



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

17 June 2021*

(Reference for a preliminary ruling – Public procurement – Framework agreement – Directive 2014/24/EU – Article 5(5) – Article 18(1) – Articles 33 and 49 – Points 7, 8 and 10 of Part C of Annex V – Implementing Regulation (EU) 2015/1986 – Annex II, fields II.1.5 and II.2.6 – Procurement procedures – Obligation to state, in the contract notice or the tender specifications, first, the estimated quantity or the estimated value and, second, the maximum quantity or the maximum value of the supplies under a framework agreement – Principles of transparency and equal treatment – Directive 89/665/EEC – Article 2d(1) – Procedures for review of the award of public contracts – Ineffectiveness of the contract – Exception)

In Case C-23/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Klagenævnet for Udbud (Public Procurement Complaints Board, Denmark), made by decision of 16 January 2020, received at the Court on 17 January 2020, in the proceedings

Simonsen & Weel A/S

v

Region Nordjylland og Region Syddanmark,

intervener:

Nutricia A/S,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra, D. Šváby (Rapporteur), S. Rodin and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Danish.

after considering the observations submitted on behalf of:

- Simonsen & Weel A/S, by S. Troels Poulsen, advokat,
- the Region Nordjylland og Region Syddanmark, by T. Braad and H. Padkjær Sørensen, advokater,
- the Danish Government, by J. Nymann-Lindegren, M. Jespersen and M. Wolff, acting as Agents,
- the Belgian Government, by L. Van den Broeck and J.-C. Halleux, acting as Agents,
- the German Government, by J. Möller, R. Kanitz and S. Eisenberg, acting as Agents,
- the Estonian Government, by N. Grünberg, acting as Agent,
- the French Government, by C. Mosser and E. de Moustier, acting as Agents,
- the Austrian Government, by A. Posch and J. Schmoll, acting as Agents,
- the European Commission, by P. Ondrůšek, H. Støvlbæk and L. Haasbeek, acting as Agents,

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

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 18(1) and Articles 33 and 49 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 well as point 7 and point 10(a) of Part C of Annex V to that directive, and of Article 2d(1)(a) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) ('Directive 92/13').
- 2 The request has been made in proceedings between Simonsen & Weel A/S and both the Region Nordjylland (Region of North Jutland, Denmark) and the Region Syddanmark (Region of Southern Denmark) (together, 'the Regions') concerning the Regions' decision to conclude a framework agreement with Nutricia A/S.

Legal context

European Union law

Directive 2014/24

3 Recitals 59 to 62 of Directive 2014/24 state:

‘(59) There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for SMEs.

(60) The instrument of framework agreements has been widely used and is considered as an efficient procurement technique throughout Europe. It should therefore be maintained largely as it is. However, certain aspects need to be clarified, in particular that framework agreements should not be used by contracting authorities which are not identified in them. For that purpose, the contracting authorities that are parties to a specific framework agreement from the outset should be clearly indicated, either by name or by other means, such as a reference to a given category of contracting authorities within a clearly delimited geographical area, so that the contracting authorities concerned can be easily and unequivocally identified. Likewise, a framework agreement should not be open to entry of new economic operators once it has been concluded. ...

(61) ...

Contracting authorities should be given additional flexibility when procuring under framework agreements, which are concluded with more than one economic operator and which set out all the terms.

... Framework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition. Contracting authorities should not be obliged pursuant to this Directive to procure works, supplies or services that are covered by a framework agreement, under that framework agreement.

(62) It should also be clarified that, while contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement itself, the duration of the individual contracts based on a framework agreement does not need to coincide with the duration of that framework agreement, but might, as appropriate, be shorter or longer. ...

It should also be clarified that there might be exceptional cases in which the length of the framework agreements themselves should be allowed to be longer than four years. Such cases, which should be duly justified, in particular by the subject of the framework agreement, might for instance arise where economic operators need to dispose of equipment the amortisation period of which is longer than four years and which must be available at any time over the entire duration of the framework agreement.’

- 4 Article 5 of that directive, which is entitled ‘Methods for calculating the estimated value of procurement’, provides, in paragraph 5 thereof:

‘With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of [value added tax (VAT)] of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.’

- 5 Article 18 of the directive, which sets out the ‘principles of procurement’, provides, in the first subparagraph of paragraph 1 thereof:

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

- 6 Under the heading ‘Framework agreements’, Article 33 of Directive 2014/24 provides:

‘1. Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.

A framework agreement means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

The term of a framework agreement shall not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

2. Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this paragraph and in paragraphs 3 and 4.

...

Contracts based on a framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

...’

- 7 Under Article 49 of that directive, which is entitled ‘Contract notices’:

‘Contract notices shall be used as a means of calling for competition in respect of all procedures, without prejudice to the second subparagraph of Article 26(5) and Article 32. Contract notices shall contain the information set out in Annex V part C and shall be published in accordance with Article 51.’

