Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

7 September 2021 *

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* Language of the case: Lithuanian.

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 58(3) and (4) – Article 60(3) and (4) – Annex XII – Conduct of procurement procedures – Selection of participants – Selection criteria – Methods of proof – Economic and financial standing of economic operators – Whether the leader of a temporary association of undertakings may rely on income received in relation to a previous public contract in the same area as the public contract at issue including where it did not itself exercise the activity which is the subject matter of the public contract at issue – Technical and professional ability of economic operators – Exhaustive nature of means of proof permitted by the directive – Article 57(4)(h), (6) and (7) – Award of public service contracts – Non-compulsory grounds for exclusion from participation in a procurement procedure – Inclusion on a list of economic operators excluded from procurement procedures – Joint liability of members of a temporary association of undertakings – Personal nature of the penalty – Article 21 – Protection of the confidentiality of information submitted to the contracting authority by an economic operator – Directive (EU) 2016/943 – Article 9 – Confidentiality – Protection of trade secrets – Applicability to procurement procedures – Directive 89/665/EEC – Article 1 – Right to an effective remedy)

In Case C-927/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania), made by decision of 17 December 2019, received at the Court on 18 December 2019, in the proceedings

'Klaipėdos regiono atliekų tvarkymo centras' UAB

intervening parties:

'Ecoservice Klaipėda' UAB,

'Klaipėdos autobusų parkas' UAB,

'Parsekas' UAB,

'Klaipėdos transportas' UAB,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, N. Piçarra and A. Kumin, Presidents of Chambers, C. Toader, M. Safjan, D. Šváby (Rapporteur), S. Rodin, F. Biltgen, L.S. Rossi, I. Jarukaitis and N. Jääskinen, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Longar, Administrator,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– 'Ecoservice Klaipėda' UAB, by J. Elzbergas and V. Mitrauskas, advokatai,

– 'Klaipėdos autobusų parkas' UAB, by D. Soloveičik, advokatas,

– the Lithuanian Government, by K. Dieninis and R. Butvydytė, acting as Agents,

– the Austrian Government, by A. Posch and J. Schmoll, acting as Agents,

– the European Commission, by L. Haasbeek and by S.L. Kalėda and P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 21 and 42, Article 57(4)(h), Article 58(3) and (4) and Article 70 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), of Articles 1 and 2 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), 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 89/665'), and Article 9(2) of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1).

2 The request has been made in proceedings between 'Klaipėdos regiono atliekų tvarkymo centras' UAB (Regional Waste Management Centre for the Region of Klaipėda, Lithuania) ('the contracting authority') and 'Ecoservice Klaipėda' UAB ('Ecoservice') concerning the award of a public contract for waste collection and transport to a group of economic operators composed of 'Klaipėdos autobusų parkas' UAB, 'Parsekas' UAB and 'Klaipėdos transportas' UAB ('the Consortium').

Legal context

EU law

Directive 2014/24

3 Recital 51 of Directive 2014/24 states:

'It should be clarified that the provisions concerning protection of confidential information do not in any way prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes.'

4 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.

…'

5 Article 21 of that directive, entitled 'Confidentiality', provides:

'1. Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

2. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.'

6 Article 42 of the directive, entitled 'Technical specifications', provides:

'1. The technical specifications as defined in point 1 of Annex VII shall be set out in the procurement documents. The technical specifications shall lay down the characteristics required of a works, service or supply.

Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance, provided that they are linked to the subject matter of the contract and proportionate to its value and its objectives.

The technical specifications may also specify whether the transfer of intellectual property rights will be required.

…

3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

(a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow contracting authorities to award the contract;

(b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or – when any of those do not exist – national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words "or equivalent";

(c) in terms of performance or functional requirements referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;

(d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

…'

7 Annex VII to Directive 2014/24 relates to the 'definition of certain technical specifications'.

8 Article 50 of that directive, entitled 'Contract award notices', provides in paragraph 4:

'Certain information on the contract award or the conclusion of the framework agreement may be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.'

9 Under Article 55 of that directive, entitled 'Informing candidates and tenderers':

'1. Contracting authorities shall as soon as possible inform each candidate and tenderer of decisions reached concerning the conclusion of a framework agreement, the award of the contract or admittance to a dynamic purchasing system, including the grounds for any decision not to conclude a framework agreement, not to award a contract for which there has been a call for competition, to recommence the procedure or not to implement a dynamic purchasing system.

2. On request from the candidate or tenderer concerned, the contracting authority shall as quickly as possible, and in any event within 15 days from receipt of a written request, inform:

(a) any unsuccessful candidate of the reasons for the rejection of its request to participate,

(b) any unsuccessful tenderer of the reasons for the rejection of its tender, including, for the cases referred to in Article 42(5) and (6), the reasons for its decision of non-equivalence or its decision that the works, supplies or services do not meet the performance or functional requirements,

(c) any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement,

(d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

3. Contracting authorities may decide to withhold certain information referred to in paragraphs 1 and 2, regarding the contract award, the conclusion of framework agreements or admittance to a dynamic purchasing system, where the release of such information would impede law enforcement or would otherwise be contrary to the public interest, would prejudice the legitimate commercial interests of a particular economic operator, whether public or private, or might prejudice fair competition between economic operators.'

10 Article 56 of that directive, entitled 'General principles', states in paragraph 3:

'Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.'

11 Article 57 of Directive 2014/24, entitled 'Exclusion grounds', provides in paragraphs 4 and 6:

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

…

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to Article 59; or

…

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

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

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

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

12 Under Article 58 of that directive, entitled 'Selection criteria':

'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.

2. With regard to suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment, as described in Annex XI, or to comply with any other request set out in that Annex.

In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership.

3. With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance.

…

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.

…'

13 Article 60 of that directive, entitled 'Means of proof', states in paragraphs 3 and 4:

'3. Proof of the economic operator's economic and financial standing may, as a general rule, be provided by one or more of the references listed in Annex XII Part I.

Where, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate.

4. Evidence of the economic operators' technical abilities may be provided by one or more of the means listed in Annex XII Part II, in accordance with the nature, quantity or importance, and use of the works, supplies or services.'

14 Annex XII to that directive, entitled 'Means of proof of selection criteria', provides:

'Part I: Economic and financial standing

Proof of the economic operator's economic and financial standing may, as a general rule, be furnished by one or more of the following references:

(a) appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance;

(b) the presentation of financial statements or extracts from the financial statements, where publication of financial statements is required under the law of the country in which the economic operator is established;

(c) a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

Part II: Technical ability

Means providing evidence of the economic operators' technical abilities, as referred to in Article 58:

(a) the following lists:
   (i) a list of the works carried out over at the most the past five years, accompanied by certificates of satisfactory execution and outcome for the most important works; where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant works carried out more than five years before will be taken into account;
   (ii) a list of the principal deliveries effected or the main services provided over at the most the past three years, with the sums, dates and recipients, whether public or private, involved. Where necessary in order to ensure an adequate level of competition, contracting authorities may indicate that evidence of relevant supplies or services delivered or performed more than three years before will be taken into account;

(b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;

(c) a description of the technical facilities and measures used by the economic operator for ensuring quality and the undertaking's study and research facilities;

(d) an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract;

(e) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, where necessary, on the means of study and research which are available to it and the quality control measures it will operate;

(f) the educational and professional qualifications of the service provider or contractor or those of the undertaking's managerial staff, provided that they are not evaluated as an award criterion;

(g) an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;

(h) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;

(i) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;

(j) an indication of the proportion of the contract which the economic operator intends possibly to subcontract;

(k) with regard to the products to be supplied:
   (i) samples, descriptions or photographs, the authenticity of which must be certified where the contracting authority so requests;
   (ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to technical specifications or standards.'

15 Article 63 of Directive 2014/24, entitled 'Reliance on the capacities of other entities', provides in paragraph 1:

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

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

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

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

16 Under Article 70 of that directive, entitled 'Conditions for performance of contracts':

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

Directive 89/665

17 Article 1 of Directive 89/665, entitled 'Scope and availability of review procedures', provides:

'1. 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.

…

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.

…

3. Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, 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.

…

5. Member States may require that the person concerned first seek review with the contracting authority. In that case, Member States shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract.

…

The suspension referred to in the first subparagraph shall not end before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contracting authority has sent a reply if fax or electronic means are used, or, if other means of communication are used, before the expiry of either at least 15 calendar days with effect from the day following the date on which the contracting authority has sent a reply, or at least 10 calendar days with effect from the day following the date of the receipt of a reply.'

18 Article 2 of that directive, headed 'Requirements for review procedures', provides in paragraph 1:

'Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c) award damages to persons harmed by an infringement.'

19 Directive 89/665, in its original version, had – prior to the amendments made by Directive 2014/23 – been amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) in order to improve the effectiveness of review procedures in relation to the award of public contracts. Recital 36 of the latter directive stated that that directive respects fundamental rights and observes the principles recognised in

particular by the Charter of Fundamental Rights of the European Union ('the Charter') and seeks, in particular, to ensure full respect for the right to an effective remedy and to a fair hearing, in accordance with the first and second paragraphs of Article 47 of the Charter.

Directive 2016/943

20 Recitals 4 and 18 of Directive 2016/943 state:

'(4) Innovative businesses are increasingly exposed to dishonest practices aimed at misappropriating trade secrets, such as theft, unauthorised copying, economic espionage or the breach of confidentiality requirements, whether from within or from outside of the Union. Recent developments, such as globalisation, increased outsourcing, longer supply chains, and the increased use of information and communication technology contribute to increasing the risk of those practices. The unlawful acquisition, use or disclosure of a trade secret compromises legitimate trade secret holders' ability to obtain first-mover returns from their innovation-related efforts. Without effective and comparable legal means for protecting trade secrets across the Union, incentives to engage in innovation-related cross-border activity within the internal market are undermined, and trade secrets are unable to fulfil their potential as drivers of economic growth and jobs. Thus, innovation and creativity are discouraged and investment diminishes, thereby affecting the smooth functioning of the internal market and undermining its growth-enhancing potential.

