



Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

31 March 2022 *

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Applicability to a purely internal situation – Article 58(1) and (4) – Selection criteria – Technical and professional ability of the tenderers – Protection of the financial interests of the European Union – Council Regulation (EC, Euratom) No 2988/95 – Article 8(3) – Control measures – Possibility for national authorities protecting the financial interests of the European Union to assess differently a public procurement procedure)

In Case C-195/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria), made by decision of 26 March 2021, received at the Court on 26 March 2021, in the proceedings

LB

v

Smetna palata na Republika Bulgaria,

THE COURT (Eighth Chamber),

composed of N. Jääskinen, President of the Chamber, M. Safjan and M. Gavalec (Rapporteur), Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- LB, by A.S. Aslanyan, advokat,
- the Smetna palata na Republika Bulgaria, by T. Tsvetkov and D.A. Dimitrova, acting as Agents,
- the European Commission, by G. Wils, J. Baquero Cruz and P. Ondrůšek and by D. Drambozova, acting as Agents,

* Language of the case: Bulgarian.

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 58(4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 (OJ 2017 L 337, p. 19) ('Directive 2014/24'), Article 8(3) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1) and the principles of legal certainty and effectiveness.
- 2 The request was made in the course of proceedings between LB and the Smetna palata na Republika Bulgaria (Chamber of Audit of the Republic of Bulgaria) ('the Chamber of Audit') concerning an administrative penalty which the latter has imposed on LB on account of irregularities committed during a public procurement procedure.

Legal framework

European Union law

Regulation No 2988/95

- 3 Regulation No 2988/95 contains three titles: Title I, entitled 'General principles' (Articles 1 to 3), Title II, entitled 'Administrative measures and penalties' (Articles 4 to 7) and Title III, entitled 'Checks' (Articles 8 to 11).
- 4 Article 8(2) and (3) of that regulation provides:

'2. Measures providing for checks shall be appropriate to the specific nature of each sector and in proportion to the objectives pursued. They shall take account of existing administrative practice and structures in the Member States and shall be determined so as not to entail excessive economic constraints or administrative costs.

The nature and frequency of the checks and inspections on the spot to be carried out by the Member States and the procedure for performing them shall be determined as necessary by sectoral rules in such a way as to ensure uniform and effective application of the relevant rules and in particular to prevent and detect irregularities.

3. The sectoral rules shall include the provisions necessary to ensure equivalent checks through the approximation of procedures and checking methods.'

Regulation (EU) No 1303/2013

- 5 Recitals 43 and 122 of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320), state:

‘(43) In the interests of ensuring proportionate control arrangements and of safeguarding the added value of financial instruments, intended final recipients should not be deterred by there being an excessive administrative burden. ...

...

(122) ... In order to reduce the administrative burden on beneficiaries, specific rules should be introduced to reduce the risk of overlap between audits of the same operations by various institutions, namely the European Court of Auditors, the Commission and the audit authority.’

- 6 Article 2 of that regulation, entitled ‘Definitions’, provides:

‘For the purposes of this Regulation, the following definitions apply:

...

(36) “irregularity” means any breach of Union law, or of national law relating to its application, resulting from an act or omission by an economic operator involved in the implementation of the [European Structural and Investment Funds (ESI Funds)], which has, or would have, the effect of prejudicing the budget of the Union by charging an unjustified item of expenditure to the budget of the Union.

...’

Directive 2014/24

- 7 Article 1 of Directive 2014/24, entitled ‘Subject matter and scope’, provides in paragraph 1:

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

- 8 Article 4 of that directive, entitled ‘Threshold amounts’, states:

‘This Directive shall apply to procurements with a value net of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

(a) EUR 5 548 000 for public works contracts;

...'

- 9 Article 18 of that directive, entitled 'Principles of procurement', provides in paragraph 1:

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

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.'

- 10 Article 58 of Directive 2014/24, entitled 'Selection criteria', states:

'1. Selection criteria may relate to:

- (a) suitability to pursue the professional activity;
- (b) economic and financial standing;
- (c) technical and professional ability.

Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 on economic operators as requirements for participation. They shall limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject matter of the contract.

...

4. With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract.

In procurement procedures for supplies requiring siting or installation work, services or works, the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability.

...'

