



Reports of Cases

OPINION OF ADVOCATE GENERAL NORKUS

delivered on 10 July 2025¹

Case C-769/23

Mara soc. coop. arl

v

**Ministero della Difesa,
Gruppo Samir Global Service Srl**

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Reference for a preliminary ruling – Public procurement – Contracting authority – Italian Ministry of Defence – Service contract – Transport of equipment including, inter alia, military equipment – Directive 2009/81/EC – Article 3 – Directive 2014/24/EU – Article 16 – Mixed contracts involving defence and security aspects – Determination of applicable directive – Standardised services – Labour-intensive services – Contract award criteria – Prohibition under national law of application of lowest price criterion)

I. Introduction

1. The present case concerns an open call for tenders by the Ministero della Difesa (Ministry of Defence, Italy) ('the Ministry') for the award of a contract for the provision of labour services related, inter alia, to the loading, unloading and transport of materials.² It appears that munitions and explosives are included in those materials.³ The services in question are both

¹ Original language: English.

² Article 17 of the tender specifications refers to 'occasional labour' services consisting of 'loading and unloading operations, assembling and breaking-up packages, stacking and unstacking incoming and outgoing materials, moving materials and anything else defined as ordinary labour for the needs of warehouses, factories, entities, naval vessels and/or military airports and military entities', page 33. See paragraph 8 of the request for a preliminary ruling.

³ In its reply to the Court's written questions (see point 22 of the present Opinion), the Italian Government stated that the services in question concern the transport of different types of goods and that a single economic operator was thus required for each lot. That government also confirmed that part (although not the greater part) of the goods in question are 'military equipment' within the meaning of Article 1(6) of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ 2009 L 216, p. 76). See also Decreto di aggiudicazione prot. N. 0021670 (awarding decree Prot. No 0021670) of 16 November 2022, by which Mara was awarded lot No 6 and which refers, inter alia, to munitions and explosives. In its reply to the Court's written questions, Mara disputed the fact that the contract in question relates to military equipment. This is ultimately a question of fact for the referring court to determine.

labour-intensive⁴ and have ‘standardised characteristics’.⁵ The contract in question was awarded on the basis of the criterion of the lowest price. Italian law provides, however, that contracts for labour-intensive services must be awarded on the basis of the criterion of the most economically advantageous offer determined on the basis of the best price-quality ratio.⁶ By contrast, contracts for services with ‘standardised characteristics’⁷ may be awarded on the basis of the criterion of the lowest price, save where they are labour intensive.⁸

2. The Consiglio di Stato (Council of State, Italy) seeks to ascertain whether, inter alia, the principle of proportionality and Article 67(2) of Directive 2014/24/EU⁹ preclude the prohibition under national law of the use of the award criterion of the lowest price where the services in question are both labour-intensive and standardised. In the alternative, the referring court asks the Court of Justice whether the contracting authority has a degree of discretion in choosing the award criterion given, inter alia, that the tender specifications provide that the salaries of the persons employed under the contract are paid in accordance with the relevant national sectoral collective agreement and that any price discount offered may be based solely on the potential profit of the tenderer, which was set at 5% of the contract value indicated in the contract notice.¹⁰

II. Legal framework

A. *European Union law*

1. *Directive 2009/81*

3. Article 1, entitled ‘Definitions’, provides:

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

...

6. “Military equipment” means equipment specifically designed or adapted for military purposes and intended for use as an arm, munitions or war material;

...’

⁴ In accordance with Article 50(1) of decreto legislativo n. 50 (Codice dei contratti pubblici) (Legislative Decree No 50 establishing the Public Procurement Code) of 18 April 2016 (‘the P.P. Code’), this implies that labour costs are at least half the total amount of the contract. See point 13 of the present Opinion.

⁵ The referring court stated that Italian law does not define ‘services ... with “standardised characteristics”, but it ... intended to refer ... to performance that is characterised by a high degree of repetitiveness and does not have customisable elements (for example, of technological or innovative scope), in relation to which it is difficult to envisage that a contribution by the competitor could affect the expectation of uniform performance; accordingly, for reasons of economic efficiency and expeditiousness of the procedure, the use of the criterion of the lowest price is permitted, there being no particular need to use the criterion of best technical quality in the competitive comparison.’

⁶ This criterion is sometimes abbreviated to ‘MEAT’. In accordance with the applicable Italian law, that criterion takes into consideration, inter alia, qualitative, environmental and social aspects. See Article 95(6) of the P.P. Code.

⁷ I shall also refer to these services in the present Opinion as ‘standardised services’.

⁸ See Article 95(4)(b) of the P.P. Code and point 15 of the present Opinion.

⁹ 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).

¹⁰ See, in particular, paragraphs 6, 9 and 10 of the request for a preliminary ruling.

4. Article 2, entitled ‘Scope’, states:

‘Subject to Articles 30, 45, 46, 55 and 296 of the Treaty, this Directive shall apply to contracts awarded in the fields of defence and security for:

- (a) the supply of military equipment, including any parts, components and/or subassemblies thereof;
- (b) the supply of sensitive equipment, including any parts, components and/or subassemblies thereof;
- (c) works, supplies and services directly related to the equipment referred to in points (a) and (b) for any and all elements of its life cycle;
- (d) works and services for specifically military purposes or sensitive works and sensitive services.’

5. Article 3, entitled ‘Mixed contracts’, provides:

‘1. A contract having as its object works, supplies or services falling within the scope of this Directive and partly within the scope of Directive [2004/17] or Directive [2004/18] shall be awarded in accordance with this Directive, provided that the award of a single contract is justified for objective reasons.

...’

6. Article 47, entitled ‘Contract award criteria’, provides:

‘1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which the contracting authorities/entities shall base the award of contracts shall be either:

- (a) when the award is made to the most economically advantageous tender from the point of view of the contracting authority/entity, various criteria linked to the [subject matter] of the contract in question: for example, quality, price, technical merit, functional characteristics, environmental characteristics, running costs, lifecycle costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, security of supply, interoperability and operational characteristics; or
- (b) the lowest price only.

...’

2. Directive 2014/24

7. Article 2(1)(9) provides that ‘public service contracts’ means public contracts having as their object the provision of services other than ‘public works contracts’ referred to in Article 2(1)(6).

8. Article 15, entitled ‘Defence and security’, states:

‘1. This Directive shall apply to the awarding of public contracts and to design contests organised in the fields of defence and security, with the exception of the following contracts:

(a) contracts falling within the scope of Directive [2009/81];

...’

9. Article 16, entitled ‘Mixed procurement involving defence or security aspects’, states:

‘1. In the case of mixed contracts which have as their [subject matter] procurement covered by this Directive as well as procurement covered by Article 346 TFEU or Directive [2009/81], this Article shall apply.

2. Where the different parts of a given public contract are objectively separable, contracting authorities may choose to award separate contracts for the separate parts or to award a single contract.

...

