Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 2 March 2023 [1]

Case C-601/21

European Commission
v

Republic of Poland

(Failure of a Member State to fulfil obligations – Public procurement – Article 15(2) and (3) of Directive 2014/24/EU – Derogations – Production of identity documents and other official documents – Protection of the essential security interests of the Member States – Less intrusive measures)

I. Introduction

1. For public authorities, in the European Union and elsewhere, the need to protect the integrity of and the public trust in public documents (such as passports, ballot papers, or service cards of members of the police, military and intelligence services) raises significant security concerns. Especially in today's world, where people are able to travel easily and quickly, and data even more so, those authorities are engaged in a never-ending competition against criminals to develop material and techniques which render the falsification of and tampering with public documents as difficult as possible.

2. Article 15(2) and (3) 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 [2] and Article 346(1) TFEU allow Member States to, in essence, exclude certain public contracts from the procedures provided for in that directive when the protection of their essential security interests could be undermined, provided no less restrictive measures exist.

3. What public interests can be regarded as being 'essential security interests' for that purpose? What is the margin of manoeuvre of the Member States in that regard? Is a Member State entitled to choose the level of protection that it deems most appropriate in relation to those interests? How far does a Member State's duty go to consider and, if need be, adopt measures that may be less restrictive?

4. These are, in a nutshell, the main legal issues that arise in the present proceedings, in respect of which I will attempt to bring some clarity with this Opinion.

[1] Original language: English.

[2] OJ 2014 L 94, p. 65.

II. Legal background

A. European Union law

5. Under the terms of Article 346(1) TFEU:

'The provisions of the Treaties shall not preclude the application of the following rules:

(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

…'

6. Article 1(1) and (3) of Directive 2014/24, concerning the subject matter and scope of the directive, as amended and currently in force, provides:

'1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts …, whose value is estimated to be not less than the thresholds laid down in Article 4.

…

3. The application of this Directive is subject to Article 346 TFEU.'

7. Article 2(1)(9) of Directive 2014/24 defines 'public service contracts' as 'public contracts having as their object the provision of services other than those referred to in point 6'. [3]

8. Article 15(2) and (3) of the same directive, concerning 'defence and security', states:

'2. This Directive shall not apply to public contracts … not otherwise exempted under paragraph 1, to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information which the contracting authority makes available in a contract award procedure as provided for in this Directive.

Furthermore, and in conformity with point (a) of Article 346(1) TFEU, this Directive shall not apply to public contracts … not otherwise exempted under paragraph 1 of this Article to the extent that the application of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security.

3. Where the procurement and performance of the public contract … are declared to be secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State, this Directive shall not apply provided that the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures, such as those referred to in the first subparagraph of paragraph 2.'

[3] Point 6 concerns the definition of 'public works contracts'.

B. Polish law

9. Article 11(4) of the ustawa z dnia 11 września 2019 r. – Prawo zamówień publicznych (Law of 11 September 2019 on Public Procurement; 'the Pzp of 2019') provides:

'The provisions of this law shall not apply to contracts for the production of:

1) blank public documents referred to in Article 5(2) of the Law on Public Documents of 22 November 2018 …, as well as their personalisation or individualisation;

2) excise stamps;

3) legal markings and control stickers referred to in the Law of 20 June 1997 establishing the highway code …;

4) ballot papers and Braille ballot papers referred to in Article 40(1) and Article 40a(1) respectively of the law of 5 January 2011 establishing the Electoral Code … and Article 20 of the law of 14 March 2003 on the National Referendum …;

5) holographic signs on certificates of voting rights referred to in Article 32(1) of the law of 5 January 2011 on the Electoral Code;

6) microprocessor systems with software for the management of public documents, computer systems and databases necessary for the use of public documents referred to in Article 5(2) of the law of 22 November 2018 on public documents, containing an electronic chip, in accordance with their purpose'.