- 11 In accordance with Article 67 of that directive, entitled 'Contract award criteria':

'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

...'

Bulgarian law

Law on public procurement

- 12 Article 1(1) of the *Zakon za obshtestvenite porachki* (Law on public procurement, DV No 13, of 16 February 2016), in the version applicable to the facts in the main proceedings ('the Law on public procurement'), provides:

'This law determines the conditions and procedures for the award of public works, supply or service contracts and the running of competitions organised by contracting authorities with the aim of ensuring the efficient allocation of:

...

2. resources granted under European funds and programmes;

...'

- 13 Article 2 of that law provides:

'(1) Public contracts shall be awarded in accordance with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the principles of free movement of goods, freedom of establishment, freedom to provide services and mutual recognition, as well as the principles deriving therefrom:

- 1. equality and prohibition of all discrimination;
- 2. free competition;
- 3. proportionality;
- 4. publicity and transparency.

(2) In the award of public contracts, contracting authorities shall not be empowered to restrict competition by imposing conditions or requirements which result in an undue advantage or which unduly restrict the access of economic operators to public contracts and which are not proportionate to the subject matter, value, complexity, quantity or scope of the public contract.

...’

14 In accordance with Article 59 of that law:

‘(1) The contracting authority may lay down selection criteria for candidates or tenderers in relation to:

...

3. technical and professional ability.

(2) Contracting authorities may apply to candidates or tenderers only the selection criteria set out in this law which are necessary to ensure that they are able to perform the contract. The criteria laid down must be consistent with the subject matter, value, scope and complexity of the contract. Where the contract is divided into lots, the selection criteria for each lot must take account of the subject matter, value, scope and complexity of the lot concerned.

...’

15 Article 247(1) of that law states:

‘... A contracting authority which infringes the prohibition referred to in Article 2(2), Article 11(5), Article 16, Article 21(14), (15) or (17), Article 149(8) or Article 150(4) shall be punished by a pecuniary penalty of 2% of the value of the contract, including VAT, but not exceeding 10 000 [leva (BGN)] [(approximately EUR 5 100)].

...’

16 In accordance with Article 260(1) and (2) of the Law on public procurement:

‘(1) Investigations finding that infringements have been committed under this law, carried out by the authorities of the Chamber of Audit, shall be documented by authorised auditors within a period of six months from the day on which the perpetrator was discovered. This time limit may not exceed three years from the date on which the offence was committed.

(2) Decisions imposing administrative penalties shall be adopted by the President of the Chamber of Audit or by officials authorised by him.’

17 Paragraph 3 of the ‘supplementary provisions’ of the Law on public procurement provides that that law introduces the requirements laid down by Directive 2014/24.

Law on European funds

- 18 Article 49(2) of the *Zakon za upravlenie na sredstvata ot evropeyskite strukturni i investitsionni fondove* (Law on the management of resources from the European Structural and Investment Funds, DV No 101 of 22 December 2015), in the version applicable to the facts in the main proceedings ('the Law on European funds'), provides:

'In respect of the appointment of a contractor for activities related to works, services and/or supplies of goods which are the subject of public procurement within the meaning of the Law on public procurement, the rules laid down in:

1. the Law on public procurement – where the recipient is a contracting authority within the meaning of that law;

... shall apply. ...'

Law on spatial planning

- 19 In accordance with Article 137(1) of the *Zakon za ustroystvo na teritoriata* (Law on spatial planning, DV No 1 of 2 January 2001), in the version applicable to the facts in the main proceedings ('the Law on spatial planning'):

'... Construction works shall be classified in the following manner according to their characteristics, size, complexity and operating risks:

1. first category:

...

(g) geo-protection and shoreline reinforcement equipment;

...'

- 20 Article 163a of that law provides:

'(1) ... The contractor shall be obliged to employ technically qualified persons by means of contracts of employment to carry out the technical management of the works.

(2) ... Technically qualified persons are persons who hold a diploma from an accredited institution of higher education with the qualification "civil engineer", "engineer" or "architect", as well as persons who have completed secondary education and four years of vocational training leading to a professional qualification in the fields of "architecture and construction" or "engineering".

...