Where contracting authorities choose to award a single contract, the following criteria shall apply to determine the applicable legal regime:

...

(b) where part of a given contract is covered by Directive [2009/81], the contract may be awarded in accordance with that Directive, provided that the award of a single contract is justified for objective reasons. This point shall be without prejudice to the thresholds and exclusions for which that Directive provides.

The decision to award a single contract shall not, however, be taken for the purpose of excluding contracts from the application of either this Directive or Directive [2009/81].

...

4. Where the different parts of a given contract are objectively not separable, the contract may be awarded without applying this Directive where it includes elements to which Article 346 TFEU applies; otherwise it may be awarded in accordance with Directive [2009/81].’

10. Article 18, entitled ‘Principles of procurement’, provides:

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

...

2. Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental,

social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.’

11. Article 67, entitled ‘Contract award criteria’, states:

‘1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.

2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the [subject matter] of the public contract in question. Such criteria may comprise, for instance:

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts.

...

4. Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria ...’

12. Article 70, entitled ‘Conditions for performance of contracts’, states:

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

B. Italian law

13. Article 50(1) of the P.P. Code¹¹ provides:

‘for the award of concession contracts and contracts for works and services other than those of an intellectual nature, in particular those relating to labour-intensive contracts, contract notices, notices and invitations shall include, in compliance with the principles of the European Union, specific social clauses aimed at promoting occupational stability of employed staff, providing for the application by the successful tenderer of the collective sectoral agreements referred to in Article 51 of decreto legislativo n. 81 (Legislative Decree No 81) of 15 June 2015. Labour-intensive services are those in which the labour cost is at least equal to 50% of the total amount of the contract.’

14. Article 95(3) of the P.P. Code provides that:

‘The following shall be awarded exclusively on the basis of the criterion of the most economically advantageous tender determined on the basis of the best price-quality ratio:

- (a) contracts relating to social services, and hospital, care and school catering services, as well as labour-intensive services, as defined in Article 50(1) ...;

...’

15. Article 95(4)(b) of the P.P. Code states:

‘The criterion of the lowest price may be used:

...

- (b) for services and supplies with standardised characteristics or whose conditions are defined by the market, with the exception of labour-intensive services referred to in paragraph 3(a)’.

III. The dispute in the main proceedings and the question referred for a preliminary ruling

16. On 14 July 2022, the Ministry launched an open procedure within the European Union¹² for the procurement of labour services relating, inter alia, to the transport of goods for the year 2023.¹³ The contract, which was renewable for three years, was divided into nine lots. The proceedings before the referring court relate to lot No 6.¹⁴ Given that the contract for that lot concerned standardised services, the award criterion used was that of the lowest price pursuant to

¹¹ In the version applicable at the relevant time.

¹² Based on Article 60 of the P.P. Code in the version applicable at the relevant time.

¹³ Contract notice 3144713.

¹⁴ CIG 9351659124 – NUTS code ITH41, concerning ‘*Aeronautica Militare area nord*’ (Air Force, northern area), for an amount of EUR 532 786.89 (estimated total amount in the call for tenders: EUR 5 200 565.31 net of VAT and/or other taxes and statutory contributions). According to the referring court ‘for the purposes of the [Union] threshold, and therefore under Article 35 of Legislative Decree No 50 of 2016, the value of the lot – including the amounts for possible renewals – was indicated in the tender specifications as a total of EUR 3 463 114.72, net of VAT (and the total value of the contract, again for the purposes of the [Union] threshold, was indicated as EUR 33 803 674.52, net of VAT)’.

Article 95(4)(b) of the P.P. Code. Mara s.c.r.l. ('Mara'), Gruppo SAMIR Global Service s.r.l. ('Samir') and another tenderer offered a 100% discount in respect of the contract for lot No 6.¹⁵ The contract was awarded to Mara by drawing lots.

17. Samir challenged that award before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).¹⁶ On 11 April 2023,¹⁷ that court upheld Samir's action and annulled the contract notice for the lot in question. It considered that, in accordance with Article 95(3)(a) of the P.P. Code, the contract should have been awarded on the basis of the best price-quality ratio. Given that the services in question are labour intensive, Article 95(4)(b) of the P.P. Code, which refers to the use of the criterion of the lowest price for standardised services, is not applicable.

18. Mara appealed that judgment before the referring court and Samir cross-appealed. In the proceedings before the referring court, Mara claimed, *inter alia*, that Article 95(3)(a) of the P.P. Code breaches the principle of proportionality as it goes beyond what is necessary to achieve the objectives of Directive 2014/24. The criterion of the lowest price may be accepted in the case of highly standardised goods or services such as those in the present case as there is no real need to acquire differentiated technical offers which would 'unnecessarily [complicate] the tender procedure and violate the constitutional principle of sound public administration.' Article 17 of the tender specifications stated that the salaries of the workers employed must be paid pursuant to the national sectoral collective agreement. Any price discount could thus only be based on the premium placed on the contract value indicated in the contract notice. 'Consequently, the objectives of Article 50 of [the P.P. Code], which essentially seek to ensure employment levels and protect workers through the application of the [national collective labour agreements], are not affected.'¹⁸

19. The referring court observes that, in accordance with Article 95(4)(b) of the P.P. Code, the criterion of the lowest price *may* be used for standardised services. However, contracts in respect of labour-intensive services must be awarded exclusively on the basis of the most economically advantageous tender¹⁹ pursuant to Article 95(3)(a) of that code. It is settled national case-law that contracts for labour-intensive services within the meaning of Article 50(1) and Article 95(3)(a) of the P.P. Code are, in any event, awarded on the basis of the criterion of the best price-quality ratio, even when they are standardised services within the meaning of Article 95(4)(b) of that code. This is in conformity with the overriding objective of Italian Constitutional law and EU law to protect workers.²⁰

¹⁵ The referring court indicated that 'the second paragraph of Article 17 of the tender specifications stated as follows: "in view of the fact that the percentage discount requested will be made only on the premium, labour costs will remain unchanged since the salaries of the workers employed are paid on the basis of the sectoral collective agreement. Consequently, the objectives of Article 50 of [the P.P. Code], which essentially seek to ensure employment levels and protect workers through the application of the [(national collective labour agreements)], are not affected.'"

¹⁶ Mara intervened in those proceedings.

¹⁷ Judgment No 6259.

¹⁸ See, in particular, paragraph 1 of the request for a preliminary ruling.

¹⁹ It would appear, subject to verification by the Consiglio di Stato (Council of State), that the 'most economically advantageous tender' is employed by that court in the main proceedings to refer to the 'best price-quality ratio' within the meaning of Article 95(3) of the P.P. Code rather than the broader meaning attributed to the concept of the 'most economically advantageous tender' under Article 67 of Directive 2014/24. See points 44 and 45 of the present Opinion.

²⁰ See, in particular, judgment No 8 of 21 May 2019 of the Adunanza Plenaria del Consiglio di Stato (Plenary Session of the Council of State). This case-law was subsequently followed in case-law of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio).