- 8 Article 53 of the directive, which is entitled ‘Electronic availability of procurement documents’, provides, in the first subparagraph of paragraph 1 thereof:

‘Contracting authorities shall by electronic means offer unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice in accordance with Article 51 or the date on which an invitation to confirm interest was sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which the procurement documents are accessible.’

- 9 Under the heading ‘Modification of contracts during their term’, Article 72 of Directive 2014/24 provides:

‘1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:

...

- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

Contracting authorities having modified a contract in the cases set out under points (b) and (c) of this paragraph shall publish a notice to that effect in the *Official Journal of the European Union*. Such notice shall contain the information set out in Annex V part G and shall be published in accordance with Article 51.

...

4. A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

- (a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
- (b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- (c) the modification extends the scope of the contract of framework agreement considerably;
- (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1.

5. A new procurement procedure in accordance with this Directive shall be required for other modifications of the provisions of a public contract or a framework agreement during its term than those provided for under paragraphs 1 and 2.’

10 Article 91 of that directive provides:

‘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)] is repealed with effect from 18 April 2016.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex XV.’

11 Annex V to the directive identifies the ‘information to be included in notices’. Part B of that annex sets out the ‘information to be included in prior information notices (as referred to in Article 48)’. Title II of that part lists the ‘additional information to be supplied where the notice is used as a means of calling for competition (Article 48(2))’.

12 That information includes the information mentioned in point 7 of that title, which reads as follows:

‘As far as already known, estimated total magnitude for contract(s); where the contract is divided into lots, this information shall be provided for each lot.’

13 Part C of Annex V lists as ‘information to be included in contract notices (as referred to in Article 49)’:

‘...

2. Email or internet address at which the procurement documents will be available for unrestricted and full direct access, free of charge.

...

...

5. CPV codes; where the contract is divided into lots, this information shall be provided for each lot.

...

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

8. Estimated total order of magnitude of contract(s); where the contract is divided into lots, this information shall be provided for each lot.

...

10. Time-frame for delivery or provision of supplies, works or services and, as far as possible, duration of the contract.

- (a) In the case of a framework agreement, indication of the planned duration of the framework agreement, stating, where appropriate, the reasons for any duration exceeding four years; as far as possible, indication of value or order of magnitude and frequency of contracts to be awarded, number and, where appropriate, proposed maximum number of economic operators to participate.

...

...'

Implementing Regulation (EU) 2015/1986

- 14 Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No 842/2011 (OJ 2015 L 296, p. 1) includes, in Annex II thereto, a standard form which sets out the different fields which, depending on the circumstances, a contracting authority or a contracting entity may or must complete.
- 15 Section II of that form, which is entitled 'Object' of the procurement, distinguishes between the 'scope of the procurement' and its 'description'.
- 16 The fields relating to the scope of the procurement include field II.1.5, which is entitled 'Estimated total value'. That field refers to footnote No 2 of the form, which simply states 'if applicable'. In that field, the contracting authority or contracting entity must indicate the value excluding VAT of the procurement and the currency used in that regard, it being specified that 'for framework agreements or dynamic purchasing systems – [this means the] estimated total maximum value for the entire duration of the framework agreement or dynamic purchasing system'.
- 17 The fields relating to the description of the procurement include field II.2.1, which is to be used to state the 'title' of the procurement. That field includes a subdivision entitled 'Lot No', which likewise refers to footnote No 2 that reads 'if applicable'.
- 18 Field II.2.6, which is entitled 'Estimated value', states that the contracting authority or contracting entity must indicate the value excluding VAT of the procurement and the currency used in that regard, and explains that 'for framework agreements or dynamic purchasing systems – [this means the] estimated total maximum value for the entire duration of this lot'.

Directive 89/665/EEC

- 19 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), as amended by Directive 2014/23 ('Directive 89/665'), applies to the facts at issue in the main proceedings because the date of transposition of the latter directive expired on 18 April 2016.

20 The initial version of Directive 89/665 was previously amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31). Recitals 13, 14 and 17 of Directive 2007/66 state:

‘(13) In order to combat the illegal direct award of contracts, which the Court of Justice has called the most serious breach of [EU] law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.

(14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete. Direct awards within the meaning of this Directive should include all contract awards made without prior publication of a contract notice in the *Official Journal of the European Union* within the meaning of Directive 2004/18/EC. This corresponds to a procedure without prior call for competition within the meaning of Directive 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1)].

...

(17) A review procedure should be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.’

21 Article 1 of Directive 89/665, which is entitled ‘Scope and availability of review procedures’, provides, in paragraph 1 thereof:

‘This Directive applies to contracts referred to in Directive [2014/24] unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

...

Contracts within the meaning of this Directive include public contracts, framework agreements, works and services concessions and dynamic purchasing systems.