(4) ... The technical supervisor shall be a civil engineer, architect or construction technician who supervises the works and ensures the implementation of the responsibilities under Article 163(2)(1) to (5), and for constructions in the fifth category – also the responsibilities under Article 168(1) and Article 169a(1). Other technically qualified persons pursuant to

paragraph 2 may carry out the specialised technical supervision of individual construction and installation works in accordance with their acquired specialisation and professional qualification.’

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

- 21 Under a management contract concluded on 21 March 2018 between the Minister for the Environment and Water (Bulgaria), in his capacity as Director of the Managing Authority of the Operational Programme ‘Environment 2014-2020’, and the municipality of Lukovit (Bulgaria), a grant cofinanced by the European Regional Development Fund (ERDF) and the Cohesion Fund was awarded to that town up to a maximum amount of BGN 649 732.14 (approximately EUR 331 000). That grant was intended to finance work to stabilise a landslide on the road leading to a regional landfill site located within that town.
- 22 By decision of 5 April 2018, LB, in his capacity as Mayor of Lukovit, launched a ‘public tender’ procedure for the award of a public contract for the performance of those works. The estimated value of that contract was BGN 482 668 excluding VAT (approximately EUR 247 000).
- 23 That decision, which was published on the same day in the Public Procurement Agency’s public procurement register, approved the contract notice and the public procurement documents at issue in the main proceedings.
- 24 The contract notice stated that the objective of the project was to reconstruct and improve the road section as a means of transport and that the award criteria would be ‘quality’ and ‘price’, each with a weighting of 50%.
- 25 Under the conditions for participation in that procurement procedure, the contract notice stated, first, that each participant had to be registered in the Central professional register of the building industry with a view to carrying out building works in Group IV, Category I, falling within the scope of Article 137(1)(1)(g) of the Law on spatial planning, or in a corresponding register for participants established in another Member State.
- 26 Moreover, with regard to the requirements relating to ‘technical and professional ability’, the contract notice stated that candidates had to prove, inter alia, that they had carried out building construction activities with the same or a similar subject matter to that of the contract at issue in the main proceedings during the five years preceding the submission of the tender. The contract notice specified, in that regard, that ‘similar’ activities meant activities to strengthen landslides and/or hillsides and/or banks and/or pits, or an equivalent building under construction.
- 27 Finally, with regard to the requirements applicable to technical engineering staff, the contract notice stated that the specific features of the contract required inter alia the presence of a technical director of construction who had the professional qualification of a ‘designer’ or ‘civil engineer’ or a similar specialisation where the qualification was obtained in a Member State in which there was no corresponding specialisation. The technical director also had to demonstrate a minimum of three years’ experience in his or her specialisation.
- 28 Three tenders were submitted within the prescribed period. After additional explanations were requested from each of the three participants, the Mayor of Lukovit, by decision of 24 July 2018, decided, first, to exclude two of them on the ground that they did not meet the selection criteria

and, secondly, to award the contract to the third. Subsequently, on 29 August 2018, a contract with a value of BGN 481 293.72 excluding VAT (approximately EUR 245 500) was concluded between that town and the successful tenderer.

