55(1)(f) of the CCP improperly curtails the contracting authority's discretion to exclude tenderers involved in collusive practices, by requiring that their conduct must have previously been the subject of an ancillary penalty of prohibition from participating in public procurement procedures imposed by the AC.

43. The fact that this is the case, as I believe it is, does not mean, however, that there was no transposition at all, but rather that the transposition was defective. Furthermore, that defective transposition could possibly be remedied by a more *expansive* interpretation of Article 70(2)(g) of the CCP, that is to say, in line with Article 57(4)(d) of Directive 2014/24 (consistent interpretation). [18]

44. In short, I do not think that the present reference for a preliminary ruling is the appropriate forum to reopen discussions on Member States' discretion not to include the optional grounds for exclusion in domestic law, precisely when the Portuguese legislature chose the opposite approach (even though that approach is not as satisfactory as it should be, from the point of view of EU law).

[16] For the purposes of complying with the obligation to transpose the provisions of a directive into domestic law, it is sufficient if pre-existing national legislation includes the rules that substantively transpose those provisions. The transposition of a directive into domestic law does not necessarily require the binding content of the directive to be enacted in precisely the same words in a provision *postdating* that directive. See, to that effect, judgment of 10 June 2021, *Ultimo Portfolio Investment (Luxembourg)* (C-303/20, EU:C:2021:479, paragraphs 33 to 36). In particular, in paragraph 35 the Court stated that in order to determine 'whether national legislation adequately implements the obligations resulting from a given directive, it is important to take into account not only the legislation specifically adopted for the purposes of transposing that directive, but also all the available and applicable legal rules'.

[17] Judgment in *Meca*, paragraph 33.

[18] That appears to have been the view taken by the Tribunal central administrativo norte (North Central Administrative Court) in its judgment of 29 May 2020 upholding Toscca's claim, as is apparent from Infraestruturas' arguments set out in paragraph 7 of the order for reference: according to that court, Article 70(2)(g) of the CCP 'necessarily also encompasses *past instances* of evidence of anticompetitive conduct by competitors not present or mentioned in the competitor's tender' (emphasis added).

45. The case-law of the Court thus far concerning Member States' discretion in this field does not, of course, disregard the fact that directives are binding, as to the result to be achieved, upon each Member State (Article 288 TFEU). Starting from that premiss, the different formations of the Court have found that Directive 2014/24, as regards the optional grounds for exclusion, is correctly implemented in the terms set out above. [19]

46. The reopening of discussions referred to earlier would, moreover, be a particularly delicate exercise as regards its outcome:

– It could result in the conversion of the optional grounds for exclusion into mandatory grounds, without any intervention by the Member States as referred to in Article 57(7) of Directive 2014/24.

– It could fragment the unitary system underlying the reference to Directive 2014/24 in the provisions on exclusion grounds in Directive 2014/25. Under the third subparagraph of Article 80(1) of Directive 2014/25, the criteria and rules applying to the exclusion of candidates are to include the optional grounds listed in Article 57(4) of Directive 2014/24 *if so required by the Member States*.

B. First question referred

47. The referring court enquires whether the exclusion ground set out in Article 57(4)(d) of Directive 2014/24/EU constitutes a matter 'reserved for decision' by the contracting authority.

48. The Court has already answered that question: 'it is clear from the wording of Article 57(4) of Directive 2014/24 that the EU legislature intended to confer on the contracting authority, and on it alone, the task of assessing whether a candidate or tenderer must be excluded from a procurement procedure during the stage of selecting the tenderers'. [20]

49. That statement of the Court is consistent with Article 56(1)(b) of Directive 2014/24: the contracting authority must verify that 'the tender comes from a tenderer that is not excluded in accordance with Article 57'. It is therefore for the contracting authority to decide, in all cases, whether a tenderer should be excluded from the procurement procedure.

50. The categorical statement reproduced above must, however, be qualified where the competent authority, by a prior final decision, has made a finding of conduct incompatible with access to procurement procedures or has banned the tenderer from participating in such procedures.