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2014/24] or Directive [2014/23], decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.’

- 22 Under the heading ‘Ineffectiveness’, Article 2d of Directive 89/665 provides, in paragraph 1 thereof:

‘Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

- (a) if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2014/24/EU or Directive 2014/23/EU;

...’

Directive 92/13

- 23 Article 1 of Directive 92/13, which is entitled ‘Scope and availability of review procedures’, provides, in the first and second subparagraphs of paragraph 1 thereof:

‘This Directive applies to the contracts referred to in Directive 2014/25/EU of the European Parliament and of the Council [of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243)] unless such contracts are excluded in accordance with Articles 18 to 24, 27 to 30, 34 or 55 of that Directive.

Contracts within the meaning of this Directive include supply, works and service contracts, works and services concessions, framework agreements and dynamic purchasing systems.’

- 24 The wording of Article 2d(1)(a) of Directive 92/13 is identical to that of Article 2d(1)(a) of Directive 89/665.

Danish law

Law on public procurement

- 25 The Udbudsloven, lov nr. 1564 (Law No 1564 on public procurement), of 15 December 2015, in the version applicable to the facts of the case in the main proceedings (‘the Law on public procurement’), which transposes Directive 2014/24 into Danish law, includes a Title I, entitled ‘General provisions’, which contains Paragraphs 1 to 38 of that law.

- 26 Paragraph 2 of the law, which is entitled ‘General principles’, provides, in subparagraph 1 thereof:

‘In relation to the public contracts referred to in Titles II to IV, the contracting authority shall comply with the principles of equal treatment, transparency and proportionality.’

- 27 Paragraph 24 of the same law contains inter alia the following definitions:

‘...’

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

...

(30) “framework agreement” means an agreement between one or more contracting authorities and one or more economic operators which establishes the terms governing contracts awarded during a given period, in particular with regard to price and the quantity envisaged.’

28 Title II of the Law on public procurement, which relates to ‘public contracts of a value greater than the threshold’, consists of Paragraphs 39 to 185 of that law.

29 Paragraph 56 of that law provides:

‘In an open procedure, any economic operator may submit a tender in response to a contract notice. The contract notice shall contain the information provided for in Part C of Annex V to Directive [2014/24]. The contracting authority shall use the standard form referred to in Paragraph 128(3) of this Law.’

30 Under Paragraph 128 of the law:

‘1. A contracting authority shall use the contract notices as a means of calling for competition in respect of all procedures, with the exception of the negotiated procedure without prior notice ...

2. The contract notices shall contain the information provided for in Part C of Annex V to Directive [2014/24] ...

3. The contract notice shall be drawn up on the basis of the standard forms established by the European Commission, transmitted electronically to the Publications Office of the European Union and published in accordance with Annex VIII to Directive [2014/24] ...

...’

Law on the Public Procurement Complaints Board

31 The Lov om Klagenævnet for udbud, lovbekendtgørelse nr. 593 (Law on the Public Procurement Complaints Board, Codification Decree No 593) of 2 June 2016, which implements Directive 92/13, provides, in Paragraph 17(1)(1) thereof:

‘A contract falling within the scope of Title II or III of the Law on public procurement or that of Directive [2014/25] shall be considered ineffective if:

(1) in breach of the Law on public procurement or of the EU rules on procurement, the contracting authority has concluded a contract without prior publication of a notice in the *Official Journal of the European Union*, subject, however, to the provisions of Paragraph 4,

...’

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

- 32 By a contract notice of 30 April 2019, the Regions initiated an open public procurement procedure within the meaning of Directive 2014/24 with a view to concluding a four-year framework agreement between the Region of North Jutland and a single economic operator for the purchase of probe kits for patients receiving home care and for institutions.
- 33 The contract notice stated that the Region of Southern Denmark would participate merely ‘by option’ and that the candidates were required to tender for ‘all items in the contract’.
- 34 Furthermore, that notice did not contain information about the estimated value of the contract under the framework agreement for the Region of North Jutland or of the option for the Region of Southern Denmark, or information about the maximum value of the framework agreements or about the estimated or maximum quantity of the products to be purchased under the framework agreements.
- 35 As is clear from Annex 3 to the notice, ‘indicated estimates and expected quantities to be consumed merely reflect the contracting authority’s expectations regarding the consumption of the services covered by the contract. The contracting authority does not therefore undertake to buy a specific quantity of service or to make purchases in a particular amount under the framework agreement. In other words, the actual consumption may prove to be higher or lower than the estimates indicate’. Nor was the framework agreement to be regarded as being exclusive, such that the contracting authority could acquire similar products from other suppliers whilst complying with the rules governing public contracts.
- 36 By decision of 9 August 2019, the Regions found that Nutricia’s tender was the most advantageous and declared that that company had been awarded the contract. On 19 August 2019, Simonsen & Weel lodged a complaint with the Klagenævnet for Udbud (Public Procurement Complaints Board, Denmark) seeking the annulment of that decision.
- 37 Since that court did not grant that complaint suspensive effect, the Region of North Jutland concluded a framework agreement with the successful tenderer. For its part, the Region of Southern Denmark did not exercise the option available to it.
- 38 In support of its complaint, Simonsen & Weel submits, in the first place, that, by failing to indicate in the contract notice the estimated quantity or estimated value of the supplies under the framework agreement at issue in the main proceedings, the Regions infringed Article 49 of Directive 2014/24, the principles of equal treatment and transparency enshrined in Article 18(1) of that directive and point 7 of Part C of Annex V to the directive.
- 39 In the second place, the Regions are required to indicate the maximum quantity of the products that can be acquired under the framework agreement or the total maximum value of that framework agreement, failing which they could divide that framework agreement up artificially throughout its duration, contrary to the case-law established in the judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034).
- 40 With regard to the failure to indicate the estimated quantity or estimated value, the Regions contend, inter alia, that the obligation to indicate a specific extent or a specific value in the contract notice does not apply in relation to framework agreements. In their view, it follows from