- 29 By decision of 9 November 2018, on the basis of an *ex post* check of the legality of the procurement procedure at issue in the main proceedings, the managing authority of the operational programme 'Environment 2014-2020' imposed a general financial correction of 5% of the value of the expenditure concerned and recognised as eligible under the contract of 29 August 2018. That authority criticised the contracting authority for having, first, evaluated a tender which did not comply with the required technical specifications and, secondly, given unclear and confusing instructions to one of the participants, which led to its unlawful exclusion and prevented it from submitting a tender with a lower price than that offered by the selected tenderer.
- 30 In determining the correction to be applied to each of the two irregularities, that managing authority took into consideration, as mitigating circumstances, the fact that, first, three tenders had been submitted, which indicated a satisfactory level of competition, secondly, the estimated value of the contract was below the thresholds for mandatory disclosure in the *Official Journal of the European Union*, with the result that the lack of cross-border effects would have limited the circle of interested parties, and, thirdly, the award criterion of the 'optimum price-quality ratio' would not necessarily have guaranteed that the tender with the lowest price would be ranked in first place.
- 31 Alongside the check carried out by that managing authority, by order of 2 October 2019, the Vice President of the Chamber of Audit ordered an audit of the compliance of the management of public funds and the activities of the municipality of Lukovit during the period from 1 January 2018 to 30 June 2019.
- 32 On 18 June 2020, an auditor from the Chamber of Audit issued a document finding that there had been an administrative infringement, stating that, by his decision of 5 April 2018, the Mayor of Lukovit had infringed the principle of free competition laid down in Article 2(2) of the Law on public procurement. By requiring the presence of a technical director of construction who had the professional qualification of a 'designer' and/or 'civil engineer' with a minimum of three years' experience in his or her specialisation, the contract notice at issue in the main proceedings set a more stringent qualification requirement than that resulting from Article 163a(2) of the Law on spatial planning.
- 33 The Mayor of Lukovit lodged an objection against the document finding an infringement, justifying the qualification requirement at issue in the main proceedings, referred to in paragraph 27 of this judgment, by the specific features of a landslide stabilisation operation and its engineering complexity. He also stated that that requirement stemmed from the operational programme through which the financing of the project had been secured. The Mayor of Lukovit added that, moreover, no infringement of the rules on free competition provided for in Article 2(2) of the Law on public procurement had been found during the *ex post* check carried out by the managing authority of the operational programme 'Environment 2014-2020'.
- 34 By decision of 16 December 2020, the President of the Chamber of Audit rejected the objection and, on the basis of the findings and conclusions contained in that document finding an infringement, imposed a fine of BGN 10 000 (approximately EUR 5 100) on the Mayor of Lukovit under Article 260(2) of the Law on public procurement.

- 35 The Mayor of Lukovit challenged that decision by bringing an action before the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria), which is the referring court.
- 36 In the first place, that court asks whether Article 58(4) of Directive 2014/24 precluded the contracting authority from setting a more stringent qualification requirement than that laid down in Article 163a of the Law on spatial planning or whether, on the contrary, as the latter provision merely lays down minimum requirements which apply to all categories of construction, that authority could lawfully set the qualification requirement at issue in the main proceedings, in view of the fact that land stabilisation works are among the most complex construction activities.
- 37 In the second place, the referring court asks how the various national authorities responsible for ensuring compliance with the Law on public procurement or the Law on European funds must coordinate their checks and conclusions regarding the legality of public procurement procedures. In that regard, various provisions of ‘soft law’ are said to advocate, first, prohibiting the managing authority and the supervisory authorities from interpreting more strictly the rules governing the selection of the successful tenderer and, secondly, coordinating the opinions of the different supervisory authorities with a view to avoiding any divergence as to the legality of procedures and expenditure incurred.
- 38 However, it states that account must also be taken, as the Chamber of Audit has noted, of the independence and complementarity of the various supervisory authorities. Thus, in the event of an established infringement of the Law on public procurement constituting an irregularity, the managing authority imposes financial corrections solely on legal persons who are beneficiaries, whereas the Chamber of Audit may impose administrative penalties on the natural persons responsible. To that end, it may challenge the administrative criminal liability of contracting authorities or authorised persons designated by them.
- 39 In the third place, the referring court asks whether the administrative measures and penalties provided for in Title II of Regulation No 2988/95 must vary according to whether or not there is wrongful conduct and according to the degree of social danger. Since the nature and gravity of the infringement and its financial consequences for the EU budget are taken into account when determining financial corrections, by the authorities responsible for ensuring compliance with the Law on European Funds, the referring court seeks to ascertain whether those same circumstances must also be taken into account in the case where penalties are imposed for infringement of EU public procurement rules.
- 40 In the fourth place and finally, the referring court asks whether Article 247(1) of the Law on public procurement, under which the contracting authority may be subject to ‘a pecuniary penalty of 2% of the value of the contract, including VAT, but not exceeding BGN 10 000’, which is said to be equivalent to approximately 16 times the minimum wage, is consistent with the principles of legality, effectiveness and proportionality.
- 41 It was in that context that the Rayonen sad Lukovit (District Court, Lukovit) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Must Article 58(4) of Directive [2014/24] be interpreted as meaning that the requirements imposed by the selection criteria on the professional ability of the staff of economic operators in respect of a specialised contract in the construction sector may be stricter than the minimum requirements for training and professional qualifications laid down by the specific national law (Article 163a(4) of the [Law on spatial planning]) without being a priori

restrictive of competition, and, more specifically, does the prescribed condition of “proportionality” of the participation requirements imposed in relation to the subject matter of the contract (a) require the national court to carry out an assessment of proportionality on the basis of the evidence gathered and the specific parameters of the contract, even in cases where the national law defines a large number of professionals who are in principle qualified to carry out the activities under the contract, or (b) permit judicial review to be limited only to an examination of whether the participation requirements are too restrictive in relation to those provided for in principle in the specific national law?