…

(18) Furthermore, the acquisition, use or disclosure of trade secrets, whenever imposed or permitted by law, should be treated as lawful for the purposes of this Directive. This concerns, in particular, the acquisition and disclosure of trade secrets in the context of the exercise of the rights of workers' representatives to information, consultation and participation in accordance with Union law and national laws and practices, and the collective defence of the interests of workers and employers, including co-determination, as well as the acquisition or disclosure of a trade secret in the context of statutory audits performed in accordance with Union or national law. However, such treatment of the acquisition of a trade secret as lawful should be without prejudice to any obligation of confidentiality as regards the trade secret or any limitation as to its use that Union or national law imposes on the recipient or acquirer of the information. In particular, this Directive should not release public authorities from the confidentiality obligations to which they are subject in respect of information passed on by trade secret holders, irrespective of whether those obligations are laid down in Union or national law. Such confidentiality obligations include, inter alia, the obligations in respect of information forwarded to contracting authorities in the context of procurement procedures, as laid down, for example, in … Directive [2014/24]'.

21 Article 1 of that directive, entitled 'Subject matter and scope', states:

'1. This Directive lays down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets.

…

2. This Directive shall not affect:

…

(b) the application of Union or national rules requiring trade secret holders to disclose, for reasons of public interest, information including trade secrets, to the public or to administrative or judicial authorities for the performance of the duties of those authorities;

(c) the application of Union or national rules requiring or allowing Union institutions and bodies or national public authorities to disclose information submitted by businesses which those institutions, bodies or authorities hold pursuant to, and in compliance with, the obligations and prerogatives set out in Union or national law;

…'

22 Article 3 of that directive, entitled 'Lawful acquisition, use and disclosure of trade secrets', provides in paragraph 2:

'The acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law.'

23 Article 4 of that directive, entitled 'Unlawful acquisition, use and disclosure of trade secrets', provides in paragraph 2(a):

'The acquisition of a trade secret without the consent of the trade secret holder shall be considered unlawful, whenever carried out by:

(a) unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced'.

24 Article 9 of Directive 2016/943, entitled 'Preservation of confidentiality of trade secrets in the course of legal proceedings', provides in paragraph 2:

'Member States shall also ensure that the competent judicial authorities may, on a duly reasoned application by a party, take specific measures necessary to preserve the confidentiality of any trade secret or alleged trade secret used or referred to in the course of legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret. Member States may also allow competent judicial authorities to take such measures on their own initiative.

The measures referred to in the first subparagraph shall at least include the possibility:

(a) of restricting access to any document containing trade secrets or alleged trade secrets submitted by the parties or third parties, in whole or in part, to a limited number of persons;

(b) of restricting access to hearings, when trade secrets or alleged trade secrets may be disclosed, and the corresponding record or transcript of those hearings to a limited number of persons;

(c) of making available to any person other than those comprised in the limited number of persons referred to in points (a) and (b) a non-confidential version of any judicial decision, in which the passages containing trade secrets have been removed or redacted.

The number of persons referred to in points (a) and (b) of the second subparagraph shall be no greater than necessary in order to ensure compliance with the right of the parties to the legal proceedings to an effective remedy and to a fair trial, and shall include, at least, one natural person from each party and the respective lawyers or other representatives of those parties to the legal proceedings.'

Lithuanian law

Law on public procurement

25 The Lietuvos Respublikos viešųjų pirkimų įstatymas (Law of the Republic of Lithuania on Public Procurement), in the version applicable to the case in the main proceedings ('the Law on public procurement'), provides, in Article 20, entitled 'Confidentiality':

'1. The contracting authority, the award committee, its members and experts, and any other person shall be prohibited from disclosing to third parties information which suppliers have provided in confidence.

2. The supplier's tender or request to participate may not be classified as confidential in its entirety, but the supplier may indicate that certain information presented in its tender is confidential. Confidential information may include, inter alia, technical or trade secrets and confidential aspects of the tender. Information cannot be classified as confidential:

(1) where this would infringe legal provisions establishing the obligation to disclose or the right to access information, and the regulations implementing those legal provisions;

(2) where this would infringe the obligations laid down in Articles 33 and 58 of this Law in connection with the publication of awarded contracts, the provision of information to candidates and tenderers, including information on the price of goods, services or works mentioned in the tender, with the exception of price components;

(3) where that information has been presented in documents confirming that the supplier is not subject to any grounds for exclusion and fulfils the capacity requirements and the standards for quality management and environmental protection, with the exception of information the disclosure of which would infringe the provisions of the Law of the Republic of Lithuania on the protection of personal data or the supplier's obligations under contracts concluded with third parties;

(4) where that information relates to economic operators and subcontractors on whose capacity the supplier relies, with the exception of information the disclosure of which would infringe the provisions of the Law on the protection of personal data.

3. Where the contracting authority has doubts as to the confidential nature of the information contained in the supplier's tender, it must ask the supplier to demonstrate why the information in question is confidential. …

4. Not later than six months after the date on which the contract was awarded, the tenderers concerned may ask the contracting authority to grant them access to the successful tenderer's tender or request to participate (just as candidates may ask it for access to requests to participate made by other suppliers which have been invited to submit a tender or participate in a dialogue), but no information may be disclosed which candidates or tenderers have classified as confidential, without prejudice to paragraph 2 of this article.

…'

26 Article 45 of that law, entitled 'General principles for the evaluation of a supplier and the request for participation or tender submitted by it', provides in paragraph 3:

'If a candidate or tenderer has submitted incorrect, incomplete or incorrect documents or data concerning compliance with the requirements of the procurement documents or such documents or data are missing, the contracting authority shall, without infringing the principles of equal treatment and transparency, ask the candidate or tenderer to correct, supplement or clarify those documents or data, within a reasonable period fixed by the contracting authority. Only the following may be corrected, supplemented, clarified or submitted: documents or data relating to the non-existence of a ground for exclusion of the supplier, its compliance with the capacity requirements, quality assurance standards and environmental protection criteria, a mandate given by the supplier to sign the request to participate or the tender, a joint venture agreement, a document certifying the validity of the tender and documents bearing no relation to the subject matter of the contract, its technical characteristics, the conditions of performance of the contract or the price of the tender. Other documents in the supplier's tender may be corrected, supplemented or clarified in accordance with Article 55(9) of this Law.'

27 Article 46 of that law, entitled 'Grounds for exclusion of a supplier', provides in paragraph 4:

'The contracting authority shall exclude a supplier from the procurement procedure where:

…

(4) that supplier, in the course of the procurement procedure, has withheld information or submitted false information concerning compliance with the requirements set out in this Article and Article 47 of this Law and the contracting authority can demonstrate this by any legal means, or the supplier is not able to submit the supporting documents required pursuant to Article 50 of this Law due to the misrepresentation of information. …'

28 Article 52 of the Law on public procurement, entitled 'Withholding information, submission of false information or failure to produce documents', provides:

'1. The contracting authority shall publish, at the latest within 10 days, in the Centrinė viešųjų pirkimų informacinė sistema [(Central Portal of Public Procurement, Lithuania)], in accordance with the rules laid down by the Viešųjų pirkimų tarnyba [(Public Procurement Authority, Lithuania)], the information relating to the supplier who, in the course of the procurement procedure, has withheld information or has provided false information concerning compliance

with the requirements set out in Articles 46 and 47 of this Law or who, due to the submission of false information, is unable to produce the supporting documents required under Article 50 of this Law, where:

(1) that supplier was excluded from the procurement procedure;

(2) a judicial decision has been issued.

…'

29 Article 55 of the Law on public procurement, entitled 'Evaluation and comparison of tenders', provides in paragraph 9:

'The contracting authority may, acting in accordance with Article 45(3) of this Law, request tenderers to correct, supplement or clarify their tenders; however, it may not request, propose or allow the modification of essential elements of a tender submitted in an open or restricted procedure or of a final tender submitted in a competitive dialogue, a negotiated procedure with or without publication of a contract notice or an innovation partnership, that is to say, modification of the price or any other modifications which would render a non-compliant tender compliant with the requirements set out in the procurement documents. In the event that, during the evaluation of tenders, the contracting authority discovers errors in the calculation of the price or costs, it must request the tenderer to correct the calculation errors identified in the tender, within the time limit fixed by the contracting authority, without changing the price or costs set out in the tender at the time it was evaluated. When correcting the calculation errors identified in the tender, the tenderer may correct the price or cost components, but may not remove price or cost components or add new components to the price or costs.'

30 Article 58 of that law, entitled 'Communication of the results of procurement procedures', provides in paragraph 3:

'In the cases referred to in paragraphs 1 and 2 of this article, the contracting authority may not disclose information the disclosure of which would infringe the rules on the provision of information and protection of data or otherwise be contrary to the general interest, would prejudice the legitimate commercial interests of a particular supplier or would adversely affect competition between suppliers.'

Code of Civil Procedure of the Republic of Lithuania

31 Article 10^1 of the Lietuvos Respublikos civilinio proceso kodeksas (Code of Civil Procedure of the Republic of Lithuania), entitled 'Special provisions on the protection of trade secrets', provides:

'1. This Article lays down specific provisions on the protection of trade secrets in cases concerning the unlawful acquisition, use and disclosure of trade secrets and other civil matters.

2. Where there are grounds for considering that a trade secret may be disclosed, the court, at the duly reasoned request of the parties or of its own motion, shall, by reasoned order, name the persons who may:

(1) have access to those parts of the file that contain information which constitutes or may constitute a trade secret, and make and obtain extracts, duplicates and copies (digital copies);

(2) take part in hearings in camera in which information which constitutes or may constitute a trade secret may be disclosed, and have access to the records of those hearings;

(3) obtain a certified copy (digital copy) of a judgment or order containing information which constitutes or may constitute a trade secret.

3. The number of persons referred to in paragraph 2 of this Article may not exceed what is necessary to safeguard the right to judicial protection and the right to a fair trial. Those persons are at least the following:

(1) if the party is a natural person: that person and his or her representative;

(2) if the party is a legal person: at least one natural person who is conducting the case on behalf of that legal person and a representative of that legal person.