51. The backdrop against which the question is submitted (that is, in the presence of anticompetitive conduct attributable to a tenderer) gives rise to three possible scenarios:

– If the operator has previously been excluded by final judgment from participating in procurement procedures (last subparagraph of Article 57(6) of Directive 2014/24) for having engaged in anticompetitive conduct, [21] the contracting authority must respect that prohibition.

[19] See footnote 12 above.

[20] Judgment in *Meca*, paragraph 34.

[21] The prohibition from tendering may have been ordered by final judgment for infringements committed in other areas of the law. I will focus below on those imposed by a competition authority, as that is what occurred here.

The economic operator subject to the prohibition is not entitled to avail itself of the possibility to demonstrate its reliability (corrective measures or self-cleaning) during the period of exclusion resulting from the judgment in the Member State in which the judgment is enforceable. [22]

– Where the prohibition from participating was ordered not by final judgment but by decision of the AC, the contracting authority is not inevitably bound by it: it may check whether that operator has taken the corrective measures referred to above and may nevertheless allow the operator to participate in the contract award procedure.

– The same would apply a fortiori if the AC did not impose a prohibition from participating in the procurement procedure but did impose a penalty on the economic operator for collusive conduct.

52. I will address the second and third situations which I have just described in my analysis of the other questions referred for a preliminary ruling. To reply to the first question in the broad terms in which it is formulated, an answer which sets out the general rule seems to me to be sufficient, subject to the exceptions arising from Directive 2014/24 itself.

C. Second question referred

53. The referring court seeks to ascertain, in essence, whether, in the context of Article 57(4)(d) of Directive 2014/24, the national legislature may 'fully replace the decision that should be taken by the contracting authority' with a decision of the AC imposing on an operator, as an ancillary penalty, a prohibition from participating in procurement procedures.

54. Law No 19/2012 allows the AC to impose on operators that have engaged in anticompetitive practices, in addition to a fine, the ancillary penalty [23] of prohibition from participating in public procurement procedures for a certain period (Article 71(1)(b)).

55. Nonetheless, as I have already explained, the AC expressly decided that it was not appropriate to impose the ancillary penalty on Futrifer.

1. Inadmissibility

56. Based on that premiss, however interesting, from other angles and in general terms, the issues raised by the referring court may be, the question is hypothetical in relation to the instant case.

57. The question would be meaningful if, in the presence of a decision of the AC imposing a prohibition from tendering, it was necessary to examine – as requested by the referring court – the extent to which that decision would be sufficient to 'replace' the (subsequent) decision of the contracting authority.

[22] On the interpretation of the analogous rule in 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), see judgment of 11 June 2020, *Vert Marine* (C-472/19, EU:C:2020:468, paragraph 20).

[23] Law No 19/2012 describes that prohibition as a 'penalty'. It does not therefore give rise to a debate concerning its legal nature, which is at issue in other legal systems.

58. However, since it is clear that, in the proceedings against Futrifer, the AC purposely did not impose on it the ancillary penalty of prohibition from tendering, I do not see how the present dispute would benefit from a ruling on the consequences of that (non-existent) prohibition.

59. The second question referred for a preliminary ruling is therefore inadmissible. [24]

2. In the alternative, as to the substance

60. If the Court disagrees with me and decides to address the substance of the question referred for a preliminary ruling, my position on the matter is as follows.

61. In my view (leaving aside the cases in which the prohibition from participating was imposed by final judgment), [25] the AC's decision prohibiting an operator from participating in procurement procedures does not bind the contracting authority to the point of 'fully replacing its decision'.

62. The contracting authority may, also in that situation, verify whether the economic operator subject to the penalty has taken the corrective measures referred to in Article 57(6) of Directive 2014/24 and nevertheless allow it to participate in the procurement procedure.