- (2) Must the provisions of Title II “Administrative measures and penalties” of Regulation No 2988/95 be interpreted as meaning that the same infringement of the [Law on public procurement] transposing Directive [2014/24] (including the infringement in the determination of the selection criteria for which the complainant was penalised) may give rise to different legal consequences depending on whether the infringement was committed without fault or intentionally or was caused by negligence?
- (3) Do the principles of legal certainty and effectiveness, having regard to the objective of Article 8(3) of Regulation No 2988/95 and recitals 43 and 122 to Regulation No 1303/13, permit the various national authorities called on to protect the financial interests of the European Union to assess the same facts differently in the procurement procedure, in that, more specifically, the managing authority of the operational programme finds no infringement in the determination of the selection criteria, whereas the Chamber of Audit, upon subsequent control and without there being any special or new circumstances, finds that those criteria are restrictive of competition and imposes an administrative penalty on the contracting authority on account of that finding?
- (4) Does the principle of proportionality preclude a provision of national law, such as that in Article 247(1) of the Law on public procurement, which provides that a contracting authority which formally infringes the prohibition laid down in Article 2(2) of that law is to be punished by way of a pecuniary penalty of 2% of the value of the contract, including VAT, but not exceeding 10 000 leva (BGN), without it being necessary to establish the seriousness of the infringement and its actual or potential impact on the interests of the European Union?’

The questions referred for a preliminary ruling

The first question

- 42 As a preliminary point, it should be noted that the estimated value of the contract at issue in the main proceedings, amounting to BGN 482 668 excluding VAT (approximately EUR 247 000), is below the threshold for the applicability of Directive 2014/24, set at EUR 5 548 000 by Article 4(a) thereof with regard to public works contracts, and therefore that contract does not fall within the scope of that directive.
- 43 Nevertheless, as is clear from the Court’s settled case-law, where, in regulating situations outside the scope of the EU measure concerned, national legislation seeks to adopt, directly and unconditionally, the same solutions as those adopted in that measure, it is clearly in the interest of the European Union that provisions taken from that measure should be interpreted uniformly. That makes it possible to forestall future differences of interpretation and to ensure that those situations and situations falling within the scope of those provisions are treated in the same way

(see, to that effect, judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraphs 36 and 37; of 5 April 2017, *Borta*, C-298/15, EU:C:2017:266, paragraphs 33 and 34; and of 10 September 2020, *Tax-Fin-Lex*, C-367/19, EU:C:2020:685, paragraph 21).

- 44 In the present case, the Law on public procurement, which transposed Directive 2014/24 into Bulgarian law, applies more generally to all public procurement procedures subsidised by European funds, irrespective of the value of the contracts, as is clear from both Article 1(1) of that law and Article 49(2) of the Law on European funds.
- 45 Thus, since the provisions of Directive 2014/24 have been made directly and unconditionally applicable to situations which, like that of the contract at issue in the main proceedings, would normally fall outside its scope, the Court must answer the first question referred for a preliminary ruling.
- 46 By that question, the referring court asks, in essence, whether Article 58(4) of Directive 2014/24 must be interpreted as meaning that, in a public procurement procedure, a contracting authority may impose, as part of the selection criteria relating to the technical and professional ability of economic operators, requirements which are more stringent than the minimum requirements laid down by the national legislation in that regard.
- 47 It should be noted that the answer to that question clearly follows from the very wording of Article 58 of Directive 2014/24.
- 48 In accordance with the second subparagraph of Article 58(1) of that directive, a contracting authority may only impose criteria referred to in Article 58(2), (3) and (4) of that directive on economic operators as requirements for participation, relating respectively to the suitability to pursue the professional activity, economic and financial standing and technical and professional ability. Those requirements must, moreover, be limited to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. Furthermore, all of those requirements must be related and proportionate to the subject matter of the contract.
- 49 When determining the selection criteria, a contracting authority must also comply with the fundamental principles of procurement set out in Article 18(1) of Directive 2014/24. It must also, first, treat economic operators equally and without discrimination and act in a transparent and proportionate manner and, secondly, ensure that procurement is not designed with the intention of excluding it from the scope of that directive or of artificially narrowing competition, by designing it with the intention of unduly favouring or disadvantaging certain economic operators.
- 50 Nevertheless, as it is best placed to assess its own needs, the contracting authority has been granted a broad discretion by the EU legislature when determining selection criteria, as can be seen inter alia from the recurring use of the term ‘may’ in Article 58 of Directive 2014/24. Thus, in accordance with paragraph 1 of that article, it has some flexibility in setting those requirements for participation in a procurement procedure which it considers to be related and proportionate to the subject matter of the contract and appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. More specifically, according to paragraph 4 of that article,