20. The referring court considers that the application of the national legislation would lead to the annulment of the call for tenders as it failed to use ‘the criterion of the most economically advantageous tender.’ However, given that the protection of workers, which is normally ensured by the use of that criterion, was achieved to the same extent in the tender rules by means of a different criterion, the obligation to use the award criterion of the most economically advantageous tender appears to be manifestly excessive, disproportionate and unjustified.²¹

21. The Consiglio di Stato (Council of State) thus decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do the principles of freedom of establishment and freedom to provide services, referred to in Articles 49 and 56 [TFEU], the [EU] principle of proportionality and Article 67(2) of Directive [2014/24] preclude the application of national legislation on public procurement, such as the Italian legislation in Article 95(3)(a) and (4)(b) of [the P.P. Code], and in Article 50(1) of that [code], as also arising from the principle of law laid down by the Plenary Session of the [Consiglio di Stato (Council of State)] in judgment No 8 of 21 May 2019, according to which, in the case of contracts concerning services with standardised characteristics and, which are, at the same time, labour-intensive, the contracting authority is prohibited from providing for, as an award criterion, the lowest price, even where the tender rules provide for the reduction only on the premium or potential profit of the undertaking, without prejudice to the labour costs?’

IV. The procedure before the Court

22. Mara, Samir, the French and Italian Governments and the European Commission submitted written observations. Written questions²² were addressed to the parties and interested parties by the Court concerning, *inter alia*, the scope of application of Directive 2009/81 and Directive 2014/24. The Court also requested them to indicate which directive applies to the contract in question and whether the award criterion for that contract would differ depending on the applicable directive. Mara, the Italian Government and the Commission replied to those written questions. They also presented oral argument and replied to the Court’s questions at the hearing on 30 April 2025.

²¹ The referring court considers that Samir’s cross-appeal is unfounded and that it is necessary to refer a question to the Court of Justice in order to rule on Mara’s appeal.

²² On the basis of Article 62(1) of the Rules of Procedure of the Court of Justice.

V. Assessment

Preliminary remarks – The legal regime applicable to the contract at issue in the main proceedings

23. In its request for a preliminary ruling, the Consiglio di Stato (Council of State) referred to Articles 49 and 56 TFEU and to Directive 2014/24. Moreover, the call for tenders was launched by the Ministry and appears to include services in respect of munitions and explosives.²³ It is thus necessary to examine whether Directive 2009/81²⁴ applies to the contract in order to determine the contract award criteria.²⁵

24. As regards the application of Articles 49 and 56 TFEU, it is settled case-law that a national measure in a sphere which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure concerned and not those of primary law.²⁶ Both Directive 2009/81 and Directive 2014/24 provide for exhaustive harmonisation concerning the goods and services falling within their scope. It follows that if one of those directives applies to the call for tenders in respect of lot No 6, Articles 49 and 56 TFEU are not relevant in the context of the present proceedings.

25. In its reply to the Court's written questions on the possible applicability of Directive 2009/81, Mara stated that the contract in question relates essentially to loading and unloading operations. As the contract does not concern military equipment such as munitions and explosives, it does not fall within the scope of Directive 2009/81 as determined by Article 2 thereof. The Italian Government observes that it is not necessary to determine which directive is applicable. Irrespective of whether Article 47 of Directive 2009/81 or Article 67 of Directive 2014/24 applies to the contract in question, both directives permit the use of the criterion of the most economically advantageous tender or the criterion of the lowest price. The Commission considers that the description of the services to be provided under lot No 6 may be 'directly related' to 'military equipment' in accordance with Article 1(6) and Article 2(c) of Directive 2009/81 and that the contract in question may fall within the scope of that directive. In the case of mixed contracts involving defence, which are governed by Article 3 of Directive 2009/81 and Article 16 of Directive 2014/24, it is clear from recital 13 of the latter directive that the EU legislature wished to leave a certain margin of discretion to the contracting authority in the choice of which directive to apply.

26. It must be emphasised at the outset that the value of lot No 6 exceeds the thresholds stipulated in both Article 8(a) of Directive 2009/81²⁷ and Article 4(b) of Directive 2014/24.²⁸

²³ As previously indicated, in its reply to written questions, the Italian Government confirmed that the supply of services in question related to munitions and explosives and non-military equipment.

²⁴ According to Leskovec and Škof, Directive 2009/81 'lays down specific rules for public procurement in the defence and security sector, with the aim of making the defence market in the EU more open and competitive, while protecting the legitimate security interests of individual Member States. Through specific public procurement rules, [Directive 2009/81] allows the protection of confidential information and prevents jeopardising the essential security interests of Member States.' Leskovec, B. and Škof, R., 'Use of security exemption as a way to procure crucial infrastructure projects', *Rechtspraxis der Industrie- und Infrastrukturprojekte*, Vol. 1, Beck-Online, 2025, p. 59; available at: <https://beck-online.beck.de/Bcid/Y-300-Z-RINPRAX-B-2025-S-59-N-1>

²⁵ There is no indication in the file before the Court that Article 346 TFEU, which relates to Member States' essential security interests, has any bearing on the case pending before the referring court. In addition, at the hearing, the parties agreed that that provision was not relevant in the context of the present proceedings. I shall therefore not deal further with that provision in the present Opinion.

²⁶ See, to that effect, judgment of 2 September 2021, *Sisal and Others* (C-721/19 and C-722/19, EU:C:2021:672, paragraph 32).

²⁷ As amended.

²⁸ As amended.

27. As regards the applicability of Directive 2009/81, the fact that the call for tenders in respect of lot No 6 was made by the Ministry is not sufficient in itself to bring it within the scope of that directive. Given, however, the apparent inclusion of munitions and explosives,²⁹ and thus military equipment within the meaning of Article 1(6) of Directive 2009/81, in the materials subject to the contract for services in respect of lot No 6, Article 2 of that directive, which determines the scope of application of that directive, must be examined.

28. The contract in question relates to the supply of services rather than goods or equipment. Article 2(a) of Directive 2009/81 on the supply of military equipment and Article 2(b) of that directive on the supply of sensitive equipment³⁰ are thus not applicable. Article 2(c) of Directive 2009/81 concerns the supply of services ‘directly related’ to military equipment while Article 2(d) of that directive refers to services ‘for *specifically* military purposes’.³¹ Given the somewhat marginal or secondary nature of the inclusion of munitions and explosives in the materials subject to the call for tenders for services in respect of lot No 6, I consider that Article 2(d) of Directive 2009/81 does not apply in respect of lot No 6.³² Article 2(c) of Directive 2009/81 may, however, be applicable as the performance of the contract concerns, *inter alia*, the transportation of military equipment.³³ In addition, the provision of such services may permit both physical access to military equipment and access to sensitive information³⁴ thereon.³⁵

29. As regards the applicability of Directive 2014/24, I consider that, in accordance with Article 1(1) of that directive and the definition of ‘public service contracts’ in Article 2(1)(9) thereof, the award of the contract for lot No 6 must, in principle, be carried out in compliance with the rules laid down in that directive. The only permitted exemptions to the application of Directive 2014/24 are those which are exhaustively and expressly mentioned therein.³⁶

30. It appears that the contract in respect of lot No 6 has as its object services covered in part by Directive 2009/81 and in part by Directive 2014/24. Both Directive 2009/81 and Directive 2014/24 provide for ‘conflict rules’ in order to determine the legal regime applicable to mixed contracts.