4. In applying the restrictions laid down in paragraph 2 of this article, the court shall take into account the need to guarantee the right to judicial protection and the right to a fair trial, the legitimate interests of the parties and of the other persons taking part in the proceedings and the harm that may be caused by applying or not applying those restrictions.

…'

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

32 By a notice of a public call for competition published on 27 September 2018, the contracting authority launched an open international procurement procedure for the award of a contract for the provision of services relating to the collection and transport of municipal waste from the municipality of Neringa (Lithuania) to waste treatment facilities in the Region of Klaipėda (Lithuania).

33 The contracting authority set out technical specifications in that notice. It provided, inter alia, that the service provider would be required to use municipal waste collection vehicles which had to comply, at least, with the Euro 5 standard and be equipped with a fixed global positioning system (GPS) transmitter operating continuously, so as to enable the contracting authority to determine the exact position of the vehicle and its specific itinerary.

34 The notice also contained a description of the professional and technical capacities necessary for the performance of the contract and a description of the required financial and economic capacities. In that regard, it stated that each tenderer had to submit a free-form declaration that its average annual turnover generated from the activity of collecting and transporting mixed municipal waste during the three preceding financial years or from the date of its registration, if it had carried on that business for less than three years, was not less than EUR 200 000 excluding value added tax.

35 The contracting authority received three tenders, including those of Ecoservice and the Consortium.

36 On 29 November 2018, the contracting authority notified the tenderers of the evaluation of the tenders and their final ranking. The contract was awarded to the Consortium because of the lower price of its tender, Ecoservice being ranked second.

37 On 4 December 2018, Ecoservice requested the contracting authority, on the basis of Article 20(4) of the Law on public procurement, to grant it access to the information used to establish that classification, in particular the Consortium's tender.

38 On 6 December 2018, Ecoservice was granted access to the non-confidential information in that tender.

39 On 10 December 2018, taking the view that the Consortium did not meet the qualification requirements, Ecoservice lodged a complaint with the contracting authority seeking to challenge the outcome of the procurement procedure. It submitted, first, that none of the members of the Consortium could have performed contracts for the collection and transport of mixed municipal waste with a value of EUR 200 000 over the three preceding years. It stated in that regard that, since Parsekas did not carry out mixed municipal waste management services, the contracting authority should have asked it to clarify the submitted declaration that Parsekas had performed mixed waste management contracts with a value of EUR 235 510.79. Secondly, Ecoservice claimed that the Consortium did not have the required technical capacities.

40 On 17 December 2018, the contracting authority dismissed that complaint, stating briefly, according to the referring court, that the Consortium had complied with the two qualification requirements contested by Ecoservice.

41 On 27 December 2018, Ecoservice brought an action against that decision before the Klaipėdos apygardos teismas (Regional Court, Klaipėda, Lithuania), seeking, inter alia, an order requiring the contracting authority to produce the tender submitted by the Consortium and the correspondence exchanged between the latter and the contracting authority. Ecoservice argued that all the evidence had to be submitted to the court, irrespective of its confidential nature, and submitted that it required access to those documents, some of which were not confidential, in order to clarify its own requests.

42 By decision of 3 January 2019, that court ordered the contracting authority to provide all the requested documents to Ecoservice.

43 In its pleading of 11 January 2019 lodged in response to that order, the contracting authority claimed, first, that, when examining the complaint, it had asked the Consortium to provide it with clarifications concerning the waste management services contracts it had concluded. The Consortium had submitted the requested information while stating that much of the information submitted was confidential and therefore had to be protected against disclosure to third parties. The contracting authority also considered that that information had commercial value for the Consortium and that its disclosure to competitors could harm the Consortium and therefore did not communicate that confidential information to the court so as not to infringe Article 20 of the Law on public procurement. It therefore produced only the non-confidential information in the tender submitted by the Consortium, while indicating that it would submit the confidential information to the court if the latter again requested it.

44 Secondly, the contracting authority contended that the action should be dismissed on the ground that the additional clarifications it had received from the Consortium and the inspection which had been carried out at the latter's premises had confirmed that the tender at issue had been evaluated correctly.

45 By order of 15 January 2019, the Klaipėdos apygardos teismas (Regional Court, Klaipėda) limited the obligation to produce documents to the tender submitted by the Consortium and the documents attached thereto and ordered their production by 25 January 2019.

46 On 25 January 2019, the contracting authority submitted the requested documents to that court, specifying whether or not they contained confidential information. The information which the Consortium claimed to be confidential, without being contradicted by the contracting authority, was addressed exclusively to the court. Moreover, the contracting authority asked the court not to grant Ecoservice access to the confidential information in the Consortium's tender and to classify that information as non-public information in the case file.

47 By order of 30 January 2019, the court of first instance granted the contracting authority's request that the information in the Consortium's tender which had been submitted to it, first, be classified as confidential and, second, not be disclosed.

48 On 14 February 2019, by an order not amenable to appeal, that court dismissed Ecoservice's request of 11 February 2019 for access to all the evidence in the case file.

49 On 21 February 2019, by an order not amenable to appeal, that court dismissed Ecoservice's request of 12 February 2019 for an order requiring Parsekas to produce data relating to waste management contracts it had concluded.

50 By judgment of 15 March 2019, the Klaipėdos apygardos teismas (Regional Court, Klaipėda) dismissed Ecoservice's action on the ground that the Consortium satisfied the qualification requirements.

51 Ruling on an appeal brought by Ecoservice, the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania), by judgment of 30 May 2019, set aside both the judgment of the court of first instance and the decision of the contracting authority establishing the ranking of the tenders. The appeal court also ordered the contracting authority to carry out a fresh evaluation of the tenders.

52 The contracting authority brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

53 On 26 July 2019, Ecoservice, before submitting its response to the appeal on a point of law, applied to the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) for access to the confidential documents submitted by the contracting authority at first instance, with the commercially sensitive information redacted.

54 In the first place, the referring court notes that some of the qualification requirements for tenderers set out in the tender notice could be understood as conditions relating to the financial and economic capacity of the economic operator as well as conditions relating to its technical and professional ability, but also as technical specifications or conditions relating to the performance of the public contract.

55 It is necessary to determine the nature of those requirements, since, in accordance with Article 45(3) and Article 55(9) of the Law on public procurement, the obligation or the possibility to correct a declaration of a tenderer differs depending on whether the information in question concerns the classification of that tenderer or the tender it submitted.

56 In the second place, according to the referring court, the question arises as to the appropriate balance between the protection of the confidential information provided by a tenderer and the effectiveness of the rights of defence of other tenderers.

57 In the present case, Ecoservice attempted unsuccessfully to gain access to the Consortium's tender. The contracting authority itself very actively prioritised the Consortium's right to protect its confidential information. That practice, which is common in Lithuania, results in the rights of tenderers being only partly protected. In disputes relating to the award of public contracts, the unsuccessful tenderers have less information than the other parties to those disputes. Furthermore, the effective protection of their rights depends on whether the court decides to classify the information they request as confidential. A decision by which the court does not grant a request for access to such information may diminish an unsuccessful tenderer's chances of having its action against the decision to award the contract upheld.

58 The referring court states, first, that it has held, inter alia, in the field of public procurement, that the right of tenderers, enshrined in Article 20 of the Law on public procurement, to the protection of confidential information which they submitted in a tender concerns only information which must be classified as trade secrets or industrial secrets under Article 1.116(1) of the Lietuvos Respublikos civilinio kodekso (Civil Code of the Republic of Lithuania), which corresponds in essence to the provisions of Directive 2016/943. Secondly, the right of a tenderer to have access to another tenderer's bid should be regarded as forming an integral part of the protection of potentially infringed rights.

59 However the referring court has doubts as to the precise scope of the contracting authorities' obligations to protect the confidentiality of the information sent to them by the tenderers and the relationship between those obligations and the obligation to ensure effective judicial protection for the economic operators which have brought an action. It takes the view that, even though the Court, in its judgment of 14 February 2008, *Varec* (C-450/06, EU:C:2008:91), stated that public contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, it appears from the third subparagraph of Article 9(2) of Directive 2016/943, which postdates that judgment, that, in any event, the parties to proceedings cannot have different amounts of information at their disposal, since otherwise the right to effective judicial protection and right to a fair trial would be infringed. It states that, since that provision requires the court to guarantee the right of economic operators to access trade secrets of a party to the proceedings, it may also be the case that economic operators should be allowed to exercise that right prior to any litigation, in particular so that they may decide whether to bring an action in full knowledge of the facts.

60 The referring court observes that there is, however, a risk that certain economic operators might abuse that right by seeking such information from the contracting authority not in order to defend their rights, but solely in order to obtain information about their competitors. However, the bringing of proceedings before a court would in any event enable those operators to obtain the information sought.

61 The referring court notes that, with the exception of recital 18 thereof, Directive 2016/943 does not contain any specific provision concerning public procurement procedures. It notes that, even though contracting authorities are not review bodies, the mandatory system of pre-litigation dispute resolution, provided for under domestic law, confers on them a broad power to cooperate with economic operators, whether they are applicants or defendants. The contracting authorities also have – as a result of their objective of guaranteeing the effective protection of those operators' rights – the duty to adopt, to the extent of their competence and the means at their disposal, the measures necessary to ensure that those operators have the ability to defend effectively any interests that may have been damaged. Thus, it may be the case that Article 21 of Directive 2014/24 and the corresponding provisions of Directive 89/665 should be interpreted as meaning that tenderers may access information which constitutes trade secrets of other tenderers not only in the context of judicial proceedings, but also during the prior administrative review stage.

62 In the third place, the referring court intends to raise of its own motion the issue of the assessment of the Consortium's conduct in the light of Article 57(4)(h) of Directive 2014/24, that is to say whether the Consortium or, at the very least, some of its members submitted false information to the contracting authority concerning the conformity of their capacities with the requirements set out in the call for tenders.

63 The referring court infers from the case-law of the Court that the information provided by Parsekas could constitute a case of negligence in the submission of information, which has affected the outcome of the procurement procedure. In that regard, it considers that Parsekas should not have indicated the income which it derived from the contracts concluded and performed together with other economic operators which provided the part of the services relating to mixed waste management and the contracts which it performed itself, but in respect of which the management of mixed waste represented only a minimal part of the waste concerned.