63. I would point out that the economic operator has an unequivocal right to demonstrate its reliability by means of those corrective measures, a right which flows directly from Article 57(6) of Directive 2014/24. [26]

64. My proposed course of action (reserving discretion to verify the corrective measures to the contracting authority, notwithstanding the prohibition from tendering imposed by the competition authority) allows a balance to be struck between two approaches:

– On the one hand, the approach that seeks to preserve the powers of the contracting authority, which must have the freedom to evaluate the candidate's reliability without necessarily being bound by the findings of other public bodies. [27]

– On the other, the approach that is respectful of the duties of the public authorities responsible for pursuing, in particular, anticompetitive conduct. [28] The contracting authority must take account of the decisions of those authorities since, ultimately, 'the existence of conduct restrictive of competition may be regarded as proved only after the adoption of such a decision, which legally classifies the facts to that effect'. [29]

[24] Futrifer argues that the reference for a preliminary ruling is inadmissible in its entirety because none of the questions, which it considers to be general and hypothetical, are relevant to the resolution of the dispute. The Commission, more succinctly, criticises the fact that the referring court 'appears to invite the Court of Justice to rule, in a broad and almost abstract manner, on the transposition of Directive 2014/24', but it does not go so far as to challenge the admissibility of the reference for a preliminary ruling. For my part, I consider Futrifer's criticism to be well placed as regards the second and fourth questions referred.

[25] See points 50 and 51 of this Opinion.

[26] Judgment of 14 January 2021, *RTS infra and Aannemingsbedrijf Norré-Behaegel* (C-387/19, EU:C:2021:13, paragraph 48).

[27] I refer to my Opinion in *Delta Antrepriză de Construcții și Montaj 93* (C-267/18, EU:C:2019:393, point 30).

[28] Judgment of 24 October 2018, *Vossloh Laeis* (C-124/17, EU:C:2018:855; 'judgment in *Vossloh Laeis*'), paragraphs 25 and 26.

[29] Judgment in *Vossloh Laeis*, paragraph 39.

65. It is true, however, that as the Court has held in the light of recital 102 of Directive 2014/24, [30] Member States have 'a broad discretion … when designating the authorities responsible for assessing the appropriateness of the compliance measures. In that regard, … Member States may entrust that task of assessment to any authority other than the contracting authority or contracting entity'. [31]

66. In short, when assessing whether to apply Article 57(4)(d), the contracting authority may either:

– exclude, in the absence of a prior decision by another authority, an economic operator in respect of whom there are sufficiently plausible indications to conclude that the operator has entered into agreements with other operators aimed at distorting competition; or

– where the relevant authority has found that those anticompetitive agreements exist, [32] and whether or not that authority has imposed a prohibition from participating in procurement procedures, assess whether the corrective measures taken by the tenderer or candidate demonstrate its reliability, with the result that the tenderer or candidate should not be excluded from the procurement procedure, pursuant to Article 57(6) of Directive 2014/24. A Member State may, however, entrust the assessment of the corrective measures to an authority other than the contracting authority, in which case the latter must comply with that assessment.

D. Third question referred

67. The wording of the third question referred for a preliminary ruling is actually made up of two questions:

– first, whether 'the contracting authority's decision concerning the "reliability" of the economic operator in view of its compliance (or non-compliance) with the rules of competition law' may be taken 'beyond the scope of the specific tendering procedure'; and

– second, whether that assessment of the economic operator's relative suitability must be 'sufficiently substantiated' by an 'independent appraisal' by the contracting authority which other competitors may challenge. [33]

68. Again, the starting premiss for this question appears to be that the contracting authority's decision was preceded by the ancillary measure (prohibition from tendering) ordered by the AC. On that basis, the referring court enquires whether the reasons underlying the ancillary measure are 'of the same type and nature' as the 'reliability assessment' to be carried out by the contracting authority. [34]

[30] '[Member States] should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task'.

[31] Judgment of 11 June 2020, *Vert Marine* (C-472/19, EU:C:2020:468, paragraph 29).

[32] On the relationship between decisions of the competition authority and those of the contracting authorities, see paragraphs 25 to 33 of the judgment in *Vossloh Laeis*.

[33] Order for reference, paragraph 2.2.6, third subparagraph.

[34] According to the referring court, in the present case 'the contracting authority has shown no interest in conducting its own assessment of the tenderer's "reliability" … On the contrary, it argues that it is not required to do so because the decision taken by the AC already contains such an assessment' (order for reference, paragraph 2.2.6, fifth subparagraph).