²⁹ It must be emphasised that explosives may be used for both military and civil purposes. Recital 10 of Directive 2009/81 states however that ‘for the purposes of this Directive, military equipment should also cover products which, although initially designed for civilian use, are later adapted to military purposes to be used as arms, munitions or war material.’

³⁰ In accordance with Article 1(7) of Directive 2009/81, “Sensitive equipment”, “sensitive works” and “sensitive services” means equipment, works and services for security purposes, involving, requiring and/or containing classified information’.

³¹ Emphasis added.

³² This is a matter of fact that must be verified by the referring court. Suffice to note for the purposes of the present Opinion that in its request for a preliminary ruling the Consiglio di Stato (Council of State) did not refer at any point to Directive 2009/81 nor indeed to the presence of munitions or explosives amongst the relevant materials.

³³ Recital 6 of Directive 2009/81 refers to ‘contracts regarding logistics services, transportation and warehousing’. See also Category No 10 of Annex I to that directive relating to ‘supporting and auxiliary transport services’.

³⁴ See recital 8 of Directive 2009/81, which states: ‘Defence and security equipment is vital for both the security and the sovereignty of Member States and for the autonomy of the Union. As a result, purchases of goods and services in the defence and security sectors are often of a sensitive nature.’ In addition, according to recital 9 of Directive 2009/81, ‘this results in specific requirements, particularly in the fields of security of supply and security of information. These requirements relate especially to purchases of arms, munitions and war material for the armed forces, as well as services and works directly relating thereto ...’

³⁵ Such as the nature, quantity and location of such equipment. This is a matter of fact which must be verified by the referring court.

³⁶ See Article 1(1) of Directive 2014/24 and judgment of 7 September 2023, *Commission v Poland* (C-601/21, EU:C:2023:629, paragraphs 69 and 70). In addition, Article 15(1)(a) of Directive 2014/24 provides that that directive applies to the award of public contracts with the exception of those falling (fully) within the scope of Directive 2009/81. As the Commission stated in its reply to the Court’s written questions, ‘if the contract in question concerned military equipment only, the entire contract would fall under Directive 2009/81 and the contracting authority could not award it in accordance with the provisions of Directive 2014/24’.

Thus, mixed contracts having as their object services falling partly within the scope of Directive 2009/81 and partly within the scope of, inter alia, Directive 2014/24³⁷ are governed by Article 3(1) of Directive 2009/81 and Article 16 of Directive 2014/24.³⁸

31. Article 3(1) of Directive 2009/81 states that such mixed contracts *shall* be awarded in accordance with Directive 2009/81 provided that the award of a single contract is justified for objective reasons.³⁹

32. The conflict rules under Article 16 of Directive 2014/24 are more complex and deal with a number of eventualities.

33. Where the different parts of a contract are *objectively separable*, a contracting authority *may* choose to award separate contracts for the separate parts or to award a single contract.⁴⁰ The fourth subparagraph of Article 16(2) of Directive 2014/24 clarifies that the decision to award a single contract shall not be taken for the purpose of excluding the application of either Directive 2014/24 or Directive 2009/81. In the event that the contracting authority chooses to award a single contract, the contract *may* be awarded in accordance with Directive 2009/81, subject to the condition that the award of a single contract is *justified for objective reasons*.⁴¹ This implies that the contracting authority *may* choose to award the contract in accordance with Directive 2014/24 if the award of a single contract is justified for objective reasons.⁴² It also implies that the contract *must* be awarded in accordance with Directive 2014/24 if the award of a single contract is not justified for objective reasons.⁴³

³⁷ Article 3(1) of Directive 2009/81 in fact refers to 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). In accordance with Article 91 of Directive 2014/24, Directive 2004/18 was repealed with effect from 18 April 2016. References to Directive 2004/18 are construed as references to Directive 2014/24.

³⁸ In accordance with the second subparagraph of Article 3(3) of Directive 2014/24, where part of a given contract is covered by Directive 2009/81, Article 16 of Directive 2014/24 applies.

³⁹ Article 3(3) of Directive 2009/81 states that ‘the decision to award a single contract may not, however, be taken for the purpose of excluding contracts from the application of this Directive or of ... Directive [2014/24].’ In accordance with recital 24 of Directive 2009/81, ‘contracting authorities/entities may find themselves obliged to award a single contract for acquisitions which is covered partially by this Directive, with the remaining part ... falling within the scope of ... Directive [2014/24]. This applies when the relevant procurements cannot, for objective reasons, be separated and awarded through separate contracts. In such cases the contracting authorities/entities should be able to award a single contract, provided that their decision is not taken for the purpose of excluding contracts from the application of this Directive or of ... Directive [2014/24].’

⁴⁰ See Article 16(2) of Directive 2014/24. It must be emphasised that Directive 2014/24 does not establish binding rules on how to determine whether the different parts of a contract are separable or not. See, by analogy, Article 3(3) of Directive 2014/24. The second subparagraph of recital 11 of that directive however states that ‘the determination [of whether the different parts are separable or not] should be carried out on a case-by-case basis, in which the expressed or presumed intentions of the contracting authority to regard the various aspects making up a mixed contract as indivisible should not be sufficient, but should be supported by objective evidence capable of justifying them and of establishing the need to conclude a single contract ... It should be clarified that the need to conclude a single contract may be due to reasons both of a technical nature and of an economic nature.’ See, by analogy, judgment of 1 August 2022, *Roma Multiservizi and Rekeep* (C-332/20, EU:C:2022:610, paragraph 54).

⁴¹ See point (b) of the third subparagraph of Article 16(2) of Directive 2014/24. See also recital 13 of Directive 2014/24, which refers to the non-application of that directive, provided the award of a single contract is justified for objective reasons.

⁴² See, by contrast, the second subparagraph of Article 3(4) of Directive 2014/24 which provides, inter alia, that in the case of mixed contracts which have as their subject matter procurement covered by that directive as well as procurement not covered by it, if contracting authorities choose to award a single contract, Directive 2014/24 *shall* apply to the contract (unless otherwise provided in Article 16 of that directive).