64 Furthermore, the referring court, which observes that the Court's case-law on Article 57(4) of Directive 2014/24 is based on the particular relationship of mutual trust between the contracting authority and the supplier concerned, has doubts as to whether a national court may depart from the contracting authority's assessment that the information communicated to it during the procurement procedure was not false or misleading.

65 Lastly, the referring court is unsure whether, where an economic operator which is a party to a joint venture agreement has provided potentially false information, its partners, with whom it submitted the joint tender, must also be included, pursuant to Article 46(4)(4) and Article 52 of the Law on public procurement, on the 'List of suppliers which have submitted false information', which would prohibit them from participating in calls for tenders published by other contracting authorities for one year.

66 That approach, which could be based on the joint liability and common interests and responsibility of all the partners, nevertheless seems incompatible with the principle of the personal responsibility of those operators, by virtue of which only economic operators which have supplied false information may be penalised.

67 In those circumstances, the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does a tender condition under which suppliers are required to demonstrate a certain level of average annual operating income derived from carrying out activities relating only to specific services (mixed municipal waste management) fall within the scope of Article 58(3) or (4) of Directive 2014/24?

(2) Does the method of assessment of the supplier’s capacity, which is set out by the Court of Justice in its judgment of 4 May 2017, *Esaprojekt* (C-387/14, EU:C:2017:338), depend on the answer to the first question?

(3) Does a tender condition under which suppliers are required to demonstrate that the vehicles necessary for the provision of [refuse management] services comply with the specific technical requirements, including polluting emissions (Euro 5 standard), installation of a GPS transmitter, appropriate capacity and so forth, fall within the scope of Article 58(4) of Directive 2014/24, Article 42 of that directive in conjunction with the provisions of Annex VII, and/or Article 70 of that directive?

(4) Are the [fourth] subparagraph of Article 1(1) of Directive 89/665, which lays down the principle of the effectiveness of review procedures, Article 1(3) and (5) thereof, Article 21 of Directive 2014/24 and the provisions of Directive [2016/943], in particular recital 18 and the third subparagraph of Article 9(2) thereof (together or separately, but without limitation thereto), to be interpreted as meaning that, where a binding pre-litigation dispute settlement procedure is laid down in the national legal rules governing public procurement:
(a) the contracting authority has to provide to the supplier who initiated the review procedure all information regarding another supplier’s tender (regardless of its confidential nature), if the subject matter of that procedure is specifically the lawfulness of the evaluation of that tender and the supplier who initiated the procedure had explicitly requested the contracting authority, prior thereto, to disclose that information;
(b) irrespective of the answer to the previous question, the contracting authority, when rejecting a complaint submitted by a supplier regarding the lawfulness of the evaluation of a competitor’s tender, must in any event give a clear, comprehensive and specific reply, regardless of the risk of disclosing confidential tender information entrusted to it?

(5) Are the [fourth] subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) of Directive 89/665, Article 21 of Directive 2014/24 and Directive 2016/943, in particular recital 18 thereof (together or separately, but without limitation thereto), to be interpreted as meaning that the contracting authority’s decision not to grant a supplier access to the confidential details of another participant’s tender is a decision which may be challenged separately before the courts?

(6) If the answer to the previous question is in the affirmative, is Article 1(5) of Directive 89/665 to be interpreted as meaning that the supplier must file a complaint with the contracting authority in respect of such a decision by it and, if need be, bring an action before the courts?

(7) If the answer to the previous question is in the affirmative, are the [fourth] subparagraph of Article 1(1) and Article 2(1)(b) of Directive 89/665 to be interpreted as meaning that the supplier may, depending on the extent of the information available on the content of the other supplier's tender, bring an action before the courts concerning exclusively the refusal to provide information to it, without separately calling the lawfulness of other decisions of the contracting authority into question?

(8) Irrespective of the answers to the previous questions, is the third subparagraph of Article 9(2) of Directive 2016/943 to be interpreted as meaning that, where the court is requested to order the other party to the dispute to produce evidence and make it available to the applicant, it must grant such a request regardless of the actions on the part of the contracting authority during the procurement or review procedures?

(9) Is the third subparagraph of Article 9(2) of Directive 2016/943 to be interpreted as meaning that, if the court rejects the request to disclose confidential information of the other party to the dispute, the court should of its own motion assess the relevance of the requested information and its effects on the lawfulness of the public procurement procedure?

(10) May the ground for exclusion of suppliers which is laid down in Article 57(4)(h) of Directive 2014/24, regard being had to the judgment of the Court of Justice of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93* (C-267/18, EU:C:2019:826), be applied in such a way that the court, when examining a dispute between a supplier and the contracting authority, may decide of its own motion, irrespective of the assessment of the contracting authority, that the tenderer concerned, acting intentionally or negligently, submitted misleading, factually inaccurate information to the contracting authority and therefore should be excluded from public procurement procedures?

(11) Is Article 57(4)(h) of Directive 2014/24, read in conjunction with the principle of proportionality set out in Article 18(1) of that directive, to be interpreted and applied in such a way that, where national law provides for additional penalties (besides exclusion from procurement procedures) in respect of the submission of false information, those penalties may be applied only on the basis of personal responsibility, in particular where factually inaccurate information is submitted only by some of the joint participants in the public procurement procedure (for example, one of several partners)?'

Consideration of the questions referred

The first question

68 By its first question, the referring court asks, in essence, whether Article 58 of Directive 2014/24 must be interpreted as meaning that the obligation on economic operators to demonstrate that they have a certain average annual turnover in the area covered by the public contract at issue constitutes a selection criterion relating to their economic and financial standing, within the meaning of paragraph 3 of that provision, or their technical and professional ability, within the meaning of paragraph 4 of that provision.

69 In that regard, it should be noted that Article 58(1) of that directive sets out the three types of selection criteria which contracting authorities may impose on economic operators as requirements for participation. Those criteria, which relate to the suitability to pursue the professional activity concerned, the economic and financial standing and the technical and professional ability of the operators, are set out in paragraphs 2 to 4 of that article respectively.

70 In addition, it is apparent from Article 58(3) of that directive that, in order to ensure that they possess the necessary economic and financial standing to perform the contract, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract.

71 It follows that the requirement that economic operators demonstrate that they have a certain average annual turnover in the area covered by the contract corresponds precisely to the definition of a selection criterion based on their economic and financial standing, within the meaning of Article 58(3) of Directive 2014/24 and therefore falls within the scope of that definition. Moreover, it is apparent from Annex XII to that directive, concerning 'means of proof of selection criteria', and more specifically from Part I of that annex, to which Article 60(3) of that directive refers, that the non-exhaustive list of means of proof of an economic operator's economic and financial standing includes 'turnover in the area covered by the contract', which supports that interpretation.

72 In the light of the foregoing considerations, the answer to the first question is that Article 58 of Directive 2014/24 must be interpreted as meaning that the obligation on economic operators to demonstrate that they have a certain average annual turnover in the area covered by the public contract at issue constitutes a selection criterion relating to the economic and financial standing of those operators, within the meaning of paragraph 3 of that provision.

The second question

73 By its second question, the referring court asks, in essence, whether Article 58(3) in conjunction with Article 60(3) of Directive 2014/24 must be interpreted as meaning that, where the contracting authority has required that economic operators have a certain minimum turnover in the area covered by the public contract in question, an economic operator may, in order to prove its economic and financial standing, rely on the income received by a temporary group of undertakings to which it belonged only where it actually contributed, in the context of a specific public contract, to the performance of an activity of that group analogous to the activity which is the subject matter of the public contract for which that operator seeks to prove its economic and financial standing.

74 In order to prove its economic and financial standing, within the meaning of Article 58(3) of Directive 2014/24, an economic operator may, as a general rule, in accordance with the first subparagraph of Article 60(3) of that directive, submit one or more of the references listed in Part I of Annex XII to that directive to the contracting authority. The second subparagraph of Article 60(3) of that directive even provides that where, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, it may prove its economic and financial standing by any other document which the contracting authority considers appropriate.

75 As is apparent from Article 58(3) of Directive 2014/24, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract.

76 It thus follows from that provision that, when setting out the requirements to ensure that economic operators have the necessary economic and financial standing to perform the contract, contracting authorities may require that economic operators have a certain overall minimum yearly turnover or a certain minimum turnover in the area covered by the public contract in question, or they may combine those two requirements.

77 If the contracting authority has imposed only a requirement of a certain minimum annual turnover, without requiring that that minimum turnover have been achieved in the area covered by the contract, nothing precludes an economic operator from relying on the income received by a temporary group of undertakings to which it belonged, even if it did not actually contribute, in the context of a specific public contract, to the performance of an activity of that group analogous to the activity which is the subject matter of the public contract for which that operator seeks to prove its economic and financial standing.

78 However, where the contracting authority has required that that minimum turnover have been achieved in the area covered by the contract, that requirement has a twofold purpose. It is intended to establish the economic and financial standing of economic operators and helps to demonstrate their technical and professional abilities. In that situation, an operator's economic and financial standing is, like its technical and professional abilities, specific and exclusive to that operator as a natural or legal person.

79 It follows that, in the latter situation, an economic operator may, in order to prove its economic and financial standing, rely, in a public procurement procedure, on the income received by a temporary group of undertakings to which it belonged only if it actually contributed, in the context of a specific public contract, to the performance of an activity of that group analogous to the activity which is the subject matter of the public contract for which that operator seeks to prove its economic and financial standing.

80 Indeed, where an economic operator relies on the economic and financial capacities of a temporary group of undertakings in which it has participated, those capacities must be assessed in relation to the effective participation of that operator and, therefore, to its actual contribution to the performance of an activity required of that group in the context of a specific public contract (see, by analogy, judgment of 4 May 2017, *Esaprojekt*, C-387/14, EU:C:2017:338, paragraph 62).

81 It is therefore necessary, in the context of Article 58(3) of Directive 2014/24, to limit, in the situation referred to in paragraph 78 of the present judgment, the turnover which may be relied on under that provision to that relating to the actual contribution of the operator in question to the performance of an activity required of that group in the context of a previous public contract.