69. Construed in that way, the question comes up against the same problems of inadmissibility (on account of being hypothetical) as those already mentioned in relation to the second question. However, in its arguments, the referring court refers to the possibility of the contracting authority deciding that an economic operator is suitable despite having been penalised for collusive conduct, where the penalty imposed did not include a prohibition from tendering. [35]

70. I will therefore answer both questions in line with the approach taken by the referring court described above.

1. Assessment of reliability or suitability by the contracting authority

71. The answer to this part of the question referred actually follows from my answer to the two previous questions. The contracting authority retains its full discretion to assess the reliability of the tenderer or candidate, following the decision of the competition authority, in the terms set out above.

72. Recital 101 of Directive 2014/24 states that 'contracting authorities should … be given the possibility to exclude economic operators which have proven *unreliable*, for instance because of … *other forms of grave professional misconduct, such as violations of competition rules*'. [36] The second paragraph of that recital refers to performance in previous contracts 'that casts serious doubts as to the reliability of the economic operator'. [37]

73. It is no surprise that, in the light of that recital, the Court has stated that 'the option available to any contracting authority to exclude a tenderer from a procurement procedure is particularly intended to enable it to assess the integrity and reliability of each of the tenderers'. [38]

74. The optional grounds for exclusion enable Member States to satisfy public interest objectives and are, in any event, intended to ensure the reliability, [39] diligence, professional honesty and responsibility of the tenderer. [40]

75. Specifically, the Court has held, as regards 'the objective underlying Article 57(4) of Directive 2014/24', that 'the option, or even the obligation, for the contracting authority to exclude an economic operator from participating in a contract award procedure is intended in particular to enable it to assess the integrity and reliability of each of the economic operators'. [41]

76. Furthermore, on a proper interpretation of Article 57(4)(d) of Directive 2014/24, the verification of the tenderer's integrity and reliability should cover its *past* anticompetitive conduct, not only collusive arrangements in the 'specific' procurement procedure which the contracting authority is to decide on.

35 That seems to be the vague gist of paragraph 2.2.6 of the order for reference.

36 Emphasis added.

37 See judgment in *Meca*, paragraph 30.

38 *Ibidem*, paragraph 29.

39 In my Opinion in *Delta Antrepriză de Construcții și Montaj 93* (C-267/18, EU:C:2019:393, point 28), I noted that 'Directive 2014/24 makes reliability a key component of [the] relationship' between the contracting authority and the tenderers.

40 Judgment of 10 July 2014, *Consorzio Stabile Libor Lavori Pubblici* (C-358/12, EU:C:2014:2063), paragraphs 29, 31 and 32.

41 Judgment of 30 January 2020, *Tim* (C-395/18, EU:C:2020:58, paragraph 41).

77. That follows in particular from the second subparagraph of Article 57(5) of Directive 2014/24, under which contracting authorities may exclude an economic operator where it transpires 'that the economic operator is, in view of acts committed or omitted either *before* or during the procedure, in one of the situations referred to in paragraph 4'. [42]

78. In addition to the foregoing considerations, it should be noted that the contracting authority may, alternatively, apply Article 57(4)(c) of Directive 2014/24, basing its decision to exclude the tenderer on the fact that the tenderer was guilty of grave professional misconduct.

79. The concept of grave professional misconduct, which is a ground for exclusion under Portuguese law, [43] may also encompass anticompetitive conduct even if such conduct attracts a specific type of exclusion: that is borne out by recital 101 of Directive 2014/24, mentioned above, which (in line with the Court's approach to the preceding directive) [44] considers infringements of the competition rules to be a form of grave professional misconduct. [45]

80. It is true, as was pointed out at the hearing, that that possibility results in a degree of overlap between the two optional grounds for exclusion. However, I think that if it is viewed as being of a complementary nature, it serves to achieve the objectives of Directive 2014/24.

81. Where Article 57(4)(d) of Directive 2014/24 applies, the logical course of action would be for the contracting authority to invoke that ground for exclusion. For all other conduct which infringes the competition rules but does not fall within the scope of 'agreements with other economic operators', the contracting authority may have recourse to the more generic wording of point (c).

82. If the aim is to maximise the contracting authority's ability to assess the reliability of tenderers and candidates, I see no reason to limit its discretion by defining which 'infringements of the competition rules' have been committed. Recital 101 of Directive 2014/24 again permits the use of Article 57(4)(c) and (d) thereof in the terms set out above. It thus gives rise to concurrent rules which the interpreting authority will have to address by applying the rule which is best suited to the circumstances of each case.