10. The following list of public documents is contained in Article 5(2) of the Law on Public Documents of 22 November 2018: 1) identity cards; 2) passports; 3) seaman's books, referred to in Article 10(1) of the Law on Maritime Labour of 5 August 2015; 4) documents issued pursuant to Article 44(1) and Article 83(1) of the Law on Civil Status Records of 28 November 2014; 5) documents issued to foreigners pursuant to Article 37 and Article 226 of the Law on Foreigners of 12 December 2013; 6) documents issued to members of diplomatic missions and consular posts of foreign states or any person assimilated to them by virtue of laws, conventions or customary international law, as well as documents issued to their family members forming part of their household pursuant to Article 61 of the Law on Foreigners of 12 December 2013; 7) the document issued to EU citizens pursuant to Article 48(1) of the Law of 14 July 2006 on entry to, stay in and exit from the territory of the Republic of Poland of nationals of EU Member States and their family members; 8) documents issued to family members of EU citizens pursuant to Article 30(1) and Article 48(2) of that law of 14 July 2006; 9) documents issued to aliens pursuant to Article 55(1) and Article 89i(1) of the Law of 13 June 2003 on granting aliens protection in the territory of the Republic of Poland; 10) enforceable titles issued by courts or judicial officers; 11) copies of final judgments establishing the acquisition, existence or extinction of a right or relating to civil status; 12) copies of judgments or certificates, issued by a court, empowering the representation of a person, the performance of a legal act or the administration of specific property; 13) copies of orders of courts and court officers concerning the affixing of the enforcement formula to an enforcement order other than those listed in Article 777(1)(1) and (1^1) of the Law of 17 November 1964 establishing the Code of Civil Procedure, if their subject matter is an enforcement order not issued by the court; 14) copies of and extracts from documents relating to the notarial acts referred to in Article 79(1–1b) and (4) of the Law of

14 February 1991 on the notarial profession, the authorisations referred to in Article 79(2) thereof and the protests referred to in Article 79(5) thereof; 15) the aircrew member's certificate; 16) personal military documents issued to persons entered in the military register pursuant to Article 54(1) of the Law of 21 November 1967 on the general obligation to defend the Republic of Poland; 17) personal military documents issued pursuant to Article 48(1) of the Law of 11 September 2003 on professional military service; 18) identity cards issued pursuant to Article 137c(1) of that law of 11 September 2003; 19) identity cards issued pursuant to Article 54a(1) of that law of 21 November 1967; 20) an annotation in a passport referred to in Article 19(1) of the Law of 13 July 2006 on Passports; 21) the visa sticker; 22) the 'Polish card' ('*Karta Polaka*'); 23) the card certifying disability or degree of disability; 24) the authorisation to work as a doctor; 25) the permit to practice dentistry; 26) the driving licence; 27) the professional registration certificate and vehicle registration certificate, except for vehicle registration certificates referred to in Article 73(3) of the Law of 20 June 1997 on the Traffic Code; 28) the vehicle booklet ('*karta pojazdu*'); 29) the temporary certificate referred to in Article 71(1) of the Law of 20 June 1997 on the Traffic Code; 30) the tachograph card referred to in Article 2(4) of the Law of 5 July 2018 on Tachographs; 31) the ADR certificate referred to in Article 2(10) of the Law of 19 August 2011 on Transport of Dangerous Goods; 31a) the registration document referred to in Article 4(1) of the Law of 12 April 2018 on the registration of yachts and other vessels up to 24 metres in length; and 32) service cards of: a) police officers, b) border guards, c) State security agents, d) officers of the Internal Security Agency, e) officers of the Intelligence Agency, f) officers of the Central Anti-Corruption Bureau, g) officers of the Military Counterintelligence Service and professional soldiers appointed to a post in that service, h) officers of the Military Iintelligence Service and professional soldiers appointed to a post in that service, i) officers and staff of the prison administration, j) tax and customs officials, k) persons employed in organisational units of the national tax administration, l) inspectors of the Road Transport Inspectorate, m) members of the military police.

III. Background to the case and the pre-litigation procedure

11. According to Article 90 of Directive 2014/24, Member States were required to transpose that directive by 18 April 2016.

12. On 14 July 2016, the European Commission received from the Polish authorities notification of the national measures transposing that directive. Taking the view that the Republic of Poland had failed to fulfil its obligations under that directive, the Commission sent it a letter of formal notice on 25 January 2019.

13. By letter of 25 March 2019, the Polish authorities responded to the letter of formal notice by informing the Commission of their intention to review certain aspects of the transposition measures in order to ensure compliance with, inter alia, Directive 2014/24. The Polish authorities, however, rejected some of the Commission's objections.

14. On 5 November 2019, the Polish authorities informed the Commission of the adoption of a new law, the Pzp of 2019, aimed at replacing, as of 1 January 2021, the national legislation previously in force.

15. On 28 November 2019, the Commission sent a reasoned opinion to the Republic of Poland, pointing out shortcomings in the transposition of Directive 2014/24. In that reasoned opinion, the Commission accepted that, with the new legislation, the Polish authorities had indeed remedied some of the problems previously identified. However, the Commission maintained the other objections raised in its letter of formal notice, which the Polish authorities had contested.