⁴³ It follows, in my view, that where the award of a single contract is not justified for objective reasons, Directive 2014/24 takes precedence over Directive 2009/81. Arrowsmith considers that ‘when the award of a single contract is not justified for objective reasons, [Directive 2014/24 does] not seem to prevent the award of a single contract. Presumably, [Directive 2014/24] will apply, as [Directive 2009/81 prevails] only where the award of a single contract is justified for objective reasons.’ Arrowsmith, S., *The Law of Public and Utilities Procurement – Regulation in the EU and UK*, Vol. 2, Sweet & Maxwell, 2018, p. 220.

34. Article 16(4) of Directive 2014/24 provides, *inter alia*, that where the different parts of a given contract are *objectively not separable*, the contract *may* be awarded in accordance with Directive 2009/81. This implies that the contracting authority may choose to award the contract in accordance with Directive 2014/24. Moreover, that choice is not subject to conditions.⁴⁴

35. The Italian Government indicated in its reply to written questions that while the parts of the contract for lot No 6 were *objectively separable*, a single contract was awarded. According to that government, given that the different materials must be handled at the same time, this ‘required’ the award of lot No 6 to a single tenderer. Mara and the Commission however stated at the hearing that the different parts of the contract in question were *objectively not separable*. This is ultimately a matter of fact which lies within the jurisdiction of the referring court.

36. A single call for tenders was launched in respect of lot No 6.

37. In the event that the referring court should find that the different parts of the contract for lot No 6 are *objectively separable*, it must be highlighted that there is no information in the file before the Court indicating that the award of a single contract in respect of that lot was not justified for objective reasons⁴⁵ or that the decision to award a single contract was adopted for the purposes of excluding that lot from the application of either Directive 2009/81 or Directive 2014/24.⁴⁶ It follows that, in accordance with Article 16 of Directive 2014/24, the Ministry could choose to award the contract for lot No 6 in accordance with that directive or Directive 2009/81.⁴⁷ If the referring court should find that the different parts of the contract for lot No 6 are *objectively not separable*, the contract *may* be awarded in accordance with Directive 2014/24 or Directive 2009/81.⁴⁸

38. It follows that, in accordance with both Article 16(2) and Article 16(4) of Directive 2014/24, the contract in question *may*, in principle, be awarded in accordance with that directive.

39. There is thus an apparent contradiction between, on the one hand, the wording of Article 3(1) of Directive 2009/81, which employs the term ‘shall’ and, on the other hand, the wording of Article 16(2) and Article 16(4) of Directive 2014/24, which employ the term ‘may’. This contradiction is particularly ‘unfortunate’ as Directive 2014/24 specifically contemplates its interaction with the earlier Directive 2009/81. Article 3(1) of Directive 2009/81, however, was not amended or repealed either by Directive 2014/24 or by other EU legislation. A literal interpretation of the provisions in question⁴⁹ is therefore insufficient to resolve the question of which directive is applicable. This is all the more untoward as both Article 3(1) of Directive 2009/81 and Article 16 of Directive 2014/24 were designed for that very purpose.

⁴⁴ See, by contrast, Article 3(6) of Directive 2014/24, which provides that ‘where the different parts of a given contract are objectively not separable, the applicable legal regime shall be determined on the basis of the *main [subject matter]* of that contract.’ Emphasis added. In my view, an analysis of the main subject matter of a contract is not relevant in the context of the application of Article 16 of Directive 2014/24 or indeed Article 3 of Directive 2009/81.

⁴⁵ See point (b) of the third subparagraph of Article 16(2) of Directive 2014/24.

⁴⁶ See the fourth subparagraph of Article 16(2) of Directive 2014/24.

⁴⁷ It must be recalled that the possibility for the contracting authority to choose which directive to apply is subject to the condition that the award of a single contract in respect of lot No 6 was justified for objective reasons and the decision to award a single contract was not adopted for the purposes of excluding that lot from the application of either Directive 2009/81 or Directive 2014/24.

⁴⁸ As previously indicated, the choice available to the contracting authority is not subject to any additional conditions.

⁴⁹ The Court has stated that it is necessary, in interpreting a provision of EU law, to take into account not only the wording of the provision concerned, but also its context and the general scheme of the rules of which it forms part and the objectives pursued thereby (judgment of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 36 and the case-law cited).

40. Despite this apparent conflict, I consider that the provisions in question may be reconciled in the light of recital 13 of Directive 2014/24, which states that ‘it should be clarified that contracting authorities should not be prevented from choosing to apply [Directive 2014/24] to certain mixed contracts instead of applying Directive [2009/81].’ The intention of the EU legislature in adopting the conflict rules in Article 16 of Directive 2014/24 was to supplement and relax the more rigid conflict rules contained, *inter alia*, in Article 3(1) of Directive 2009/81 and to allow contracting authorities to choose⁵⁰ which directive to apply.⁵¹

41. It must also be observed that this approach is wholly in keeping with the principal objective of Directive 2009/81, which is to establish a European defence equipment market⁵² and to ensure the effective opening-up of procurement in the defence sector to competition⁵³ while respecting the security requirements of Member States⁵⁴ in the light of the sensitive nature⁵⁵ of, *inter alia*, services in that sector where necessary. Contracting authorities are better placed to decide on a case-by-case basis whether a specific contract in fact warrants the application of the *sui generis* rules under Directive 2009/81 or the more general, flexible and pro-competitive rules under Directive 2014/24. In certain instances, where the defence elements of a contract are marginal or insignificant, as appears to be the case in the present instance,⁵⁶ it may be in the interest of the contracting authority to choose to apply the rules contained in Directive 2014/24.

42. I therefore consider that the Ministry was, in principle, free to choose⁵⁷ which rules to apply and in fact appears⁵⁸ to have applied the rules under Directive 2014/24. This is evident from the use of the open procedure contained in Article 27 of Directive 2014/24⁵⁹ as Directive 2009/81 does not contain such a procedure or a procedure equivalent thereto.⁶⁰

⁵⁰ Subject to the conditions laid down in point (b) of the third subparagraph and the fourth subparagraph of Article 16(2) of Directive 2014/24, where applicable.

⁵¹ See, by analogy, judgment of 15 September 2022, *Veridos* (C-669/20, EU:C:2022:684, paragraph 31).

⁵² See recital 2 of Directive 2009/81. The legal bases of Directive 2009/81 are Article 47(2) EC (right of establishment), Article 55 EC (freedom to provide services) and Article 95 EC (internal market).

⁵³ See recital 15 of Directive 2009/81. Prior to the adoption of Directive 2009/81, contracts in the field of defence fell, in principle, within the scope of Directive 2004/18. Thus, Article 10 of Directive 2004/18 provided that it applied to public contracts awarded by contracting authorities in the field of defence, subject to Article 296 EC (now Article 346 TFEU). However, the Commission stated in its Green Paper – Defence procurement, COM/2004/608, that there was quasi-systematic use of the derogation in Article 296 EC (now Article 346 TFEU) in the area of public procurement in the defence sector and that some Member States believed they could apply the derogation in that provision automatically. The Commission therefore considered that the ‘EU’s legal framework could be supplemented by a new specific legal instrument for defence procurement ... The directive would establish a special set of rules for contracts falling within the scope *ratione materiae* of Article 296 EC, but for which use of the derogation is not justified ...’ See page 9. According to Arrowsmith, ‘this abuse of exemptions has always presented an important challenge to completing the open and integrated defence market that the EU has sought to achieve and was one of the main concerns that led to the adoption of a separate directive on defence and security procurement.’ Arrowsmith, S., footnote 43, *op. cit.*, p. 152.