the contracting authority is free to determine which requirements for participation it considers appropriate, from its point of view, to ensure inter alia the performance of the contract to a quality standard which it considers appropriate.

- 51 Therefore, where a qualification requirement is justified by the subject matter of the contract, it remains proportionate to it and also complies with the other conditions recalled in paragraphs 48 and 49 of this judgment, Article 58 of Directive 2014/24 cannot prevent a contracting authority from imposing that requirement in the contract notice on the sole ground that it exceeds the minimum level imposed by national legislation. To that end, it is for national courts to interpret, to the greatest extent possible, their national law in conformity with EU law (see, to that effect, judgments of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 57, and of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 70).
- 52 In the present case, the qualification requirement at issue in the main proceedings appears to be justified in the light of Article 58 of Directive 2014/24, which, however, is a matter for the referring court to establish. First, that requirement undoubtedly has a link with the subject matter of the contract at issue in the main proceedings. Secondly, that requirement does not appear to have exceeded the discretion enjoyed by the contracting authority when defining selection criteria, particularly since three tenders were submitted even though the estimated value of that contract was modest as it was not even 5% of the threshold for the applicability of Directive 2014/24.
- 53 In the light of the foregoing considerations, the answer to the first question referred for a preliminary ruling is that Article 58(1) and (4) of Directive 2014/24 must be interpreted as not precluding, in a public procurement procedure, a contracting authority from being able to impose, under the selection criteria relating to the technical and professional abilities of the economic operators, stricter requirements than the minimum requirements set by the national legislation, provided that such requirements are appropriate to ensure that a candidate or tenderer has the technical and professional abilities to perform the contract to be awarded, that they are related to the subject matter of the contract and that they are proportionate to it.

The second and fourth questions

- 54 By its second question, the referring court asks, in essence, whether Articles 4 and 5 of Regulation No 2988/95 must be interpreted as meaning that the imposition by a contracting authority of selection criteria which infringe Article 58 of Directive 2014/24 may have different consequences depending on whether the infringement was committed without fault or intentionally or was caused by negligence.
- 55 The fourth question seeks, in essence, to ascertain whether the principle of proportionality must be interpreted as precluding national legislation under which a contracting authority which infringes public procurement rules may be fined 2% of the value of the contract concluded, including VAT, but limited to BGN 10 000, thus approximately EUR 5 100, without it being necessary to establish the seriousness of the infringement and its actual or potential impact on the interests of the European Union.
- 56 It should be noted that the second and fourth questions are based on the premiss that the qualification requirement at issue in the main proceedings was set by the contracting authority in breach of Article 58 of Directive 2014/24.

- 57 In so far as it is clear from the answer to the first question that such a requirement appears to be compatible with that provision, there is no need for the Court to examine the second and fourth questions.