16. In their reply of 28 January 2020, the Polish authorities again disagreed with the Commission's complaints, arguing that the national legislation at issue complied with the provisions of Directive 2014/24.

17. In those circumstances, the Commission decided to bring the present action.

IV. Procedure before the Court and forms of order sought

18. By its application, submitted on 28 September 2021, the Commission claims that the Court should:

– declare that, by adding exemptions relating to the production of certain documents, printed matter and stamps and markings, which are not provided for in Directive 2014/24, the Republic of Poland has failed to fulfil its obligations under Article 1(1) and (3) and Article 15(2) and (3) of Directive 2014/24, read in conjunction with Article 346(1)(a) TFEU; and

– order the Republic of Poland to pay the costs.

19. In its defence, submitted on 17 December 2021, the Republic of Poland contends that the Court should:

– dismiss the action; and

– order the Commission to pay the costs.

20. The Commission lodged a reply on 9 February 2022, the Republic of Poland lodged a rejoinder on 21 March 2022, and both presented oral argument at the hearing on 1 December 2022.

V. Analysis

A. Arguments of the parties

21. In its application, the Commission points out that the Republic of Poland has, when transposing Directive 2014/24 into national law, excluded from the scope of that directive the contracts for the production of a large and diverse series of documents and other objects ('the documents at issue'). Indeed, those contracts have been entrusted directly to Polska Wytwórnia Papierów Wartościowych ('PWPW') – a public undertaking established in Poland and wholly owned by the State Treasury – without any public tenders being organised to that end.

22. The Commission recalls that Directive 2014/24 expressly provides for cases in which its provisions do not apply. The Commission points out that the list of derogations is, according to the case-law of the Court, exhaustive, and that such derogations should be interpreted strictly.

23. In the Commission's view, the Polish Government cannot validly rely on Article 15(2) and (3) of Directive 2014/24 to justify the exclusion of the contracts for the production of the documents at issue from the public procurement rules. In that regard, the Commission refers to the Court's findings in the judgment of 20 March 2018, *Commission* v *Austria (State printing office)*,[4] which are – in its view – applicable *mutatis mutandis* to the present case. In that judgment, the Court stated, inter alia, that Member States' measures cannot be exempted, as a whole, from the application of public procurement rules solely because they were taken in the interest of public security or national defence. It is for the Member State relying on those derogations to establish that the need to protect such interests could not have been achieved through a competitive tendering procedure.

24. The Commission is of the view that some of the interests invoked by the Polish Government are not related to that Member State's security, let alone its *essential* security interests. In addition, even with regard to those interests that can possibly fall within that concept, the Commission contends that the Polish Government failed to show that the objective of protecting such interests cannot be equally protected by means of alternative, less restrictive measures.

25. In particular, the Commission argues that the Polish Government did not explain why PWPW would be the only company with the experience and technical certificates required to produce the documents at issue with the highest safety standards. In that context, the Commission notes that several companies active in the European Union (including some established in Poland) offer similar guarantees in terms of technical capacity, financial stability and security. In fact, PWPW competes against those companies in tenders for the production of documents equivalent to those concerned in the present proceedings for other EU Member States (or, for that matter, for countries outside the European Union).

26. The Commission submits that nothing prevents the contracting authority from imposing particularly high requirements for tenderers (in terms of technical and financial capabilities, moral standing, etc.) and from asking them to provide the necessary evidence in support of their tender. In particular, Articles 42 and 58 of Directive 2014/24 give national authorities, in the Commission's view, ample room for manoeuvre in that respect. For example, an economic operator could be required to agree to appropriate checks by the authorities and to provide guarantees as to the security and punctuality of supply and to solvency. The contract could also include clauses on compensation and financial and disciplinary liability in case of breach.

27. The Commission expresses doubts as to whether the Polish Government's argument concerning the de facto impossibility for PWPW to go bankrupt is correct, since the EU provisions on State aid control may be applicable to financial aid provided to that company by the Treasury.

28. For its part, the Republic of Poland emphasises that it has an extensive system of security of official documents, and that PWPW is an entity entirely controlled and managed by the State. It adds that, under national law, shares or rights attached to shares owned by the Treasury – such as those of PWPW – cannot, in principle, be sold. Exceptionally, a possible sale of those shares could be subject to the condition of approval by the Council of Ministers, but could only be done in favour of other public companies that cannot be sold to private shareholders.