2. Obligation to state reasons

83. The contracting authority is obliged to 'carry out a specific and individual assessment of the conduct of the entity concerned'. [46] That assessment must be reflected in a statement of reasons for the measure adopted enabling the addressees, and any competitors, to challenge it before the courts. [47]

[42] Emphasis added.

[43] Article 55(1)(c) of the CCP imposes a prohibition from tendering on natural and legal persons who have received an administrative penalty for grave professional misconduct.

[44] Order of 4 June 2019, *Consorzio Nazionale Servizi* (C-425/18, EU:C:2019:476), concerning point (d) of the first subparagraph of Article 45(2) 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).

[45] On 'the scope of the collusion-related exclusion ground: coverage of concerted practices and interplay with the exclusion ground due to grave professional misconduct', reference should be made to section 5.2 of the Notice of the European Commission on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (2021/C 91/01).

[46] Judgment of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraph 157), citing judgment of 9 November 2017, *LS Customs Services* (C-46/16, EU:C:2017:839, paragraph 39), and the case-law cited therein.

[47] *Ibidem*, paragraph 120.

84. Where (as here) one of the competitors claims that another falls within the scope of a ground for exclusion under Article 57(4)(d) of Directive 2014/24, the contracting authority must explain, in particular, why it considers that candidate to be reliable. Where appropriate, the statement of reasons must include the assessment of the corrective measures taken by the tenderer. [48]

85. The requirement to state reasons may be satisfied if the contracting authority endorses, directly or by reference, the arguments taken into account by the sectoral authority (here, the AC) when finding that an operator has colluded with others to distort competition.

E. Fourth question referred

86. The referring court entertains doubts as to whether the 'solution adopted in Portuguese law under Article 55(1)(f) of the CCP' is compatible with Article 57(4)(d) of Directive 2014/24.

87. The referring court's interpretation of that provision of the CCP (which the Court must follow, since it originates from the highest administrative court in Portugal) is as follows: where the exclusion of an economic operator is due to the 'infringement of competition rules unrelated to [the] specific procurement procedure', Article 55(1)(f) of the CCP makes that exclusion dependent on the AC's decision 'in the context of an application of an ancillary penalty consisting of a prohibition from tendering'. The referring court adds that, in that procedure, the AC is to assess the suitability of the corrective measures taken.

88. This question is a hypothetical one for the same reasons as those set out in the analysis of the second question referred: [49]

– first, the AC expressly ruled out the ancillary penalty as a response to Futrifer's conduct;

– second, it is not apparent from the documents before the Court that any of the operators concerned relied on the adoption of the corrective measures referred to in Article 57(6) of Directive 2014/24 in order to bypass a (non-existent) prior prohibition from tendering.

89. The referring court's questions therefore overstep the boundaries of the dispute, in the light of the facts at issue, and require, de facto, an advisory opinion from the Court on matters unrelated to those facts.

90. To overcome the objection of inadmissibility, the question could be reformulated so that it is construed as arising where the AC considers the collusive agreement to be proven and punishes it with a fine, but without adding the prohibition from tendering.

[48] Under the third subparagraph of Article 57(6) of Directive 2014/24, 'where the measures [taken by the economic operator] are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision'. That provision does not, however, preclude the statement of reasons from operating in the opposite direction, where required by another competing operator in order to argue that its opponent should be excluded.

[49] The difference between this question and the second question referred is that, here, the referring court focuses on the fact that, under Portuguese law, where an ancillary penalty of prohibition from tendering has been imposed, the AC is also competent to decide on the rehabilitation of the economic operator subject to the penalty.

91. In any event, either in accordance with that reformulation or in the alternative, the answer I propose is based on my earlier considerations. Thus:

– A national provision (or the interpretation thereof) which requires, as a necessary condition for its application, the prior determination of a competition authority would not be compatible with Article 57(4)(d) of Directive 2014/24.