82 The answer to the second question is therefore that Article 58(3) in conjunction with Article 60(3) of Directive 2014/24 must be interpreted as meaning that, where the contracting authority has required that economic operators have achieved a certain minimum turnover in the area covered by the public contract in question, an economic operator may, in order to prove its economic and financial standing, rely on income received by a temporary group of undertakings to which it

belonged only if it actually contributed, in the context of a specific public contract, to the performance of an activity of that group analogous to the activity which is the subject matter of the public contract for which that operator seeks to prove its economic and financial standing.

The third question

83 By its third question, the referring court asks, in essence, whether Article 58(4), Article 42 and Article 70 of Directive 2014/24 must be interpreted as meaning that those articles can apply simultaneously to a technical requirement set out in a call for tenders.

84 In that regard, it must be held that Directive 2014/24 does not preclude the consideration of technical requirements simultaneously as selection criteria relating to technical and professional ability, as technical specifications and/or as conditions for the performance of the contract, within the meaning of Article 58(4), Article 42 and Article 70 of that directive, respectively.

85 As regards selection criteria relating to the 'technical and professional ability' of economic operators within the meaning of Article 58(4) of Directive 2014/24, it should be noted that the means of proof of those abilities listed in Part II of Annex XII to that directive, includes, in points (g) and (i) of that part, respectively, 'an indication of the environmental management measures that the economic operator will be able to apply when performing the contract' and 'a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract'.

86 If such means of proof are capable of demonstrating the 'technical and professional ability' of economic operators, then technical requirements such as those concerning polluting emissions from vehicles (Euro 5 standard) and the obligation to equip those vehicles with a GPS transmitter, which are at issue in the present case, appear apt to relate to the 'technical resources' of economic operators and, therefore, to be classified as selection criteria relating to their technical and professional abilities, within the meaning of Article 58(4) of that directive, provided that the tender documentation states that they are imposed specifically as abilities which tenderers must prove they have or will have in time to perform the contract, which it is for the referring court to verify.

87 As regards 'technical specifications', within the meaning of Article 42 of Directive 2014/24, it is apparent from paragraph 3 of that article that such specifications define the 'characteristics required' of the services covered by a contract and are formulated in terms of performance or functional requirements, including environmental characteristics, or by reference to technical standards. Moreover, paragraph 1 of that article refers to Annex VII to that directive, point 1(b) of which states, with regard to public supply or service contracts, that a technical specification is contained 'in a document defining the required characteristics of a product or a service, such as … environmental and climate performance levels …'. Thus, the technical requirements at issue in the main proceedings, which are formulated in terms of performance or functional requirements, and which refer in particular to the Euro 5 standard relating to polluting emissions from vehicles, may also fall within the concept of 'technical specifications'.

88 Lastly, since they lay down special conditions relating to the performance of a contract, they appear to be linked to the subject matter of the contract and they are indicated in the call for competition or in the procurement documents, those requirements, which include innovation-related and environmental considerations, may also fall within the scope of 'conditions for performance of the contract', within the meaning of Article 70 of Directive

2014/24, provided that it is apparent from the tender documentation that they are imposed as conditions with which the successful tenderer must comply when performing the contract, which it is for the referring court to verify.

89 In that regard, it must be noted that compliance with the conditions for the performance of a contract is not to be assessed when a contract is awarded. It follows that, if the requirement at issue in the main proceedings were classified as a performance condition and if the successful tenderer did not satisfy it when the public contract was awarded to it, the non-compliance with that condition would have no effect on the question whether the award of the contract to the Consortium was compatible with the provisions of Directive 2014/24.

90 Thus, a requirement contained in a call for tenders, such as the requirement at issue in the main proceedings, may be classified as a selection criterion relating to technical and professional ability or a technical specification or even as a condition for the performance of the contract. Furthermore, since the referring court raises the question, inter alia, of the compatibility of the requirements at issue in the main proceedings with EU law, it should be added that Articles 42 and 70 of Directive 2014/24 must be interpreted as not precluding, as a matter of principle, the imposition, in a call for tenders, of requirements specifying certain technical characteristics of vehicles which must be used for the purpose of providing the services covered by the contract in question, subject to compliance with the fundamental principles of public procurement, as set out in Article 18(1) of that directive.

91 It should be noted that, in the context of the third question, the referring court is also unsure whether the classification of the requirements at issue may have an effect on the possibility of rectifying and correcting submitted tenders.

92 In that regard, it should be pointed out that, under Article 56(3) of Directive 2014/24, where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing that directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.

93 As is apparent from settled case-law on the interpretation of the provisions of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), based in particular on the principle of equal treatment and which it is appropriate to apply by analogy in the context of Article 56(3) of Directive 2014/24, a request for clarification sent to an economic operator under that provision cannot however make up for the lack of a document or information the submission of which was required by the contract documents, since the contracting authority is required to observe strictly the criteria which it has itself laid down. In addition, such a request may not lead to the submission by a tenderer of what would appear in reality to be a new tender (see, by analogy, judgments of 29 March 2012, *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191, paragraph 40; of 10 October 2013, *Manova*, C-336/12, EU:C:2013:647, paragraphs 36 and 40; and of 28 February 2018, *MA.T.I. SUD and Duemme SGR*, C-523/16 and C-536/16, EU:C:2018:122, paragraphs 51 and 52).

94 It follows from the foregoing considerations that the scope of the contracting authority's power to allow the successful tenderer subsequently to supplement or clarify its initial tender depends on compliance with the provisions of Article 56(3) of Directive 2014/24, having regard, in particular, to the requirements of the principle of equal treatment, and not, as such, on the classification of the requirements at issue in the main proceedings as selection criteria relating to the 'technical and professional ability' of economic operators, within the meaning of Article 58(4) of that directive, as 'technical specifications', within the meaning of Article 42 thereof or as 'conditions for performance' within the meaning of Article 70 of that directive.

95 The answer to the third question is therefore that Article 58(4), Article 42 and Article 70 of Directive 2014/24 must be interpreted as meaning that they can apply simultaneously to a technical requirement set out in a call for tenders.

The fourth to ninth questions

Preliminary observations

96 Since the fourth, fifth, eighth and ninth questions concern the interpretation of provisions of Directive 2016/943, it must be determined whether that directive is applicable, first, to a situation in which a contracting authority receives a request from a tenderer for the disclosure of information deemed confidential contained in a competitor's tender and, where relevant, a complaint against the decision rejecting that request in the context of a mandatory pre-litigation procedure and, secondly, where an action is brought before a court against the decision of the contracting authority dismissing that complaint.

97 Having regard to its purpose, as set out in Article 1(1) thereof, read in conjunction with recital 4 thereof, Directive 2016/943 concerns only the unlawful acquisition, use or disclosure of trade secrets and does not provide for measures to protect the confidentiality of trade secrets in other types of court proceedings, such as proceedings relating to public procurement.

98 Moreover, Article 4(2)(a) of that directive provides that the acquisition of a trade secret without the consent of the trade secret holder is to be considered unlawful whenever it is carried out by unauthorised access to, appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced.

99 Furthermore, as is apparent from Article 1(2)(c) thereof, that directive does not affect the application of EU or national rules requiring or allowing EU institutions and bodies or national public authorities to disclose information submitted by businesses which those institutions, bodies or authorities hold pursuant to, and in compliance with, the obligations and prerogatives set out in EU or national law. In addition, recital 18 of that directive, in the light of which that provision must be interpreted, states that Directive 2016/943 should not release public authorities from the confidentiality obligations to which they are subject in respect of information passed on by trade secret holders, irrespective of whether those obligations are laid down in EU or national law. Accordingly, it must be concluded that Directive 2016/943 does not release public authorities from the confidentiality obligations which may arise under Directive 2014/24.

100 Lastly, Article 3(2) of Directive 2016/943 provides that the acquisition, use or disclosure of a trade secret is to be considered lawful to the extent that it is required or allowed by EU or national law.

101 In that context, it should be noted that Article 21 of Directive 2014/24, read in conjunction with recital 51 thereof, provides that, in principle, the contracting authority is not to disclose information forwarded to it by economic operators which they have designated as confidential and that it may impose on economic operators requirements aimed at protecting the confidential nature of information which they make available throughout the procurement procedure.

102 Accordingly, in order to provide a useful answer to the referring court, the Court will interpret the relevant provisions of Directives 2014/24 and 89/665 which specify, inter alia, the special rules applicable to contracting authorities and national courts as regards the protection of the confidentiality of documents submitted to them in the context of public procurement procedures.

The fifth to seventh questions

103 By its fifth to seventh questions, the referring court asks, in essence, whether the fourth subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) of Directive 89/665 must be interpreted as meaning that a decision of a contracting authority refusing to disclose to an economic operator the information deemed confidential in the application file or in the tender of another economic operator is a measure amenable to review and that, where the Member State in which the public procurement procedure in question is taking place has provided for a mandatory pre-litigation procedure in respect of decisions taken by contracting authorities, judicial proceedings against that decision must be preceded by such a prior administrative review procedure.

104 In that regard, it follows from the fourth subparagraph of Article 1(1) of Directive 89/665 that the Member States are to take the measures necessary to ensure that, as regards inter alia contracts falling within the scope of Directive 2014/24, 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 Directive 89/665, on the grounds that such decisions have infringed EU law in the field of public procurement or national rules transposing that law. Under Article 1(3) of that directive, those review procedures must be available, under detailed rules which the Member States may establish, 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.

105 Furthermore, it is clear from the case-law of the Court that the concept of 'decisions taken by the contracting authorities' must be interpreted broadly. By using the terms 'as regards contracts', the wording of the fourth subparagraph of Article 1(1) of Directive 89/665 implies that every decision of a contracting authority falling under the EU rules in the field of public procurement and liable to infringe them is subject to the judicial review provided for in Articles 2 to 2f of that directive. That wording thus refers generally to the decisions of a contracting authority without distinguishing between those decisions according to their content or time of adoption and does not lay down any restriction with regard to the nature or content of the decisions to which it refers (see, to that effect, judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraphs 26 and 27 and the case-law cited).