[4] C-187/16, EU:C:2018:194; 'the judgment in *Commission* v *Austria*'.

29. According to the Republic of Poland, such a configuration allows the exercise of full control over both the functioning of PWPW's bodies and the process of producing official documents. In those circumstances, entrusting the task of producing such documents to such an entity, without going through a public procurement procedure, would limit the circle of entities that have access to information considered to be classified. Such a solution would also ensure continuity of production while eliminating the risks associated with the bankruptcy of the producer or the poor execution of a possible public contract.

30. As regards the Commission's arguments concerning bankruptcy of a company such as PWPW, the Polish Government points out that, although bankruptcy of companies owned by the Treasury is obviously possible, that risk is almost nil given their strategic importance. The Republic of Poland contends that the Commission has not put forward any reason why, in the event of PWPW's financial difficulties, it would not be possible to grant State aid to that company.

31. In the Polish Government's view, the factual and legal situation in the present case is not similar to that examined by the Court in the abovementioned judgment in *Commission* v *Austria*. In that regard, it points out that the legal status of the Austrian company responsible for printing official documents was significantly different from that of PWPW, in that it was a private limited company whose shares were listed on the stock exchange and held by private individuals. Furthermore, it considers that the Austrian Government's control over the company was much more limited than in the case here in the Republic of Poland. On that basis, the Polish Government argues that, under Austrian law, the level of protection of the State's essential interests chosen by the authorities was lower than that chosen in Poland, and that it cannot be required to reduce that level of protection to that chosen by other States.

32. The Republic of Poland further submits that the contractual guarantees proposed by the Commission do not make it possible to prevent a threat to its security interests, arising from a possible acquisition of the economic operator in question or from influence on its management bodies by the secret services of a third country or by an organised criminal group. With regard to the risk of insolvency of the producer of the documents, the solution proposed by the Commission – which aims to establish an eligibility criterion in the form of a certificate of financial standing enabling the contract to be performed safely and without hindrance – would not make it possible to avoid a sudden deterioration in the financial situation of the economic operator concerned.

33. The exclusions provided for in national law are thus – in the view of the Polish Government – a proportionate, adequate and necessary measure to achieve the objective of guaranteeing Poland's essential security interests at the level that is considered adequate. In order to demonstrate the proportionality of the use of the derogations, it would not be necessary – according to the Polish Government – to prove that, in the event the directive in question would be applied, the likelihood of a threat to the essential security interests of the Member State concerned would be particularly high. Indeed, even the slightest likelihood of significant harm to the security interests of the State would – in the opinion of that government – constitute grounds for making use of those derogations.

34. More generally, the Polish Government submits, the Commission has not demonstrated that the level of State security that can be achieved by entrusting the production of documents to an entity selected pursuant to Directive 2014/24 would be as high as when that task is entrusted to a company owned by the Treasury.

B. Assessment

35. At the outset, it must be pointed out that – as the Commission claims without it being disputed by the Polish Government – Directive 2014/24 is, in principle, applicable to public contracts for the production of the documents at issue. Indeed, it is common ground that the public contracts in question (i) do not concern the services, sectors and situations for which Articles 7 to 12 of Directive 2014/24 provide exclusions, and (ii) have a value that is no less than the thresholds laid down in Article 4 of that directive. In addition, Article 15(1) of Directive 2014/24 makes it clear that, in principle, that directive applies to the awarding of public contracts 'organised in the fields of defence and security'.

36. However, the Polish Government argues that such contracts could be awarded without making use of the procedures set out in Directive 2014/24 since some of the derogations set out in Article 15(2) and (3) thereof are applicable to the present case.

37. In the following sections, I shall first lay down the relevant analytical framework (1) and then assess the parties' arguments against that framework (2). My conclusion will be that the national legislation at issue, as it currently stands, cannot be considered to fall entirely within the scope of the derogations discussed in this Opinion and, consequently, infringes the provisions of Directive 2014/24 (3).

1. The relevant analytical framework

(a) Article 15(2) and (3) of Directive 2014/24 and Article 346(1)(a) TFEU

38. Article 15(2) and (3) of Directive 2014/24 provides for four situations in which that directive 'shall not apply'. Those derogations to the application of the directive – which all concern procurement procedures relating to the field of 'defence and security', as the title of that provision makes clear –[5] are the following.