the very wording of Article 33(1) of Directive 2014/24 that the estimated quantities envisaged can be stated ‘where appropriate’, thus meaning that such an indication remains optional for the contracting authority.

- 41 As for the failure to indicate the maximum quantity of the products that can be acquired under the framework agreement or the total maximum value of that framework agreement, the Regions argue that the solution adopted in the judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034), is limited to those situations in which a contracting authority is acting on behalf of other contracting authorities who are not directly parties to the framework agreement, which was not the case here. In addition, it follows from that judgment that the principles of transparency and equal treatment are observed where the total quantity of the services is indicated in the framework agreement itself or in another contractual document.
- 42 Moreover, in the case of calls for tenders relating to a framework agreement, the question of whether it is also carried out on behalf of other contracting authorities is decisive, as also follows from recitals 59 to 62 of Directive 2014/24. The requirement to indicate a maximum volume or a maximum value, which is mentioned in paragraph 61 of the judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034), cannot be extended to circumstances that are not comparable to that at issue in that case. In the present case, the Regions contend that they put out for tender a non-exclusive, non-synallagmatic framework agreement, and that they were unaware at the time of the call for tenders of the extent of the specific purchasing requirements or the price level for the ‘individual contracts’. Accordingly, they were unable to provide a reliable estimate of the value of the framework agreement.
- 43 The Klagenævnet for Udbud (Public Procurement Complaints Board) therefore asks about the possibility of applying by analogy the solution adopted in the judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034), to the dispute in the main proceedings, given the particular nature of the circumstances of the case that gave rise to that judgment and the fact that Directive 2014/24 contains, in relation to framework agreements, some – admittedly minor – amendments as compared with the wording of Directive 2004/18, which was applicable to that case. Its doubts relate in particular to whether a maximum limit should specify both the maximum quantities and maximum values of the products that may be purchased under the framework agreement and whether such a maximum should, where appropriate, be determined ‘from the start’, that is to say in the contract notice – in which case it would therefore be identical to the estimated value – and/or in the tender specifications, or whether it is sufficient for a maximum to be determined for the first time in the framework agreement itself, that is to say on completion of the competitive tendering procedure. Lastly, if that maximum limit was not duly stated by the contracting authority, the referring court asks whether, pursuant to Article 2d of Directive 92/13, the framework agreement concluded on that basis must be treated in the same way as the situation in which a contract notice was not published and, therefore, be regarded as being ineffective.