– Member States may entrust the assessment of corrective measures to authorities other than contracting authorities, such as the AC. It is for the referring court to determine whether that is the case under Portuguese law and, if so, to verify 'that the national rules put in place for that purpose satisfy all the requirements laid down in Article [57(6) of Directive 2014/24]'. [50]

F. Fifth question referred

92. The referring court turns its attention to Article 70(2)(g) of the CCP in order to enquire whether its content is consistent with Article 57(4)(d) of Directive 2014/24.

93. The referring court interprets that article of the CCP as 'limit[ing] the possibility of excluding a tender due to significant evidence of acts, agreements, practices or information that are liable to distort competition rules in the specific procurement procedure in which such practices are detected'.

94. Article 70 of the CCP applies, at least on a literal reading, at a later stage of the procurement procedure: while Article 55 applies at the initial stage (selection of the operator based on qualitative criteria), Article 70 applies to the following phase (evaluation of the tenders submitted). In order to reach that second stage, the tenderer or candidate must naturally have passed the first stage, that is to say, it must not have been previously excluded from the procedure.

95. The national provision is unobjectionable if its interpretation in all cases leaves intact the contracting authority's discretion to find that, prior to the specific procurement procedure it has to decide on, a tenderer engaged in anticompetitive conduct resulting in its exclusion.

96. In other words, no provision of Directive 2014/24 is infringed if Article 70(2)(g) of the CCP merely allows the contracting authority to exclude a tenderer's bid where it finds that the bid was the outcome of collusive conduct in the context of the procurement procedure itself. [51]

97. The wording of Article 57(4)(d) of Directive 2014/24 is sufficiently broad to cover all the possible ways in which the contracting authority may become aware of conduct by a tenderer aimed at distorting competition.

98. In my Opinion in *Vossloh Laeis*, I argued that Article 57 of Directive 2014/24 confers certain functions having investigative connotations on contracting authorities, [52] a position that the Court endorsed in its judgment in that case. [53]

[50] Judgment of 11 June 2020, *Vert Marine* (C-472/19, EU:C:2020:468, paragraphs 31 and 38) and point 2 of the operative part.

[51] It is for the referring court to decide whether, in addition, Article 70(2)(g) of the CCP could be interpreted in the manner described in footnote 18.

[52] C-124/17, EU:C:2018:316, points 46 to 49.

[53] Judgment in *Vossloh Laeis*, paragraph 24 et seq.

99. In the exercise of those functions, contracting authorities are empowered to detect the existence of agreements by tenderers entered into in connection with the procurement procedure underway which distort competition. It is possible that, as the Commission points out, the contracting authority may encounter difficulties in proving the anticompetitive conduct. In addition to not being insurmountable in practice, those difficulties do not justify limiting the contracting authority's discretion to assess collusive conduct which it has found to exist.

V. Conclusion

100. In the light of the foregoing considerations, I propose that the Court of Justice declare the second and fourth questions referred for a preliminary ruling to be inadmissible and give the following answer to the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal):

Article 57(4)(d) 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

must be interpreted as meaning that:

– the optional ground for exclusion set out in that provision is to be assessed by the contracting authority without being bound by decisions of other authorities, unless an operator has been excluded by final judgment from participating in procurement procedures, during the period of exclusion resulting from that judgment in the Member State where the judgment is enforceable;

– the contracting authority must state, directly or by reference, the reasons for allowing a tenderer who has previously been penalised for anticompetitive conduct to participate in the procurement procedure;

– it does not preclude a national provision which permits the contracting authority to exclude a tender due to significant evidence of acts, agreements, practices or information that are liable to distort the competition rules in the specific procurement procedure in which such conduct is detected.

In the alternative, I suggest that the Court of Justice give the following answer to the second and fourth questions referred for a preliminary ruling:

– where a competition authority has imposed on an economic operator an ancillary penalty of prohibition from participating in public procurement procedures for a certain period, the contracting authority retains its discretion not to exclude that operator from the procurement procedure in the circumstances referred to in Article 57(6) of Directive 2014/24;

– the economic operator is entitled to provide evidence that it has taken sufficient measures to demonstrate its reliability under Article 57(6) of Directive 2014/24, which the contracting authority (or the authority empowered for that purpose under national law) must assess, including where a competition authority has imposed an ancillary penalty on the economic operator prohibiting it from participating in procurement procedures.