39. First, pursuant to the first subparagraph of Article 15(2) of Directive 2014/24, that directive does not apply to public contracts 'to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures'. Second, under the second subparagraph of Article 15(2), the directive does not apply to the extent that its application 'would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security'. Third, Article 15(3) provides for two additional situations, stating that the directive does not apply when the public contract is (i) 'declared to be secret' or (ii) 'must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State'. Also under this paragraph, that is valid only in so far as 'the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures'.

40. That being said, I should also point out that Article 346(1)(a) TFEU does not appear to add, as regards the situation at issue in the present proceedings, any further (or self-standing) derogation. Indeed, the second subparagraph of Article 15(2) of Directive 2014/24 includes an express reference to Article 346(1)(a) TFEU[6] and the two provisions are worded very similarly.

[5] Similarly, the title of the subsection of Directive 2014/24 which includes Article 15 is entitled 'Procurement involving defence or security aspects'.

[6] Another reference to that Treaty provision can be found in Article 1(3) of the directive.

Therefore, the former provision constitutes, in my view, an application of the principle laid down in the latter, within the area governed by Directive 2014/24. Accordingly, once the arguments of the parties are assessed in the light of the provisions of the directive, there is, in my view, no need to carry out a separate and independent assessment under Article 346(1)(a) TFEU.[7] In that respect I note, in passing, that the parties' arguments appear consistent with such an approach.

41. The Polish Government relies on three derogations provided for in Article 15(2) and (3) of Directive 2014/24; that is, all of them except the one concerned with secret contracts ('the derogations at issue'). However, neither in its written nor its oral submissions does that government develop arguments which are specific to one or the other of those derogations; nor are the Commission's arguments any more specific in that regard, which leads me to believe that both parties agree – at least in principle – that the framework of analysis for the three derogations at issue is largely analogous.

42. I am of the same view. Despite some textual differences between the different paragraphs or subparagraphs of Article 15 of Directive 2014/24[8] and some terminology which may appear puzzling,[9] they share the same key elements and thus require from the Court a relatively similar assessment.

(b) Scope of the derogations at issue

43. In essence, the derogations at issue allow any Member State to exclude procurement of certain services from the procedures laid down in Directive 2014/24 when the following conditions are satisfied: (i) the public interests protected relate to that Member State's 'security interests', (ii) those interests may be considered 'essential', (iii) the application of the directive in question could, in the view of that Member State, prejudice the protection of those interests, and (iv) the protection of those interests cannot be guaranteed by less intrusive measures.

44. I shall now attempt to clarify the meaning of those conditions.

(1) The concept of 'essential security interests'

45. As far as conditions (i) and (ii) are concerned, it is for each Member State to define the specific public interests that constitute its 'essential security interests'.[10] At the same time, however, the Member States' discretion in that regard cannot be unfettered, as otherwise the terms *essential* and *security* would be deprived of all practical effect.

46. I can accept that defining 'security' in a precise and exhaustive manner is an impossible task. What is actually covered by that concept depends, I believe, on a multitude of factors which may vary between different Member States and also over time. The same holds true with respect to the specification that the security-related interests protected by the Member States must be

7 See, by analogy, Opinion of Advocate General Kokott in *Commission* v *Austria (State printing office)* (C-187/16, EU:C:2017:578, points 43 and 45; 'the Opinion in *Commission* v *Austria*').

8 Such as, in particular, the fact that the second subparagraph of Article 15(2) of Directive 2014/24, unlike the first subparagraph of Article 15(2) and Article 15(3) thereof, does not expressly require the absence of 'less intrusive measures'. However, the lack of such a requirement is, in my view, immaterial, since it follows in any event from the principle of proportionality.

9 The second subparagraph of Article 15(2) of Directive 2014/24 starts with the term 'furthermore', which would suggest that it supplements what was provided in the first subparagraph thereof. However, it seems to me that the (more broadly formulated) situation provided for in the first subparagraph encompasses also the (more narrowly defined) situation provided for in the second subparagraph.

10 See, to that effect, the judgment in *Commission* v *Austria*, paragraph 75.

'essential'. That adjective requires an assessment that is inevitably subjective, at least to some extent: much depends on historical, political and geopolitical considerations which may vary from one State to the other. [11]

47. Nevertheless, unless the conditions set out in Article 15(2) and (3) of Directive 2014/24 are reduced to a mere formality, the Court must be able to verify whether, when relying on the derogations at issue, a Member State has exceeded its margin of discretion, [12] since the exclusion from public tendering is meant to protect interests which either do not relate or are only loosely related to security. [13]

48. In that regard, I think that the term 'security' – appearing in both Article 15 of Directive 2014/24 and Article 346 TFEU – corresponds to the terms 'public security' [14] and 'national security' [15] which can be found in several EU law provisions, and largely overlaps with (but is arguably broader than) the term 'internal security' [16] appearing in a number of other EU law provisions.