44 It is in that context that the Klagenævnet for Udbud (Public Procurement Complaints Board) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘(1) (a) Are the principles of equal treatment and transparency laid down in Article 18(1) of [Directive 2014/24] and Article 49 of [that directive], in conjunction with points 7 and 10(a) of Part C of Annex V [thereto], to be interpreted as meaning that the contract notice in a case such as the present must contain information on the estimated quantity and/or the estimated value of the supplies under the framework contract to which the tender relates?
- (b) If the answer to this question is in the affirmative, the Court is also asked whether the above provisions are to be interpreted as meaning that the information must be stated in respect of the framework contract (a) as a whole and/or (b) in respect of the original contracting authority which stated its intention to conclude an agreement on the basis of the invitation to tender (in the present case: Region of North Jutland) and/or (c) in respect of the original contracting authority which merely stated that it is participating in an option (in the present case: Region of Southern Denmark).
- (2) (a) Are the principles of equal treatment and transparency laid down in Article 18(1) of [Directive 2014/24] and Articles 33 and 49 of [Directive 2014/24], in conjunction with points 7 and 10(a) of Part C of Annex V to Directive 2014/24, to be interpreted as meaning that either the contract notice or the tender specifications must set a maximum quantity and/or a maximum value of the supplies under the framework contract to which the tender relates, such that the framework contract in question will no longer have any effect when that limit is reached?
- (b) If the answer to this question is in the affirmative, the Court is also asked whether the above provisions are to be interpreted as meaning that the above maximum limit must be indicated in respect of the framework contract (a) as a whole and/or (b) in respect of the original contracting authority which stated its intention to conclude an agreement on the basis of the invitation to tender (in the present case: Region of North Jutland) and/or (c) in respect of the original contracting authority which merely stated that it is participating in one option (in the present case: Region of Southern Denmark).
- (3) If the answer to Question 1 and/or Question 2 is in the affirmative, the Court is further asked – in so far as it is relevant to the content of those answers – to answer the following question:
- Is Article 2d(1)(a) of [Directive 92/13], read in conjunction with Articles 33 and 49 of [Directive 2014/24], in conjunction with points 7 and 10(a) of Part C of Annex V to Directive 2014/24, to be interpreted as meaning that the condition that “the contracting entity has awarded a contract without prior publication of a notice in the *Official Journal of the European Union*” covers a case such as the present where the contracting authority has published a contract notice in the *Official Journal of the European Union* concerning the envisaged framework contract, but
- (a) where the contract notice does not meet the requirement to indicate the estimated quantity and/or the estimated value of the supplies under the framework contract to which the tender relates since an estimate thereof is set out in the tender specifications, and

- (b) where the contracting authority has breached the requirement to set in the contract notice or the tender specifications a maximum quantity and/or a maximum value of the supplies under the framework contract to which the call for tenders relates?’

Consideration of the questions referred

Part (a) of the first question and part (a) of the second question

- 45 By part (a) of its first question and part (a) of its second question, the referring court asks, in essence, whether Article 49 of Directive 2014/24 and points 7, 8 and 10(a) of Part C of Annex V to that directive, read in conjunction with Article 33 of the directive and the principles of equal treatment and transparency laid down in Article 18(1) thereof, are to be interpreted as meaning that the contract notice must state the estimated quantity and/or the estimated value as well as a maximum quantity and/or a maximum value of the supplies under a framework agreement and that that agreement will no longer have any effect once that limit is reached.
- 46 It must be recalled that, pursuant to the second subparagraph of Article 33(1) of Directive 2014/42, a framework agreement is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged. The first subparagraph of that paragraph provides that contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in the directive.
- 47 Article 49 of Directive 2014/24 provides that contract notices are to be used as a means of calling for competition in respect of all procedures, without prejudice to the second subparagraph of Article 26(5) and Article 32 of that directive. They are to contain the information set out in Part C of Annex V to the directive and are to be published in accordance with Article 51 of the directive.
- 48 It follows that Article 49 of Directive 2014/24 and, therefore, Part C of Annex V thereto apply to framework agreements.
- 49 In that regard, certain provisions of Directive 2014/24, taken in isolation, may suggest that the contracting authority has some discretion as to expediency of indicating, in the contract notice, a maximum value of the supplies under a framework agreement.
- 50 Point 8 of Part C of Annex V to Directive 2014/24 provides that, in terms of the information to be included in contract notices, the contracting authority must state the estimated total order of magnitude of the contract(s), and that information is to be provided for each lot where the contract is divided into lots. The reference merely to an ‘order of magnitude’ rather than to a specifically defined value suggests that the valuation required of the contracting authority may be approximate.
- 51 Point 10 of that Part C, which relates to information concerning the timeframe for delivery or provision of supplies, works or services and, as far as possible, the duration of the contract, provides in point (a) thereof, which is specifically devoted to frameworks agreements, that the contracting authority must indicate, as far as possible, the value or the order of magnitude and

the frequency of the contracts to be awarded. It therefore follows that, in accordance with that provision, the contracting authority is not required in all circumstances to indicate the value or the order of magnitude and the frequency of the contracts to be awarded.