106 That broad interpretation of the concept of 'decisions amenable to review', which led the Court, inter alia, to consider that a decision of a contracting authority allowing an economic operator to participate in a public procurement procedure constitutes a decision within the meaning of the fourth subparagraph of Article 1(1) of Directive 89/665 (judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268, paragraph 28, and see, to that effect, as regards Article 1(3) of that directive, order of 14 February 2019, *Cooperativa Animazione Valdocco*, C-54/18, EU:C:2019:118, paragraph 36), must also apply as regards a decision by which a contracting authority refuses to disclose to an economic operator the information deemed confidential submitted to it by a candidate or a tenderer.

107 Since the referring court asks, in essence, by its seventh question, whether an unsuccessful tenderer may bring legal proceedings relating solely to the refusal to disclose to it information deemed confidential, without also challenging the legality of other decisions of the contracting authority, it is sufficient, first of all, to note that Directive 89/665 does not contain any provision precluding such a tenderer from bringing an action against a contracting authority's decision refusing to provide it with such information, regardless of the content and scope of that decision.

108 Next, as the Advocate General noted, in essence, in points 77 and 78 of his Opinion, that finding is supported by the objectives of effectiveness and speed referred to in the fourth subparagraph of Article 1(1) of that directive.

109 Lastly, as regards the question whether judicial proceedings against a decision by which the contracting authority refuses to disclose to an economic operator information deemed confidential submitted by a candidate or tenderer must be preceded by a prior administrative review procedure where the Member State in which the public procurement procedure in question takes place has provided for a mandatory pre-litigation procedure, it should be noted that, although Article 1(5) of Directive 89/665 provides that a Member State may require that the person concerned first seek review with the contracting authority before seeking judicial review, that provision does not however specify that review procedure or the detailed rules thereof.

110 Accordingly, where, in accordance with Article 1(5) of that directive, the Member State in which the public procurement procedure in question takes place has provided that any person who wishes to challenge a decision taken by the contracting authority is required to seek administrative review before bringing an action before the courts, that Member State may also provide, while respecting the principles of equivalence and effectiveness, that an action against a decision of the contracting authority refusing to disclose to an economic operator the information deemed confidential in the application file or in the tender of another economic operator must be preceded by an administrative review procedure before the contracting authority.

111 It follows from the foregoing considerations that the answer to the fifth to seventh questions is that the fourth subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) of Directive 89/665 must be interpreted as meaning that a decision of a contracting authority refusing to disclose to an economic operator the information deemed confidential in the application file or in the tender of another economic operator is a measure amenable to review and that, where the Member State in which the public procurement procedure in question takes place has provided that any person wishing to challenge decisions taken by the contracting authority is required to seek administrative review before bringing an action before the courts, that Member State may also provide that judicial proceedings against that decision refusing access have to be preceded by such a prior administrative review procedure.

The fourth, eighth and ninth questions

112 By its fourth, eighth and ninth questions, the referring court asks, in essence, whether the fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665 and Article 21 of Directive 2014/24 must be interpreted as meaning that both the contracting authority and, as the case may be, the competent national court are required to disclose to an economic operator which has requested it all the information contained in the documents submitted by a competitor, including the confidential information contained therein. That court also wishes to know whether, in the event of a refusal to disclose information on the ground of its confidentiality, the contracting authority must state reasons for its position regarding the confidential nature of that information.

– *The scope of the contracting authority's obligation to protect confidential information and the obligation to state reasons*

113 Under Article 21(1) of Directive 2014/24, unless otherwise provided in that directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55 of that directive, the contracting authority is not to disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders. Article 21(2) of that directive provides that contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

114 In addition, it is true that Article 55(2)(c) of Directive 2014/24 expressly authorises any tenderer that has made an admissible tender to request the contracting authority to communicate to it, as quickly as possible, and in any event within 15 days from receipt of a written request, the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer. Article 50(4) and Article 55(3) of that directive provide, however, that contracting authorities may decide not to disclose certain information concerning the award of the contract, inter alia where its release would be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators

115 In that regard, it should be recalled that the principal objective of the EU rules on public procurement is the opening-up of public procurement to undistorted competition in all the Member States and that, in order to achieve that objective, it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. Furthermore, the obligation to state reasons for a decision rejecting a tender in a public procurement procedure does not mean that that unsuccessful tenderer must be provided with all the information regarding the characteristics of the tender accepted by the contracting authority. Since public procurement procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to those operators (see, to that effect, judgments of

14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraphs 34 to 36, and of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraph 112 and the case-law cited).

116 It follows from the provisions of Directive 2014/24, cited in paragraphs 113 and 114 above, and from the case-law referred to in paragraph 115 above, that a contracting authority which has received a request from an economic operator for disclosure of information deemed confidential in the tender of the competitor to which the contract was awarded, must not, in principle, disclose that information.

117 However, as the Advocate General observes, in essence, in points 40 and 41 of his Opinion, the contracting authority cannot be bound by an economic operator's mere claim that the information submitted is confidential. Such an operator must demonstrate the genuinely confidential nature of the information which it claims should not be disclosed, by establishing, for example, that that information contains technical or trade secrets, that it could be used to distort competition or that its disclosure could be damaging to that operator.

118 Consequently, if the contracting authority has doubts as to the confidential nature of the information submitted by that operator, it must, before taking a decision granting the applicant access to that information, give the operator concerned the opportunity to provide additional evidence in order to ensure that its rights of defence are respected. Having regard to the harm which could result from the improper disclosure of certain information to a competitor, the contracting authority must, before disclosing that information to a party to the dispute, give the economic operator concerned an opportunity to plead that the information in question is confidential or a trade secret (see, by analogy, judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraph 54).

119 Furthermore, it is for the contracting authority to ensure that the decision which it intends to take on an economic operator's request for access to information contained in the documents submitted by a competitor complies with the public procurement rules set out in Directive 2014/24, in particular those relating to the protection of confidential information referred to in paragraphs 113 and 114 above. The contracting authority is subject to the same obligation where, under Article 1(5) of Directive 89/665, the Member State of that authority has opted to make the right to seek judicial review of decisions taken by the contracting authorities subject to the obligation first to seek administrative review before those authorities.

120 It should also be pointed out that the contracting authority – whether where it refuses to disclose the confidential information of an economic operator to one of its competitors or where it receives an application for administrative review of its refusal to disclose such information in the context of a mandatory pre-litigation procedure – must also comply with the general principle of EU law relating to good administration, which entails requirements that must be met by the Member States when they implement EU law (judgment of 9 November 2017, *LS Customs Services*, C-46/16, EU:C:2017:839, paragraph 39 and the case-law cited). Among those requirements, the obligation to state reasons for decisions adopted by the national authorities is particularly important, since it puts their addressee in a position to defend its rights and decide in full knowledge of the circumstances whether it is worthwhile to bring an action against those decisions. It is also necessary in order to enable the courts to review the legality of those decisions and it is therefore a requirement for ensuring that the judicial review guaranteed by Article 47 of the Charter is effective (see, to that effect, judgments of 15 October 1987, *Heylens*

and Others, 222/86, EU:C:1987:442, paragraph 15; of 9 November 2017, *LS Customs Services*, C-46/16, EU:C:2017:839, paragraph 40; and of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraph 103).

121 Furthermore, the principle of the protection of confidential information and of trade secrets must be observed in such a way as to reconcile it with the requirements of effective judicial protection and the rights of defence of the parties to the dispute (judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraphs 51 and 52 and the case-law cited).

122 In order to balance the prohibition laid down in Article 21(1) of Directive 2014/24 on the disclosure of confidential information communicated by economic operators with the general principle of EU law relating to good administration, from which the obligation to state reasons arises, a contracting authority must indicate clearly the reasons it considers that the requested information, or at least some of it, is confidential.

123 In addition, that balancing exercise must take account of the fact that, in the absence of sufficient information enabling it to ascertain whether the decision of the contracting authority to award the contract at issue to another operator is vitiated by errors or unlawfulness, an unsuccessful tenderer will not, in practice, be able to rely on its right, referred to in Article 1(1) and (3) of Directive 89/665, to an effective review of that decision, whether in the context of a review before the contracting authority, in accordance with Article 1(5) of that directive, or judicial review. Accordingly, if that right is not to be infringed, the contracting authority must not only state the reasons for its decision to treat certain data as confidential but must also communicate in a neutral form – to the extent possible and in so far as such disclosure is capable of preserving the confidentiality of the specific elements of that data which merit protection on that basis – the essential content of that data to such a tenderer which requests it, and in particular the content of the data concerning the decisive aspects of its decision and of the successful tender.

124 The contracting authority's obligation to protect the information deemed confidential of the economic operator to which the public contract has been awarded cannot be given so broad an interpretation that the obligation to provide a statement of reasons is thereby deprived of its essence (see, to that effect, judgment of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, C-584/20 P and C-621/20 P, EU:C:2021:601, paragraph 120) and Article 1(1) and (3) of Directive 89/665, which sets out, in particular, the obligation for the Member States to provide effective review procedures, is rendered ineffective. To that end, the contracting authority may, inter alia and in so far as it is not precluded from doing so by the national law to which it is subject, communicate in summary form certain aspects of an application or tender and their technical characteristics, in such a way that the confidential information cannot be identified.

125 It should also be noted that, pursuant to Article 21(2) of Directive 2014/24, contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure. Thus, assuming that the non-confidential information is adequate for that purpose, a contracting authority may also avail itself of that power in order to ensure that the unsuccessful tenderer's right to an effective review is respected, by requesting the successful tenderer to provide it with a non-confidential version of the documents containing confidential information.

126 Lastly, it should be noted that, in any event, before implementing a decision to disclose information which an economic operator claims to be confidential to one of its competitors, the contracting authority is required to inform the economic operator concerned of its decision in a timely manner, in order to enable that operator to request the contracting authority or the competent national court to adopt interim measures, such as those referred to in Article 2(1)(a) of Directive 89/665, and thus prevent irreparable damage to its interests.