49. As the Court stated with regard to the term 'national security', it consists in 'the primary interest in protecting the essential functions of the State and the fundamental interests of society and encompasses the prevention and punishment of activities capable of seriously destabilising the fundamental constitutional, political, economic or social structures of a country and, in particular, of directly threatening society, the population or the State itself'. [17] In other words, that term refers to matters relating to the *safety* of a Member State's institutions or people from threats of a certain significance stemming from circumstances which may be internal (organised crime, riots, etc.) or external (intelligence or counter-intelligence, cyberwarfare, etc.) to the State. Such threats may be specific to that State (such as paramilitary or armed nationalist groups) or of a global nature (such as a lethal pandemic), man-made (nuclear accidents, environmental disasters, acts of terrorism, etc.) or occurring naturally (earthquakes, tsunamis, floods, etc.).

50. In turn, the term 'essential' necessarily implies some *selectivity* with regard to the public functions and interests that (even if security related) can be covered by the derogations at issue. In my view, that term should be read as limiting those derogations to core components of Member States' security policy, to the exclusion of issues that are only *indirectly* or *loosely* concerned with public security. [18]

51. To be clear, I have no doubt that a variety of situations – connected to, for example, public health, environmental protection, privacy, public finance, etc. – could, when of a systemic or large-scale nature, be possibly regarded as also raising issues of public security. Nevertheless, I would be very hesitant to endorse an interpretation of Article 15(2) and (3) of Directive 2014/24

[11] Just to give an example, the risks posed by a possible energy crisis may perhaps be regarded as 'essential security interests' by a State that is a significant importer of energy (or of the materials used to generate energy), whereas they may not be so for a State that is energy self-sufficient. See, for example, judgment of 10 July 1984, *Campus Oil and Others* (72/83, EU:C:1984:256, paragraphs 34 and 35). That is all the more so in the current geopolitical context.

[12] Similarly, Opinion of Advocate General Cosmas in *Albore* (C-423/98, EU:C:2000:158, point 58).

[13] See, to that effect, Opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v *Germany* (C-284/05, C-294/05, C-372/05, C-387/05, C-409/05, C-461/05 and C-239/06, EU:C:2009:76, points 129 to 133).

[14] Articles 36, 45, 52, 65 and 202 TFEU.

[15] Article 4(2) TEU.

[16] Articles 71, 72 and 276 TFEU.

[17] Judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 135).

[18] See, for example, Article 4(2) TEU that speaks of '*essential* State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'. Emphasis added.

which would result in widening the ambit of the derogations set out therein beyond any interest that, when affected, has an immediate and manifest impact on the safety of a Member State's institutions or people.

52. This approach appears consistent with the interpretative principle according to which exceptions to EU rules of general application – such as those at issue in the present action – must be interpreted strictly.[19]

(2) Prejudice

53. As regards condition (iii) referred to in point 43 above, three observations, based on the very wording of Article 15(2) and (3) of Directive 2014/24, are in order.

54. First, the text of the provision – which emphasises the Member State's margin of appreciation ('considers', 'has determined') – makes it clear that a Member State need not provide positive and irrefutable evidence that the application of Directive 2014/24 with regard to certain public contracts would actually prejudice the protection of its essential security interests. It is sufficient that a Member State explain, on the basis of specific and credible elements,[20] why it has reasonable grounds to take the view[21] that the application of public procurement rules in respect of certain public contracts could undermine[22] its essential security interests.

55. Second, it also follows from the above that the threat to the security interests invoked by a Member State need not be actual or certain: potential risks can, to my mind, suffice.[23] However, those risks cannot be purely speculative or hypothetical, but must be *genuine*.