- 52 Similarly, the second subparagraph of Article 33(1) of Directive 2014/24 provides that the purpose of a framework agreement is to establish, 'where appropriate', the quantity envisaged. By using the words 'where appropriate', that provision makes clear, specifically in relation to the quantity of the supplies, that that quantity must, in so far as possible, be established in a framework agreement. It is likewise apparent from the standard form contained in Annex II to Implementing Regulation 2015/1986 that the contracting authority is not required to complete field II.1.5, which is entitled 'Estimated total value'; that value can be specified 'if applicable', as is clear from the reference made in that field to footnote No 2 of that form.
- 53 It follows from the foregoing that a literal interpretation alone of those provisions is not conclusive for the purpose of determining whether a contract notice must indicate the estimated quantity and/or estimated value as well as a maximum quantity and/or maximum value of the supplies under a framework agreement.
- 54 However, in the light of the principles of equal treatment and transparency laid down in Article 18(1) of Directive 2014/24 and of the general scheme of that directive, a failure by the contracting authority to indicate, in the contract notice, a maximum value of the supplies under a framework agreement cannot be accepted.
- 55 Indeed, it follows from other provisions of Directive 2014/24 that the contracting authority must determine the content of the framework agreement that it intends to conclude.
- 56 First, Article 5 of that directive, which concerns the methods for calculating the estimated value of procurement, provides, in paragraph 5 thereof, that, with regard to framework agreements, the value to be taken into consideration is to be the maximum estimated value net of VAT of all the public contracts envisaged for the total term of the framework agreement.
- 57 Since the contracting authority is called upon to assess the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement, it is able to communicate that value to the tenderers.
- 58 Furthermore, the Court relied inter alia on Article 9(9) of Directive 2004/18, the wording of which is identical to that of Article 5(5) of Directive 2014/24, to find, in paragraph 60 of the judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice* (C-216/17, EU:C:2018:1034), that, although the contracting authority that is an original party to the framework agreement is subject only to a requirement to use best endeavours with regard to the value and frequency of each of the subsequent contracts to be awarded, it is nevertheless imperative that that authority state vis-à-vis the framework agreement itself the total quantity, and therefore the maximum quantity and/or maximum value, which the subsequent contracts may comprise.
- 59 Second, pursuant to point 7 of Part C of Annex V to Directive 2014/24, the contracting authority must, in respect of the information to be included in contract notices, describe the procurement and, in that regard, state the quantity or the value of the supplies which will be covered by the framework agreement in its entirety. It cannot comply with that requirement without indicating, at the very least, a maximum quantity and/or a maximum value of such supplies.

- 60 Furthermore, when a contracting authority is required to complete the form contained in Annex II to Implementing Regulation 2015/1986, it is required to indicate, in field II.2.6 of that form, which concerns the estimated value, the total maximum value for the entire duration of each of the lots.
- 61 Moreover, it is important to note that the fundamental principles of EU law, such as equal treatment and transparency, are applicable to the conclusion of a framework agreement; this follows from the first subparagraph of Article 33(1) of Directive 2014/24. Not only the principles of equal treatment and non-discrimination, but also the principle of transparency that stems from them imply that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question (see, to that effect, judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraph 63).
- 62 The principles of transparency and equal treatment of economic operators with an interest in the conclusion of a framework agreement, as established, inter alia, by Article 18(1) of Directive 2014/24, would be affected if the contracting authority that is an original party to the framework agreement did not set out the maximum quantity which such an agreement covers (see, to that effect, judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraph 64).
- 63 In that connection, the indication by the contracting authority of the estimated quantity and/or the estimated value as well as of a maximum quantity and/or a maximum value of the supplies under a framework agreement is of considerable importance for a tenderer, since it is on the basis of that estimate that he or she will be able to assess his or her ability to perform the obligations arising from that framework agreement.
- 64 Furthermore, if the maximum estimated value or quantity which such an agreement covers were not indicated or if that indication were not legally binding, the contracting authority could flout that maximum quantity. As a result, the successful tenderer could be held contractually liable for non-performance of the framework agreement if he or she were to fail to supply the quantities requested by the contracting authority, even though those quantities exceed the maximum quantity in the contract notice. Such a situation would be contrary to the principle of transparency as laid down in Article 18(1) of Directive 2014/24.
- 65 In addition, the principle of transparency could be infringed over the long term since, as follows from the third subparagraph of Article 33(1) of that directive, a framework agreement can be concluded for a term of up to four years, or even longer in duly justified exceptional cases, in particular by the subject of the framework agreement. Moreover, as is stated in recital 62 of the directive, while contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement, the duration of the individual contracts based on a framework agreement does not need to coincide with the duration of that framework agreement, but might sometimes be shorter or longer.
- 66 Lastly, a broad interpretation of the obligation to define the maximum estimated value or quantity covered by the framework agreement could also, first, render redundant the rule laid down in the third subparagraph of Article 33(2) of Directive 2014/24, under which contracts based on a

framework agreement may under no circumstances entail substantial modifications to the terms laid down in that framework agreement, and, second, constitute improper use or use intended to prevent, restrict or distort competition, as referred to in recital 61 of the directive.