The third question

- 58 By its third question, the referring court asks, in essence, whether Article 8(3) of Regulation No 2988/95, read in conjunction with recitals 43 and 122 of Regulation No 1303/2013, must be interpreted as precluding national authorities protecting the financial interests of the European Union from assessing the same facts differently in a public procurement procedure.
- 59 It should be recalled that, in accordance with Article 8(3) of Regulation No 2988/95, the sectoral rules must include the provisions necessary to ensure equivalent checks through the approximation of procedures and checking methods.
- 60 Recital 43 of the sectoral regulation applicable in the main proceedings, namely Regulation No 1303/2013, states, *inter alia*, that, in the interests of ensuring proportionate control arrangements and of safeguarding the added value of financial instruments, intended final recipients should not be deterred by there being an excessive administrative burden. Recital 122 of that regulation specifies that, in order to reduce the administrative burden on beneficiaries, specific rules should be introduced to reduce the risk of overlap between audits of the same operations by various institutions, namely the European Court of Auditors, the Commission and the audit authority.
- 61 However, it is clear from the order for reference that the audit of the management of the municipality of Lukovit was carried out by the Chamber of Audit with a view to ensuring compliance with the Law on public procurement and not compliance with Regulation No 1303/2013, with the result that that audit and the penalty imposed on the basis of it do not fall within the scope of that regulation.
- 62 Moreover, as the Commission noted in its written observations, Regulation No 1303/2013 does not prevent Member States from establishing bodies responsible for monitoring and auditing the activities of public or private bodies and therefore the competence of such bodies is not governed by that regulation.
- 63 Accordingly, recitals 43 and 122 of that regulation do not affect the answer to the question referred for a preliminary ruling.
- 64 It therefore appears that no provision of Regulations No 2988/95 and No 1303/2013 precludes a public procurement procedure from being subject to two checks, one carried out by the managing authority and the other by the audit authority. Both the independence of each of those authorities and the different purposes assigned to them mean that they may monitor in turn the same public procurement procedure.
- 65 Furthermore, the fact that, in the present case, the managing authority of the operational programme ‘Environment 2014-2020’ considered that the qualification requirement at issue in the main proceedings was not contrary to the rules on public procurement cannot give rise to any legitimate expectation on the part of the contracting authority. The right to rely on the principle of the protection of legitimate expectations extends only to a person in a situation in which an administrative authority has caused that person to entertain expectations which are

justified by precise unconditional and consistent assurances provided to him or her and originating from authorised, reliable sources. Nevertheless, the concept that a State is to be viewed as a single entity, which prevails both in public international law and in EU law, precludes, in principle, a national authority from relying on the principle of EU law of legitimate expectations in the context of a dispute between that authority and another component of that State (judgment of 20 May 2021, *Riigi Tugiteenuste Keskus*, C-6/20, EU:C:2021:402, paragraphs 69 and 70).

- 66 Thus, the fact that the managing authority of the operational programme ‘Environment 2014-2020’ had already approved, albeit implicitly, the qualification requirement at issue in the main proceedings cannot be relied on by the contracting authority in order to prevent the Chamber of Audit from examining its compatibility with EU law.
- 67 It should be noted, however, first, that the joint intervention by a managing authority and an audit authority must respect the rights and principles guaranteed by the Charter of Fundamental Rights of the European Union, and in particular the principle of proportionality. In that regard, Article 8(2) of Regulation No 2988/95 provides, moreover, that measures providing for checks must be determined so as not to entail excessive economic constraints or administrative costs.
- 68 In the present case, subject to verification by the national court, there is nothing to suggest that the recipients of EU funds would be deterred in the territory of the Republic of Bulgaria from applying for such funds on account of there being an excessive administrative burden.
- 69 Secondly, the *ex post* checks carried out by a managing authority and an audit authority cannot affect the legality of an award decision which has become final as regards the contract participants and the contracting authority, since the assessments made in that regard by the contracting authority fall within the scope of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).
- 70 It follows from the foregoing considerations that Article 8(3) of Regulation No 2988/95, read in conjunction with Regulation No 1303/2013, must be interpreted as meaning that, subject to the principle of proportionality, it does not preclude national authorities protecting the financial interests of the European Union from assessing the same facts in a public procurement procedure differently.

Costs

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

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

- 1. Article 58(1) and (4) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017, must be interpreted as not precluding, in a public procurement**

procedure, a contracting authority from being able to impose, under the selection criteria relating to the technical and professional abilities of the economic operators, stricter requirements than the minimum requirements set by the national legislation, provided that such requirements are appropriate to ensure that a candidate or tenderer has the technical and professional abilities to perform the contract to be awarded, that they are related to the subject matter of the contract and that they are proportionate to it.

- 2. Article 8(3) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, read in conjunction with Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, must be interpreted as meaning that, subject to the principle of proportionality, it does not preclude national authorities protecting the financial interests of the European Union from assessing the same facts in a public procurement procedure differently.**

[Signatures]