– *The scope of the competent national court's obligation to protect confidential information*

127 As regards the obligations of the competent national court in the context of proceedings brought against a decision of the contracting authority to reject, in whole or in part, a request for access to information submitted by the successful tenderer, it should also be noted that Article 1(1) and (3) of Directive 89/665, which is intended to protect economic operators against arbitrary behaviour on the part of the contracting authority, is thus designed to reinforce the existence, in all Member States, of effective remedies, so as to ensure the effective application of the EU rules on public procurement, in particular at a stage when infringements can still be rectified (see, to that effect, judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraph 41 and the case-law cited).

128 Accordingly, it is up to the Member States to adopt detailed procedural rules governing the judicial remedies intended to safeguard the rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities in such a way as to ensure that neither the effectiveness of Directive 89/665 nor the rights conferred on individuals by EU law are undermined. In addition, as is clear from recital 36 thereof, Directive 2007/66, and therefore Directive 89/665 which it amended and supplemented, is intended to ensure full respect for the right to an effective remedy and to a fair hearing, enshrined in the first and second paragraphs of Article 47 of the Charter (see, to that effect, judgment 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, paragraphs 42 to 46 and the case-law cited). Consequently, when they lay down the detailed procedural rules governing legal remedies, the Member States must ensure that that right is observed. Thus, despite the absence of rules of EU law on procedures for bringing actions before national courts, and in order to determine the rigour of judicial review of national decisions adopted pursuant to an act of EU law, it is necessary to take into account the purpose of the act and to ensure that its effectiveness is not undermined (judgment of 26 June 2019, *Craeynest and Others*, C-723/17, EU:C:2019:533, paragraphs 46 and the case-law cited).

129 However, in the context of a review of a decision taken by a contracting authority in relation to a public procurement procedure, the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the procurement procedure concerned which has been filed with the body responsible for the review (see, to that effect, judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraph 51). On the contrary, as noted, in essence, in paragraph 121 above in relation to the obligations incumbent on contracting authorities in that regard, the obligation to provide the unsuccessful tenderer with sufficient information to safeguard its right to an effective remedy must be weighed against the right of other economic operators to protection of their confidential information and their trade secrets.

130 The competent national court must therefore ascertain, taking full account of both the need to safeguard the public interest in maintaining fair competition in public procurement procedures and the need to protect genuinely confidential information and in particular the trade secrets of

participants in the procurement procedure, that the contracting authority rightly considered that the information which it refused to disclose to the applicant was confidential. To that end, the competent national court must carry out a full examination of all the relevant matters of fact and law. Accordingly, it must necessarily be able to have at its disposal the information required in order to decide in full knowledge of the facts, including confidential information and trade secrets (see, to that effect, judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraph 53).

131 Assuming that that court also concludes that the information in question is confidential, which precludes its disclosure to the competitors of the operator concerned, it must be borne in mind that, as the Court has already held, although the adversarial principle means, as a rule, that the parties to proceedings have a right to inspect and comment on the evidence and observations submitted to the court, in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest (judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraph 47).

132 The fundamental rights capable of being protected in this way include the right to respect for private life and communications, enshrined in Article 7 of the Charter, and the right to the protection of trade secrets, which the Court has acknowledged as a general principle of EU law (see, to that effect, judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraphs 48 and 49).

133 Accordingly, in view of the importance of protecting confidential information, highlighted in paragraphs 131 and 132 above, the entity responsible for a review procedure in relation to the award of a public contract must be able to decide, if necessary, that certain information in the file should not be communicated to the parties or their lawyers (see, to that effect, judgment of 14 February 2008, *Varec*, C-450/06, EU:C:2008:91, paragraph 43).

134 It should also be pointed out that, if the competent national court considers that the contracting authority decided correctly and with sufficient reasons that the requested information could not be disclosed because of its confidential nature, having regard to that contracting authority's obligations in respect of the principle of effective judicial protection, as set out in paragraphs 121 to 123 above, the conduct of that contracting authority in that regard cannot be criticised on the ground that it was excessively protective of the interests of the economic operator whose confidential information was requested.

135 The competent national court must also review the adequacy of the statement of reasons for the decision by which the contracting authority refused to disclose the confidential information or for the decision dismissing the application for administrative review of the prior refusal decision, in order to ensure, in accordance with the case-law referred to in paragraph 120 above, first, that the applicant is able to defend its rights and decide in full knowledge of the circumstances whether it is worthwhile to seek judicial review of that decision and, secondly, that the courts are able to review the legality of that decision. Furthermore, in view of the harm to an economic operator which could result from the improper disclosure of certain information to a competitor, it is for the competent national court to reconcile the applicant's right to an effective remedy, within the meaning of Article 47 of the Charter, with that operator's right to the protection of confidential information.

136 Lastly, the competent national court must be able to annul the refusal decision or the decision dismissing the application for administrative review if they are unlawful and, where appropriate, refer the case back to the contracting authority, or itself adopt a new decision if it is permitted to do so under national law. In so far as the referring court asks, in the context of its ninth question, whether a court which has received a request for disclosure of confidential information must itself examine not only its relevance but also its effects on the legality of the procurement procedure, it is sufficient to point out that, in accordance with Article 1(3) of Directive 89/665, it is for the Member States to determine the detailed rules governing the review procedures enabling decisions taken by contracting authorities to be challenged.

137 In the light of the foregoing considerations, the answer to the fourth, eighth and ninth questions is that:

– The fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665, and Article 21 of Directive 2014/24, read in the light of the general principle of EU law relating to good administration, must be interpreted as meaning that a contracting authority which is requested by an economic operator to disclose information deemed confidential contained in the tender of a competitor to which the contract has been awarded is not required to communicate that information where its disclosure would infringe the rules of EU law relating to the protection of confidential information, even if that request is made in the context of an action brought by that operator challenging the lawfulness of the contracting authority's assessment of the competitor's tender. Where it refuses to disclose such information or where, while refusing such disclosure, it dismisses the application for administrative review lodged by an economic operator concerning the lawfulness of the assessment of the tender of the competitor concerned, the contracting authority is required to balance the applicant's right to good administration with its competitor's right to protection of its confidential information in order that the refusal or dismissal decision is supported by a statement of reasons and the unsuccessful tenderer's right to an effective remedy is not rendered ineffective;

– the fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665 and Article 21 of Directive 2014/24, read in the light of Article 47 of the Charter, must be interpreted as meaning that the competent national court, hearing an action brought against a decision of a contracting authority refusing to disclose to an economic operator information deemed confidential in the documents submitted by the competitor to which the contract has been awarded or an action brought against the decision of a contracting authority dismissing an application for administrative review lodged against such a refusal decision, is required to weigh the applicant's right to an effective remedy against the competitor's right to protection of its confidential information and trade secrets. To that end, that court, which must necessarily have at its disposal the information required, including confidential information and trade secrets, in order to be able to determine, with full knowledge of the facts, whether that information can be disclosed, must examine all the relevant matters of fact and of law. It must also be able to annul the refusal decision or the decision dismissing the application for administrative review if they are unlawful and, where appropriate, refer the case back to the contracting authority, or itself adopt a new decision if it is permitted to do so under national law.

The tenth question

138 By its tenth question, the referring court asks, in essence, whether Article 57(4) of Directive 2014/24 must be interpreted as meaning that a national court, hearing a dispute between an economic operator excluded from the award of a contract and a contracting authority, may, first, depart from the latter's assessment of the lawfulness of the conduct of the economic operator to which the contract was awarded and, accordingly, draw all the necessary inferences in its decision and, secondly, raise of its own motion the issue of an error of assessment made by the contracting authority.

139 Under Article 57(4) of Directive 2014/24, contracting authorities may exclude or may be required by Member States to exclude any economic operator from participation in a procurement procedure in any of the situations referred to in that provision.

140 It should be noted at the outset, since the referring court expressly referred to the judgment of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93* (C-267/18, EU:C:2019:826), in the wording of its tenth question, that that judgment relates to the powers of the contracting authority itself to carry out its own assessment under one of the non-compulsory grounds for exclusion referred to in Article 57(4) of Directive 2014/24, and it is therefore not directly relevant in order to answer that question, which concerns the powers of a court hearing a dispute between an unsuccessful tenderer and a contracting authority.

141 In that regard, it is true that the Court noted, in paragraphs 28 and 34 of the judgment of 19 June 2019, *Meca* (C-41/18, EU:C:2019:507), that it follows from the wording of that provision that it is the contracting authority alone – and not, therefore, a national court – that has been entrusted with determining whether an economic operator must be excluded from a procurement procedure during the stage of selecting the tenderers.

142 However, that interpretation was made in view of the context of the case which gave rise to that judgment, in which the Court had to rule on a national provision under which the lodging of a legal challenge to a decision adopted by a contracting authority to terminate a public contract early on account of major deficiencies in the performance thereof prevented the contracting authority which issued a further call for tenders from conducting an assessment, at the stage of selecting tenderers, of the reliability of the operator concerned by that early termination (judgment of 19 June 2019, *Meca*, C-41/18, EU:C:2019:507, paragraph 42).

143 If the right to an effective remedy – as guaranteed, in relation to public procurement, by the fourth subparagraph of Article 1(1) and Article 1(3) of Directive 89/665 and by Article 47 of the Charter – is not to be disregarded, a decision by which a contracting authority refuses, even implicitly, to exclude an economic operator from a procurement procedure on one of the non-compulsory grounds for exclusion laid down in Article 57(4) of Directive 2014/24 must necessarily be capable of being challenged by any person having or having had an interest in obtaining a specific contract or having been or at risk of being harmed by a breach of that provision.

144 It follows that a national court may, in the context of a dispute between a candidate or a tenderer excluded from the award of a contract and a contracting authority, review the latter's assessment as to whether the conditions required for the application of one of the non-compulsory grounds for exclusion referred to in Article 57(4) of Directive 2014/24 were satisfied with regard to the

economic operator to which the contract was awarded and, consequently, depart from that assessment. Accordingly, depending on the case, that court may rule to that effect on the merits or remit the case to the contracting authority or the competent national court for that purpose.

145 That being said, EU law does not require national courts to raise of their own motion an issue concerning the breach of provisions of EU law where the examination of that issue would oblige them to overstep the bounds of the role assigned to them, inter alia by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in the application of those provisions bases its claim (see, to that effect, judgments of 14 December 1995, *van Schijndel and van Veen*, C-430/93 and C-431/93, EU:C:1995:441, paragraphs 21 and 22, and of 19 December 2018, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*, C-216/17, EU:C:2018:1034, paragraph 40).