- 67 It follows that the requirement that the contracting authority that is an original party to the framework agreement indicate therein the maximum quantity or the maximum value of the services that that agreement will cover is a manifestation of the prohibition on using framework agreements improperly or in such a way as to prevent, restrict or distort competition (see, to that effect, judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraph 69).
- 68 It follows from the foregoing considerations that the contracting authority that is an original party to the framework agreement can make commitments on its own behalf or on behalf of the potential contracting authorities that are specifically indicated in the agreement only up to a maximum quantity and/or a maximum value and once that limit has been reached the agreement will no longer have any effect (see, by analogy, judgment of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraph 61).
- 69 However, two further clarifications must be made.
- 70 First, in accordance with the third subparagraph of Article 33(2) and Article 72 of Directive 2014/24, modifications to a framework agreement that are not substantial are allowed, it being understood that, by definition, such a modification is consensual in nature and, accordingly, the agreement of the successful tenderer is required.
- 71 Second, the indication of the maximum quantity or the maximum value of the supplies under a framework agreement can appear in either the contract notice or the tender specifications, since, in the case of a framework agreement, the contracting authorities are required to offer, pursuant to Article 53(1) of Directive 2014/24, by electronic means unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice in accordance with Article 51 of that directive.
- 72 Compliance with the principles of transparency and equal treatment laid down in Article 18(1) of Directive 2014/24 can thus be ensured if those conditions are met.
- 73 However, those principles would not be satisfied if an economic operator wanting to access those tender specifications in order to assess the expediency of tendering were required to express, in advance, any interest whatsoever to the contracting authority.
- 74 In those circumstances, part (a) of the first question and part (a) of the second question must be answered to the effect that Article 49 of Directive 2014/24 and points 7, 8 and 10(a) of Part C of Annex V to that directive, read in conjunction with Article 33 of the directive and the principles of equal treatment and transparency laid down in Article 18(1) thereof, are to be interpreted as meaning that the contract notice must indicate the estimated quantity and/or the estimated value as well as a maximum quantity and/or a maximum value of the supplies under a framework agreement and that that agreement will no longer have any effect once that limit is reached.

Part (b) of the first question and part (b) of the second question

- 75 By part (b) of its first question and part (b) of its second question, the referring court asks, in essence, whether Article 49 of Directive 2014/24 and points 7 and 10(a) of Part C of Annex V to that directive, read in conjunction with Article 33 of the directive and the principles of equal treatment and transparency laid down in Article 18(1) thereof, are to be interpreted as meaning that the estimated quantity or the estimated value of the supplies under a framework agreement as well as the maximum quantity or the maximum value of those supplies must be indicated in the contract notice as a whole.
- 76 Since, as is clear from the answer given to part (a) of the first question and part (a) of the second question, the contract notice must indicate the estimated quantity and/or estimated value as well as a maximum quantity and/or maximum value of the supplies under a framework agreement, the principles of transparency and equal treatment laid down in Article 18(1) of Directive 2014/24 preclude a contracting authority from communicating only partial information about the subject and the extent, in quantitative and/or financial terms, of a framework agreement.
- 77 That indication could appear as a whole in the contract notice, since such an indication would be sufficient to ensure compliance with the principles of transparency and equal treatment laid down in Article 18(1) of that directive.
- 78 However, nothing precludes a contracting authority, with a view to refining the information provided to tenderers and to enable them best to assess the expediency of submitting a tender, from laying down additional requirements and dividing the total estimated quantity or value of the supplies under the framework agreement in order to define the requirements of the contracting authority that is an original party which intends to conclude a framework agreement and those of the contracting authority or authorities that is/are an original party which has/have expressed the desire to participate in that framework agreement on an optional basis.
- 79 Similarly, a contracting authority can present separately, in the contract notice, the estimated quantity and/or the estimated value as well as a maximum quantity and/or a maximum value of the supplies under a framework agreement for each of the contracting authorities, whether they intend to conclude the framework agreement or have an option to do so. That could be the case in particular where, in the light of the terms governing the performance of the subsequent public contracts, the economic operators are invited to tender for all the lots or for all the items referred to in the contract notice, or even where the subsequent contracts are to be performed in remote locations.
- 80 Part (b) of the first question and part (b) of the second question must therefore be answered to the effect that Article 49 of Directive 2014/24 and points 7 and 10(a) of Part C of Annex V to that directive, read in conjunction with Article 33 of the directive and the principles of equal treatment and transparency laid down in Article 18(1) thereof, are to be interpreted as meaning that the contract notice must indicate the estimated quantity and/or the estimated value and a maximum quantity and/or a maximum value of the supplies under a framework agreement as a whole and that that notice may lay down additional requirements which the contracting authority decides to add thereto.