⁵⁴ See recital 4 of Directive 2009/81.

⁵⁵ See recital 8 of Directive 2009/81.

⁵⁶ This is somewhat evident from the questions posed by the referring court, which does not refer to Directive 2009/81. Moreover, the request for a preliminary ruling itself does not refer or allude to military equipment such as munitions or explosives. Mara also stated at the hearing that it is performing transport services for the Ministry in the interim and military equipment is not in fact included in the goods transported.

⁵⁷ See, *inter alia*, Heuninckx, B., ‘Mixed procurement involving defence or security’, in Caranta, R. and Sanchez-Graells, A. (eds), *European Public Procurement*, Edward Elgar, 2021, pp. 174 to 175.

⁵⁸ Subject to verification by the referring court.

⁵⁹ See point 16 of the present Opinion.

⁶⁰ See also paragraph 3 of the Italian Government’s reply to written questions.

Award criterion for the contract in question – the third subparagraph of Article 67(2) of Directive 2014/24

43. The criteria for the award of the contract in question must be assessed in accordance, *inter alia*, with Article 47 of Directive 2009/81 or Article 67 of Directive 2014/24 depending on which directive is applicable.⁶¹ Given my preliminary remarks on the applicable EU rules, I shall examine the referring court's question in the light of Directive 2014/24,⁶² in particular the third subparagraph of Article 67(2) thereof, and the principle of proportionality.

44. Article 67(1) of Directive 2014/24 provides that contracting authorities must award public contracts on the basis of the most economically advantageous tender. The first subparagraph of Article 67(2) of that directive defines that concept in extremely broad terms. It states that the most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost and *may* include the best price-quality ratio. The best price-quality ratio shall be assessed on the basis of criteria including qualitative, environmental⁶³ and/or social⁶⁴ aspects linked to the subject matter of the contract in question.⁶⁵ The list of criteria in the first subparagraph of Article 67(2) of Directive 2014/24 in respect of the best price-quality ratio is non-exhaustive.⁶⁶ In the judgment in *Concordia Bus Finland*,⁶⁷ the Court confirmed that the award criteria used by the contracting authority to identify the most economically advantageous tender⁶⁸ are not necessarily of a purely economic nature as other factors may influence the value of a tender from the point of view of the contracting authority.

45. The inclusion of additional criteria other than price or cost by contracting authorities is optional under first subparagraph of Article 67(2) of Directive 2014/24.⁶⁹ Where contracting authorities choose to apply additional criteria when awarding a contract, the criteria chosen must comply with the principles of transparency, non-discrimination and equal treatment, so as

⁶¹ Recital 89 of Directive 2014/24 states that 'the notion of award criteria is central to this Directive.'

⁶² Where a contracting authority chooses, pursuant to Article 16(2) or Article 16(4) of Directive 2014/24, to award a contract in accordance with that directive, it must comply in full with the applicable rules contained therein. As the Commission observed at the hearing, the contracting authority cannot 'cherry pick' certain provisions from another directive such as Directive 2009/81 even if that authority could have chosen to award the contract in accordance with that directive at the outset.

⁶³ Where the contracting authority decides to award a contract to the tenderer which submits the most economically advantageous tender, it may, in principle, take criteria relating to the preservation of the environment into consideration. See, to that effect, judgment of 17 September 2002, *Concordia Bus Finland* (C-513/99, EU:C:2002:495, paragraph 64) ('the judgment in *Concordia Bus Finland*'). The case concerned the interpretation of Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). Article 36(1) of that directive drew a distinction between two award criteria, namely, the most economically advantageous tender – which included quality and technical merit – and the lowest price only. The reference in that case to the criterion of the most economically advantageous tender is equivalent to a reference to the best price-quality ratio within the meaning of Article 67 of Directive 2014/24. See, by analogy, recital 89 of Directive 2014/24.

⁶⁴ See, by analogy, judgment of 20 September 1988, *Beentjes* (31/87, EU:C:1988:422, paragraphs 28 to 37), in which the Court recognised that a social clause or condition on the employment of long-term unemployed persons could, in principle, be imposed by contracting authorities. See also, judgments of 26 September 2000, *Commission v France* (C-225/98, EU:C:2000:494, paragraph 50); of 15 July 2010, *Commission v Germany* (C-271/08, EU:C:2010:426, paragraphs 55 and 56); and of 10 May 2012, *Commission v Netherlands* (C-368/10, EU:C:2012:284, paragraphs 84 to 88).

⁶⁵ See also, by analogy, Article 70 of Directive 2014/24 on conditions for performance of contracts.

⁶⁶ See recital 92 of Directive 2014/24.

⁶⁷ See paragraph 55.

⁶⁸ As previously stated, this is equivalent to the best price-quality ratio within the meaning of Article 67 of Directive 2014/24.

⁶⁹ The first subparagraph of recital 90 of Directive 2014/24 clarifies that the most economically advantageous tender 'should always include a price or cost element.'

to guarantee an objective comparison of the relative merits of the tenders and, accordingly, effective competition. It follows that contracting authorities do not have an unfettered discretion in choosing additional criteria.⁷⁰

46. By contrast, the third subparagraph of Article 67(2) of Directive 2014/24 provides in unequivocal and unconditional terms that each Member State *may* prohibit all of its contracting authorities from using ‘price only or cost only as the sole award criterion’.⁷¹ The option to adopt such a prohibition applies irrespective of the specific features or subject matter of the contract in question. In that regard, the third subparagraph of Article 67(2) of Directive 2014/24 is not subject to any exception or derogation and thus confers a broad discretion on Member States when exercising the option contained therein. In addition, it is clear from the text of that provision that Member States may choose to exercise their discretion by restricting the use of price or cost to certain categories of contracting authorities or certain types of contracts.⁷² This implies that Member States may prohibit the use of price or cost as the sole award criteria by certain contracting authorities or for certain types of contracts.