146 The Court has consistently held that, in the absence of EU rules governing the matter, it is for each Member State, in accordance with the principle of the procedural autonomy of the Member States, to lay down the detailed rules of administrative and judicial procedures governing actions for safeguarding rights which individuals derive from EU law. Those detailed procedural rules must, however, be no less favourable than those governing similar domestic actions, in accordance with the principle of equivalence (judgment of 6 October 2015, *Orizzonte Salute*, C-61/14, EU:C:2015:655, paragraph 46 and the case-law cited).

147 Accordingly, a national court may raise of its own motion an issue concerning the breach, by an economic operator, of Article 57(4) of Directive 2014/24, only if it is permitted to do so under national law (see, to that effect, judgment of 14 December 1995, *van Schijndel and van Veen*, C-430/93 and C-431/93, EU:C:1995:441, paragraphs 13 and 14).

148 In the light of the foregoing considerations, the answer to the tenth question is that Article 57(4) of Directive 2014/24 must be interpreted as meaning that a national court, hearing a dispute between an economic operator excluded from the award of a contract and a contracting authority, may depart from the latter's assessment of the lawfulness of the conduct of the economic operator to which the contract was awarded and, accordingly, draw all the necessary inferences in its decision. However, in accordance with the principle of equivalence, such a court may raise of its own motion the issue of an error of assessment made by the contracting authority only if permitted to do so under national law.

The eleventh question

149 By its eleventh question, the referring court asks, in essence, whether the second subparagraph of Article 63(1) of Directive 2014/24, read in conjunction with Article 57(4) and (6) of that directive, must be interpreted as precluding national legislation under which, where an economic operator which is a member of a group of economic operators has been found guilty of serious misrepresentation in supplying the information required for the verification, as regards that group, of the absence of grounds for exclusion or the fulfilment of the selection criteria, without the other members of that group having been aware of that misrepresentation, all of the members of that group may be excluded from participation in any public procurement procedure.

150 In that regard, it must be noted that the first subparagraph of Article 63(1) of Directive 2014/24 provides for the right of an economic operator to rely, for a particular contract, on the capacities of other entities, regardless of the legal nature of the links which it has with them, with a view to

satisfying both the criteria relating to economic and financial standing set out in Article 58(3) of that directive and the criteria relating to technical and professional capacities referred to in Article 58(4) of that directive (judgment of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 30 and the case-law cited).

151 An economic operator intending to invoke that right must, pursuant to the second and third subparagraphs of Article 59(1) of Directive 2014/24, send a European Single Procurement Document (ESPD) to the contracting authority when submitting its request to participate or its tender, stating that both itself and the entities on whose capacities it intends to rely are not in one of the situations referred to in Article 57 of that directive, which must or may lead to an economic operator's exclusion, and/or that the selection criterion concerned is fulfilled.

152 It is then for the contracting authority, pursuant to the second subparagraph of Article 63(1) of Directive 2014/24, to determine, inter alia, whether there are grounds for exclusion, as referred to in Article 57 of that directive, in respect of that economic operator itself or one of those entities. If so, the contracting authority may require, or may be obliged by its Member State to require, that the economic operator concerned replace an entity on whose capacities it intends to rely, but in respect of which there are non-compulsory grounds for exclusion.

153 It must however be noted that, even before requiring a tenderer to replace an entity on whose capacities it intends to rely, on the ground that it is in one of the situations referred to in Article 57(1) and (4) of Directive 2014/24, Article 63 of that directive presupposes that the contracting authority will give that tenderer and/or that entity the opportunity to submit to it corrective measures which it may have adopted in order to remedy the irregularity found and, consequently, to demonstrate that it may once again be considered a reliable entity (see, to that effect, judgments of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93*, C-267/18, EU:C:2019:826, paragraph 37, and of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 36).

154 That interpretation of the second subparagraph of Article 63(1) of Directive 2014/24 ensures the effectiveness of the first subparagraph of Article 57(6) of that directive, which guarantees, as a matter of principle, the right of any economic operator in one of the situations referred to in paragraphs 1 and 4 of Article 57 to provide evidence that the measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion (see, to that effect, judgment of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 35).

155 That interpretation also helps to ensure that contracting authorities comply with the principle of proportionality, in accordance with the first subparagraph of Article 18(1) of that directive. It follows from that principle, which is a general principle of EU law, that the rules laid down by the Member States or the contracting authorities in implementing the provisions of that directive must not go beyond what is necessary to achieve the objectives of that directive (see, to that effect, judgments of 16 December 2008, *Michaniki*, C-213/07, EU:C:2008:731, paragraph 48, and of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 45).

156 In that regard, it must be borne in mind that, when applying non-compulsory grounds for exclusion, contracting authorities must pay particular attention to that principle. That attention must be even greater in the case where the exclusion provided for by national legislation is imposed on the tenderer not for a failure attributable to it, but for a failure on the part of an

entity on whose capacities the tenderer intends to rely and over which it has no control (see, to that effect, judgments of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 48, and of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 39).

157 The principle of proportionality requires the contracting authority to carry out a specific and individual assessment of the conduct of the entity concerned. On that basis, the contracting authority must have regard to the means available to the tenderer for establishing whether there was a failure on the part of the entity on whose capacities it intended to rely (judgment of 3 June 2021, *Rad Service and Others*, C-210/20, EU:C:2021:445, paragraph 40).

158 Consequently, the answer to the eleventh question is that the second subparagraph of Article 63(1) of Directive 2014/24, read in conjunction with Article 57(4) and (6) of that directive, must be interpreted as precluding national legislation under which, where an economic operator which is a member of a group of economic operators has been guilty of serious misrepresentation in supplying the information required for the verification, as regards that group, of the absence of grounds for exclusion or the fulfilment of the selection criteria, without the other members of that group having been aware of that misrepresentation, all of the members of that group may be excluded from participation in any public procurement procedure.

Costs

159 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 (Grand Chamber) hereby rules:

1. **Article 58 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that the obligation on economic operators to demonstrate that they have a certain average annual turnover in the area covered by the public contract at issue constitutes a selection criterion relating to the economic and financial standing of those operators, within the meaning of paragraph 3 of that provision.**

2. **Article 58(3) in conjunction with Article 60(3) of Directive 2014/24 must be interpreted as meaning that, where the contracting authority has required that economic operators have achieved a certain minimum turnover in the area covered by the public contract in question, an economic operator may, in order to prove its economic and financial standing, rely on income received by a temporary group of undertakings to which it belonged only if it actually contributed, in the context of a specific public contract, to the performance of an activity of that group analogous to the activity which is the subject matter of the public contract for which that operator seeks to prove its economic and financial standing.**

3. **Article 58(4), Article 42 and Article 70 of Directive 2014/24 must be interpreted as meaning that they can apply simultaneously to a technical requirement set out in a call for tenders.**

4. **The fourth subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) 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, must be interpreted as meaning that a decision of a contracting authority refusing to disclose to an economic operator the information deemed confidential in the application file or in the tender of another economic operator is a measure amenable to review and that, where the Member State in which the public procurement procedure in question takes place has provided that any person wishing to challenge decisions taken by the contracting authority is required to seek administrative review before bringing an action before the courts, that Member State may also provide that judicial proceedings against that decision refusing access have to be preceded by such a prior administrative review procedure.**

5. **The fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665, as amended by Directive 2014/23, and Article 21 of Directive 2014/24, read in the light of the general principle of EU law relating to good administration, must be interpreted as meaning that a contracting authority, when requested by an economic operator to disclose information deemed confidential contained in the tender of a competitor to which the contract has been awarded, is not required to communicate that information where its disclosure would infringe the rules of EU law relating to the protection of confidential information, even if that request is made in the context of an action brought by that operator challenging the lawfulness of the contracting authority's assessment of the competitor's tender. Where it refuses to disclose such information or where, while refusing such disclosure, it dismisses the application for administrative review lodged by an economic operator concerning the lawfulness of the assessment of the tender of the competitor concerned, the contracting authority is required to balance the applicant's right to good administration with its competitor's right to protection of its confidential information in order that the refusal or dismissal decision is supported by a statement of reasons and the unsuccessful tenderer's right to an effective remedy is not rendered ineffective.**

6. **The fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665, as amended by Directive 2014/23, and Article 21 of Directive 2014/24, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that the competent national court, hearing an action brought against a decision of a contracting authority refusing to disclose to an economic operator information deemed confidential in the documents submitted by the competitor to which the contract has been awarded or an action brought against the decision of a contracting authority dismissing an application for administrative review lodged against such a decision, is required to weigh the applicant's right to an effective remedy against its competitor's right to protection of its confidential information and trade secrets. To that end, that court, which must necessarily have at its disposal the information required, including confidential information and trade secrets, in order to be able to determine, with full knowledge of the facts, whether that information can be disclosed, must examine all the relevant matters of fact and of law. It must also be able to annul the refusal decision or the decision dismissing the application for administrative review if they are unlawful and, where appropriate, refer the case back to the contracting authority, or itself adopt a new decision if it is permitted to do so under national law.**

7. **Article 57(4) of Directive 2014/24 must be interpreted as meaning that a national court, hearing a dispute between an economic operator excluded from the award of a contract and a contracting authority, may depart from the latter's assessment of the lawfulness of the conduct of the economic operator to which the contract was awarded and, accordingly, draw all the necessary inferences in its decision. However, in accordance with the principle of equivalence, such a court may raise of its own motion the issue of an error of assessment made by the contracting authority only if permitted to do so under national law.**

8. **Article 63(1) of Directive 2014/24, read in conjunction with Article 57(4) and (6) of that directive, must be interpreted as precluding national legislation under which, where an economic operator which is a member of a group of economic operators has been guilty of serious misrepresentation in supplying the information required for the verification, as regards that group, of the absence of grounds for exclusion or the fulfilment of the selection criteria, without the other members of that group having been aware of that misrepresentation, all of the members of that group may be excluded from participation in any public procurement procedure.**

[Signatures]