56. Third, the text of Article 15(2) and (3) of Directive 2014/24 ('the protection … cannot be guaranteed', 'disclosure … contrary to', 'interests concerned cannot be guaranteed') also suggests that the (actual or potential) security threats must have a minimum level of gravity. I find it hard to consider the terms of that provision as covering events or situations which, because of their limited scale, magnitude and impact, do not pose any *sufficiently serious* threat to the proper functioning of a Member State's institutions and the general well-being of its people.[24]

57. These are elements that, in my view, can be subject to judicial review. As the Court has consistently held, measures adopted by the Member States in connection with the legitimate requirements of national interest are not excluded in their entirety from the application of EU law solely because they are taken, inter alia, in the interests of public security.[25] In particular,

19 See the judgment in *Commission* v *Austria*, paragraph 77 and the case-law cited.

20 Emphasising the importance of the Member States' duty to provide reasons and evidence in that regard are the Opinion of Advocate General Ruiz-Jarabo Colomer in *Commission* v *Germany* (C-284/05, C-294/05, C-372/05, C-387/05, C-409/05, C-461/05 and C-239/06, EU:C:2009:76, points 131, 142 and 160), and the Opinion in *Commission* v *Austria*, point 48.

21 On the need to approach the issue from the Member State's point of view, see, by analogy, Opinion of Advocate General Jacobs in *Commission* v *Greece* (C-120/94, EU:C:1995:109, point 58).

22 See, by analogy, judgment of 16 September 1999, *Commission* v *Spain* (C-414/97, EU:C:1999:417, paragraph 24).

23 See, to that effect and by analogy, Opinion of Advocate General Cosmas in *Albore* (C-423/98, EU:C:2000:158, point 31).

24 See, to that effect, judgments of 13 July 2000, *Albore* (C-423/98, EU:C:2000:401, paragraph 22), and of 14 March 2000, *Église de scientologie* (C-54/99, EU:C:2000:124, paragraph 17 and the case-law cited).

25 See the judgment in *Commission* v *Austria*, paragraph 76 and the case-law cited.

neither Article 15(2) and (3) of Directive 2014/24 nor Article 346(1)(a) TFEU can be read in such a way as to confer on Member States the power to depart from the provisions of the directive based on no more than reliance on those interests. [26]

58. Given the significant leeway accorded to the Member States in that respect, [27] however, the Court's standard of review should, in my view, be one of reasonableness or plausibility. [28]

(3) Proportionality of the measure

59. Finally, condition (iv) mentioned in point 43 above consists in the unavailability of 'less intrusive measures'. This means that, in conformity with the principle of proportionality, in order to validly invoke the derogations set out in Article 15(2) and (3) of Directive 2014/24, a Member State must show that the exclusion of tendering procedures for the public contracts in question is a measure that is *suitable* and *necessary* to protect its essential security interests.

60. In this context, a specific point may need clarifying: the Polish Government argues that, under the provisions at issue, Member States are free to set the degree of protection of their security interests at the level they deem most appropriate. As a consequence, the national measures adopted to ensure that level of protection cannot be considered disproportionate, unless any alternative measures available also ensure that level of protection. It would follow from this that a Member State cannot be forced to accept a lower level of protection of that chosen, on the ground that the alternative measures would be less restrictive to intra-Union trade.

61. Asked at the hearing whether it shared that view, the Commission answered in the negative. However, it seems to me that it struggled to explain the reasons for its position and, in any event, it failed to point to any provision of EU law which would give the European Union a power to review the Member States' choices in that regard.

62. In that respect, I tend to agree with the position expressed by the Polish Government. Unless a matter is of such nature and dimension that it affects the *European Union's* security, and thus falls within the common foreign and security policy, [29] the European Union has no specific competence with regard to *Member States*' national/public security. In fact, the relevant Treaty provisions are essentially meant to establish limits to the European Union's action – either in general [30] or when acting in some specific field (such as the internal market [31] and the area of freedom, security and justice [32]) – when that may affect the Member States' security interests. As the Court has consistently emphasised, it follows from Article 4(2) TEU that 'national security remains the sole responsibility of each Member State'. [33]

[26] See, by analogy, judgment of 2 April 2020, *Commissio*n v *Poland*, *Hungary* and *Czech Republic (Temporary mechanism for the relocation of applicants for international protection)* (C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraph 145 and the case-law cited).

[27] See judgment of 30 September 2003, *Fiocchi munizioni* v *Commission* (T-26/01, EU:T:2003:248, paragraph 58).

[28] On this matter more generally, see my Opinion in *ECB* v *Crédit lyonnais* (C-389/21 P, EU:C:2022:844, points 41 to 74).

[29] See, especially, Article 24(1) TEU ('The Union's competence in matters of common foreign and security policy shall cover … all questions relating to the *Union's security*') and Article 42(1) TEU ('The *common security* and defence policy shall be an integral part of the common foreign and security policy'). Emphasis added.