47. Despite their broad discretion under the third subparagraph of Article 67(2) of Directive 2014/24, Member States, in making use of the option contained in that provision, must nonetheless respect the fundamental rules of the FEU Treaty, in particular those relating to the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles deriving from them, such as the principles of equal treatment and proportionality which are, moreover, reflected in Article 18 of Directive 2014/24.⁷³

48. The Italian legislature availed of the narrower option in the third subparagraph of Article 67(2) of Directive 2014/24 by adopting Article 95(3)(a) and Article 95(4)(b) of the P.P. Code, which provide, in essence, that labour-intensive contracts – in which labour costs are at least equal to 50% of the total amount of the contract – must be awarded on the basis of the best price-quality ratio. This requirement applies even where the services are standardised. The use of the criterion of the lowest price is thus prohibited in such cases. It would appear from the request for a preliminary ruling that the purpose of Article 95(3)(a) and Article 95(4)(b) of the P.P. Code is to protect workers.⁷⁴

49. The contract in respect of lot No 6 falls within the terms of Article 95(3)(a) and Article 95(4)(b) of the P.P. Code. However, contrary to those provisions, lot No 6 was awarded on the basis of the lowest price rather than the best price-quality ratio.⁷⁵

⁷⁰ See judgments of 20 September 2018, *Montte* (C-546/16, EU:C:2018:752, paragraph 31 and the case-law cited), and of 17 November 2022, *Antea Polska and Others* (C-54/21, EU:C:2022:888, paragraphs 88 to 91). See also Article 18(1) and Article 67(4) of Directive 2014/24 and the first subparagraph of recital 90 of that directive.

⁷¹ The second subparagraph of recital 90 to Directive 2014/24 states that ‘in order to encourage a greater quality orientation of public procurement, Member States should be permitted to prohibit or restrict use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate.’

⁷² This reflects the latin maxim or adage ‘*qui potest plus, potest minus*’ or ‘*qui potest majus potest et minus*.’

⁷³ See, by analogy, judgment of 6 October 2021, *Conacee* (C-598/19, EU:C:2021:810, paragraph 33 and the case-law cited), which concerned the right to reserve contracts pursuant to Article 20(1) of Directive 2014/24 to certain categories of tenderers. See also, by analogy, judgment of 30 January 2020, *Tim* (C-395/18, EU:C:2020:58, paragraph 45), which concerned ‘exclusion grounds’ pursuant to Article 57 of Directive 2014/24. See recital 1 of Directive 2014/24.

⁷⁴ See paragraph 7 of the request for a preliminary ruling in which the referring court stated that the Adunanza Plenaria del Consiglio di Stato (Plenary Session of the Council of State) ‘pointed out that the rationale for imposing the criterion of the most economically advantageous tender, for the award of [labour-intensive] services, is that of pursuing the objectives ... of protection of workers.’ This is an issue of national law and the objectives of the national provisions in question are ultimately a matter for the referring court to decide.

⁷⁵ This led to the annulment of the contract notice in respect of lot No 6 on 11 April 2023 by the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio). See point 17 of the present Opinion.

50. Mara considers that, in the case of labour-intensive standardised services, the general and abstract prohibition under Italian law of the use of the criterion of the lowest price is a manifestly excessive, disproportionate and unjustified measure as the qualitative aspects of such services are irrelevant. In addition, that conclusion cannot be called into question in order to safeguard workers' pay or safety. In the present case, any discount granted was based exclusively on the potential profit of the tenderer (set at 5% of the value of the lot), thereby excluding the possibility of the erosion of labour costs and/or the grant of excessive discounts to the detriment of workers. The rules of the call for tenders were therefore fully consistent with the provisions of Article 18(2) of Directive 2014/24 and with the objective of protecting staff as set out in recital 98 of that directive. The infringement of the principle of proportionality is also evident in the present case as the relevant national authorities and the national court confirmed that Mara had complied with pay and safety requirements.

51. Samir,⁷⁶ the French⁷⁷ and Italian⁷⁸ Governments and the Commission⁷⁹ consider that the prohibition in Article 95(3)(a) and Article 95(4)(b) of the P.P. Code of the use of the lowest price is proportionate as it protects workers' rights and ensures the quality of the services provided.

52. In accordance with the principle of proportionality,⁸⁰ which is a general principle of EU law, the rules laid down by the Member States in implementing the provisions of Directive 2014/24, such as the rules intended to lay down the implementing conditions of the third subparagraph of Article 67(2) thereof, must not go beyond what is necessary to achieve the objectives of that directive.⁸¹

53. It must be emphasised at the outset that the third subparagraph of Article 67(2) of Directive 2014/24 does not permit the exclusion of price or cost from the criteria for the award of a contract.⁸² That provision merely allows Member States to prohibit their use as the *sole* award criteria. Contracting authorities are thus free to choose from a non-exhaustive range of relevant criteria, which necessarily include price and cost, for the award of a contract. In that regard, the prohibition in Article 95(3)(a) and Article 95(4)(b) of the P.P. Code is limited in scope and is tailored, according to the referring court, to protect workers.⁸³ The exclusion by the Italian legislature in an abstract and general manner of the lowest price as the sole criterion for the

⁷⁶ Samir claims that the successful tenderer only received an amount equal to labour costs. This resulted in the contract being awarded by drawing lots rather than on the basis of other criteria such as the quality of service. It claims that the criterion of the lowest price negatively affects both the quality of the service and workers' rights. According to Samir, in the case at hand, workers were paid the minimum wage rather than the higher wage provided by the national sectoral collective agreement.

⁷⁷ The French Government submits that price or cost are, in essence, minimum criteria, which should be supplemented by other criteria where appropriate. It also observes that price or cost are not necessarily the most important criteria. According to that government, it is clear from recitals 2, 37, 41, 89 to 94 and 98 of Directive 2014/24 that the objective of that directive is, on the one hand, to increase the efficiency of public spending in a more cost-effective manner in procurement procedures and, on the other hand, to enable buyers to make better use of public procurement to support common societal objectives, such as environmental protection, the promotion of employment and social inclusion, or ensuring the best possible conditions for the provision of high-quality social services.

⁷⁸ According to the Italian Government, the limitation contained in the second paragraph of Article 17 of the tender specifications on discounts may encourage the circumvention of provisions on labour protection, distort competition to the detriment of smaller undertakings and encourage the submission of identical tenders, as is evidenced by the case before the referring court, which led to the award of the contract to Mara by drawing lots. That government also observes that over the long term, undertakings may surreptitiously try to recoup their very low or zero profit margins from workers' pay. In the case of labour-intensive services, the workforce may be protected more effectively and transparently by limiting the importance of price and combining it with an assessment of qualitative aspects of the tender.

⁷⁹ According to the Commission, the protection of worker's pay is only one of the reasons justifying the application of the criterion of the best price-quality ratio. In addition, it cannot be ruled out that the use of the lowest price criterion may lead to a deterioration in safety conditions in the workplace or in the quality of the service.

⁸⁰ No other matter, such as the principle of non-discrimination referred to in Article 18(1) of Directive 2014/24, was raised.

⁸¹ Judgment of 6 October 2021, *Conacee* (C-598/19, EU:C:2021:810, paragraph 42).

⁸² See the first subparagraph of recital 90 of Directive 2014/24.