The third question

- 81 As a preliminary point, it must be recalled that the fact that the referring court has worded a question referred for a preliminary ruling with reference only to certain provisions of EU law does not preclude the Court from providing to the referring court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (see, inter alia, judgments of 27 October 2009, *ČEZ*, C-115/08, EU:C:2009:660, paragraph 81; of 22 March 2012, *Nilas and Others*, C-248/11, EU:C:2012:166, paragraph 31; and of 20 December 2017, *Impresa di Costruzioni Ing. E. Mantovani and Guerrato*, C-178/16, EU:C:2017:1000, paragraph 28).
- 82 In the present case, Directive 92/13, the interpretation of a provision of which is sought by the referring court, concerns the rules on the procurement procedures of entities operating in the water, energy, transport and postal services sectors. However, such services are not at issue in the case in the main proceedings, which concerns reviews relating to contract award procedures based on Directive 2014/24 that are governed by Directive 89/665, Article 2d(1)(a) of which is worded in similar terms to the corresponding provision of Directive 92/13.
- 83 In those circumstances, the view must be taken that, by its third question, the referring court is essentially asking whether Article 2d(1)(a) of Directive 89/665 is to be interpreted as meaning that it is applicable where a contract notice has been published in the *Official Journal of the European Union*, even though, first, the estimated quantity and/or the estimated value of the supplies under the envisaged framework agreement is stated not in that contract notice but in the tender specifications and, second, neither that contract notice nor those tender specifications mention a maximum quantity and/or a maximum value of the supplies under that framework agreement.
- 84 Under Article 2d(1) of Directive 89/665, if a contract notice is not published beforehand in the *Official Journal of the European Union* without this being permissible in accordance with Directive 2014/24, the contract or, as in the present case, the framework agreement concerned is ineffective.
- 85 Article 2d was inserted into the initial version of Directive 89/665 by Directive 2007/66. The EU legislature explained the amendments made by stating in recital 13 of Directive 2007/66 that, in order to combat the illegal direct award of contracts – which the Court in its judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraphs 36 and 37), called the most serious breach of EU law in the field of public procurement on the part of a contracting authority or contracting entity – there should be provision for effective, proportionate and dissuasive sanctions and, on that basis, a contract resulting from an illegal direct award should in principle be considered ineffective. In recital 14 of that directive, the EU legislature clarified that ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete, and that direct awards within the meaning of that directive should include all contract awards made without prior publication of a contract notice in the *Official Journal of the European Union* within the meaning of Directive 2004/18.

- 86 It thus follows from Article 2d(1)(a) of Directive 89/665, read in the light of recitals 13 and 14 of Directive 2007/66, that, when Directive 2007/66 was adopted, the EU legislature intended to introduce into the applicable law a serious penalty, the application of which should however be confined to the most serious cases of infringements of EU law on public procurement, namely those in which a contract is awarded directly without having been the subject of any prior publication of a contract notice in the *Official Journal of the European Union*.
- 87 It follows that it would be disproportionate to extend the application of that provision to a situation such as that at issue in the main proceedings, in which the Regions published a contract notice and made the tender specifications accessible without mentioning, in that notice or those tender specifications, the estimated quantity and/or estimated value and the maximum quantity and/or maximum value of the supplies under that framework agreement.
- 88 In such a situation, the infringement of Article 49 of Directive 2014/24, read in conjunction with points 7, 8 and 10(a) of Part C of Annex V to that directive, does not reach the degree of seriousness required to entail the application of the penalty provided for in Article 2d(1)(a) of Directive 89/665.
- 89 The contracting authority's failure to comply with its obligation to indicate the extent of a framework agreement is, in such circumstances, sufficiently noticeable for it to be detected by an economic operator who intended to submit a tender and who ought, as a result, to be regarded as being duly informed.
- 90 The third question must therefore be answered to the effect that Article 2d(1)(a) of Directive 89/665 is to be interpreted as meaning that it is not applicable where a contract notice has been published in the *Official Journal of the European Union*, even though, first, the estimated quantity and/or the estimated value of the supplies under the envisaged framework agreement is stated not in that contract notice but in the tender specifications and, second, neither that contract notice nor those tender specifications mention a maximum quantity and/or a maximum value of the supplies under that framework agreement.

Costs

- 91 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 (Fourth Chamber) hereby rules:

- 1. Article 49 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 points 7, 8 and 10(a) of Part C of Annex V to that directive, read in conjunction with Article 33 of the directive and the principles of equal treatment and transparency laid down in Article 18(1) thereof, are to be interpreted as meaning that the contract notice must indicate the estimated quantity and/or the estimated value as well as a maximum quantity and/or a maximum value of the supplies under a framework agreement and that that agreement will no longer have any effect once that limit is reached.**

2. **Article 49 of Directive 2014/24 and points 7 and 10(a) of Part C of Annex V to that directive, read in conjunction with Article 33 of the directive and the principles of equal treatment and transparency laid down in Article 18(1) thereof, are to be interpreted as meaning that the contract notice must indicate the estimated quantity and/or the estimated value and a maximum quantity and/or a maximum value of the supplies under a framework agreement as a whole and that that notice may lay down additional requirements which the contracting authority decides to add thereto.**

3. **Article 2d(1)(a) 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, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014, is to be interpreted as meaning that it is not applicable where a contract notice has been published in the *Official Journal of the European Union*, even though, first, the estimated quantity and/or the estimated value of the supplies under the envisaged framework agreement is stated not in that contract notice but in the tender specifications and, second, neither that contract notice nor those tender specifications mention a maximum quantity and/or a maximum value of the supplies under that framework agreement.**

[Signatures]