⁸³ Which is a legitimate objective specifically recognised by Article 67(2) of Directive 2014/24 itself.

award of contracts in respect of labour-intensive services does not deprive contracting authorities of the possibility of taking into consideration the price or cost of such contracts but merely requires them, in addition, to take into account the nature and specific characteristics of such contracts, thereby ensuring that the best tender will be accepted.⁸⁴

54. In the case of labour-intensive services, including standardised services, it is not apparent⁸⁵ that all criteria other than price or cost are entirely superfluous or irrelevant in the context of the award of a contract for such services. Such a conclusion is based on the assumption that the quality of such services cannot be differentiated in any manner whatsoever and that workers' rights and their health and safety can be fully ensured in all instances by national law and/or Article 17 of the tender specifications.

55. The relevance of additional criteria other than price or cost in order to ensure – *in concreto* in the case of a specific call for tenders and in the abstract in relation to the award of public contracts in general – not only the levels of workers' pay⁸⁶ but also their health⁸⁷ and safety is evident for all labour-intensive services including standardised services, notwithstanding their repetitive nature.⁸⁸ For example, the relevance of additional award criteria other than the lowest price in order to protect workers' health and safety is particularly acute in the case of lot No 6, which requires, *inter alia*, the handling of munitions and explosives. In addition, as Samir observes, the use of the criterion of the lowest price rather than the best price-quality ratio may encourage the use of unskilled labour to the detriment not only of the quality of the service provided, but also of safety. It may also discourage investment in staff training.⁸⁹

56. While the provisions of national law in question do not appear to have been designed specifically to protect the quality of services provided,⁹⁰ it cannot be excluded that the organisation, qualifications and experience of the staff assigned to perform such standardised services may affect the level of performance of contracts and, as a result, the economic value of tenders.⁹¹ In that regard, recital 93 of Directive 2014/24 states that 'where national provisions

⁸⁴ See, *a contrario*, judgment of 7 October 2004, *Sintesi* (C-247/02, EU:C:2004:593, paragraphs 38 to 42).

⁸⁵ Subject to verification by the referring court.

⁸⁶ See, by analogy, judgment of 17 November 2015, *RegioPost* (C-115/14, EU:C:2015:760, paragraphs 77 and 79).

⁸⁷ See recital 99 of Directive 2014/24, which refers to criteria aimed at the protection of the health of staff.

⁸⁸ Caranta considers that 'criteria giving too much weight to price naturally lead to depressing workers' conditions, and this is especially so for contracts where personnel are the most relevant cost. To fight against social dumping, [Article] 95(3) of the [P.P.] Code implements the last phrase in [Article] 67(2) by providing that it is impermissible merely to refer to the price or cost alone in the award of contracts relating to ... any contract for which the personnel costs amount to at least 50% of the overall budget of the contract.' Caranta, R., 'Towards socially responsible public procurement', *ERA Forum*, Vol. 23, 2022, p. 158; available at: <https://doi.org/10.1007/s12027-022-00718-5>

⁸⁹ See recital 99 of Directive 2014/24, which refers to 'training in ... skills'.

⁹⁰ As previously indicated, the objectives pursued by the Italian legislature are a matter for the referring court to determine.

⁹¹ See Article 67(2)(b) and recital 94 of Directive 2014/24. While that recital refers to the example of contracts for intellectual services such as consultancy or architectural services, I consider that it cannot be construed as excluding standardised services from the scope of Article 67(2)(b) of Directive 2014/24.

determine the remuneration of certain services or set out fixed prices for certain supplies, it should be clarified that it remains possible to assess value for money on the basis of other factors than solely the price or remuneration.’⁹²

57. In its observations, Mara⁹³ also relied on the judgment in *Tedeschi and Consorzio Stabile Istant Service*,⁹⁴ which concerned national legislation limiting the possibility of reducing the prices applicable to subcontracted works, supplies or services by no more than 20% compared to the prices stated in the decision awarding the contract.⁹⁵ The Court held that such a limitation is liable to render less attractive the option of using subcontractors to perform a contract, since it limits any competitive advantage in terms of cost which subcontracted workers present to undertakings seeking to avail themselves of that possibility. Such a disincentive runs counter to the objective pursued by the relevant directives of opening up public contracts to the broadest possible competition and, in particular, enabling small and medium-sized undertakings to access public procurement procedures. In addition, the 20% limit, *inter alia*, goes beyond what is necessary to ensure pay protection for subcontracted workers as it does not leave room for an assessment on a case-by-case basis by the contracting authority and applies irrespective of any consideration of the social protection guaranteed by the laws, regulations and collective agreements applicable to the workers concerned.

58. The reasoning in that case cannot be transposed to the present case. The requirement under Article 95(3)(a) and Article 95(4)(b) of the P.P. Code to use the best price-quality ratio for labour-intensive standardised services does not automatically exclude any tenderer and in fact calls for an individual analysis of the tenders submitted on the basis of criteria including, but not limited to, price or cost.

59. It appears therefore, subject to verification by the referring court, that the national legislation in question transposing the third subparagraph of Article 67(2) of Directive 2014/24 is suitable for ensuring its main purpose of protecting workers, does not go beyond what is necessary to achieve that purpose and thus complies with the principle of proportionality.

⁹² That recital also states that ‘given the numerous possibilities of evaluating value for money on the basis of substantive criteria, recourse to drawing of lots as the sole means of awarding the contract should be avoided.’ It would appear that the necessity to draw lots resulted from a combination of the use of the lowest price as the sole award criterion and the requirement in Article 17 of the tender specifications that any price discount offered be based solely on the potential profit of the tenderer, which was set at 5% of the contract value indicated in the contract notice. Given that these rigid constraints were imposed by the Ministry itself, it appears unlikely that tenderers would be required to explain to that contracting authority in accordance with Article 69 of Directive 2014/24 any apparently abnormally low tenders and their compliance with social and labour law pursuant to Article 18(2) of that directive. As the French Government observes, the initiation of the procedure under Article 69 of that directive is not automatic. First, it implies that an economic operator must submit a tender the price of which is manifestly undervalued and liable to compromise the proper performance of the contract. Next, it presupposes that a contracting authority has suspicions. Finally, it is for the latter to carry out the necessary checks, within the limits of its capacity.

⁹³ Mara considers that the exclusion of the criterion of lowest price by the Italian legislature does not permit an assessment on a case-by-case basis by the contracting authority and applies irrespective of any consideration of the social protection guaranteed by the laws, regulations and collective agreements applicable to the workers concerned.

⁹⁴ Judgment of 27 November 2019 (C-402/18, EU:C:2019:1023, paragraphs 59 and 65).

⁹⁵ The 20% limit was mandatory.

VI. Conclusion

60. In the light of the foregoing, I propose that the Court of Justice answer the question referred by the Consiglio di Stato (Council of State, Italy) as follows:

Article 67(2) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, and the principle of proportionality

must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prohibits contracting authorities from using the lowest price as the sole award criteria for a public contract for services which are both labour-intensive and standardised even though the tender specifications provide that the salaries of the persons employed under the contract are paid in accordance with the relevant national sectoral collective agreement and that any price discount offered may be based solely on the potential profit of the tenderer.