[30] As mentioned above, Article 4(2) TEU states, inter alia, that the European Union shall respect the Member States' essential State functions, 'including ensuring the territorial integrity of the State, maintaining law and order and *safeguarding national security*'. Emphasis added.

[31] See Articles 36, 45, 52 and 65 TFEU.

[32] See Articles 71, 72 and 276 TFEU.

[33] See judgment of 5 April 2022, *Commissioner of An Garda Síochána and Others* (C-140/20, EU:C:2022:258, paragraph 57 and the case-law cited).

(c) Burden of proof

63. It is well established that, in the context of an action under Article 258 TFEU, it is incumbent upon the Commission to prove the alleged failure. That institution must provide the Court with the information necessary for it to determine whether the infringement is established, and may not rely on any presumption for that purpose. [34]

64. Once the Commission has adduced sufficient evidence to prove the relevant facts, it is then for the defendant Member State to challenge in substance and in detail the information produced and the inferences drawn. [35] In particular, when a Member State relies on a derogation provided for in EU law – such as in the present proceedings – it is for that Member State to prove that the relevant conditions are satisfied. [36] The burden upon the defendant Member State includes a requirement to analyse the appropriateness and proportionality of the measure adopted by it and to offer specific evidence substantiating its arguments. [37]

65. However, the evidentiary burden placed on that Member State cannot – the Court added – be so extensive as to require it to prove, positively, that no other conceivable measure could enable the public objective to be attained under the same conditions. [38] That means, in my view, that, before adopting derogations from EU law, Member States are required to examine carefully the possibility of using measures that are less restrictive, [39] but cannot be expected to identify each and every alternative measure that could hypothetically be envisaged and explain why they all should be discarded. To that, I would add that a Member State cannot be required to adopt alternative measures, when those measures are of uncertain feasibility or effectiveness or would result in an intolerable (organisational or financial) burden on the Member State in question.

66. It is against this analytical framework that I shall now examine the merits of the parties' arguments.

2. Analysis of the parties' arguments

67. In order to establish whether the Republic of Poland failed to fulfil its obligations under Directive 2014/24 in the present case, it is, in the first place, necessary to verify whether the interests which the national legislation at issue sought to protect may be considered '*essential security interests*' within the meaning of Article 15(2) and (3) of that directive. In the second place, it must be ascertained whether the Member State in question had reasonable grounds to consider that the application of public procurement rules to the public contracts in question could give rise to threats to public security that are real and sufficiently serious. Thirdly, the proportionality of the national legislation at issue should be examined.

68. At this stage, however, some preliminary remarks are in order.

[34] See, inter alia, judgment of 26 April 2018, *Commission* v *Bulgaria* (C-97/17, EU:C:2018:285, paragraph 69 and the case-law cited).

[35] See, to that effect, judgment of 24 June 2021, *Commission* v *Spain (Deterioration of the Doñana natural area)* (C-559/19, EU:C:2021:512, paragraph 47 and the case-law cited).

[36] See, to that effect, judgment of 21 January 2016, *Commission* v *Cyprus* (C-515/14, EU:C:2016:30, paragraph 54 and the case-law cited).

[37] See, to that effect, judgment of 23 January 2014, *Commission* v *Belgium* (C-296/12, EU:C:2014:24, paragraph 33 and the case-law cited).

[38] See judgment of 29 July 2019, *Commission* v *Austria (Civil engineers, patent agents and veterinary surgeons)* (C-209/18, EU:C:2019:632, paragraph 82 and the case-law cited).

[39] See, to that effect, judgment of 21 December 2011, *Commission* v *Austria* (C-28/09, EU:C:2011:854, paragraph 140 and the case-law cited).

(a) Preliminary remarks

69. I must state, from the outset, that the legal assessment in the present case is, at times, made quite complicated by the fact that both parties mostly developed their arguments in a rather general fashion, whereas the national legislation at issue excludes from public procurement – as the Commission rightly points out – the contracts for the production of a rather large and diverse series of documents and other objects.

70. I do not think that those documents and objects can, for the purposes of these proceedings, be treated as belonging to a homogeneous group. They do not contain similar information and do not fulfil the same function. At least to some extent, they are also produced from different materials and on the basis of different techniques. The reasons for which those documents have been excluded from public tenders vary, and it is undeniable that their sensitivity as well as their capacity to affect the Republic of Poland's security interests differ – significantly even.

71. It is thus hardly surprising that, often, the arguments put forward by one of the parties have a certain force, but only with regard to *some* of the documents at issue. This mismatch between the legal arguments of the parties and the underlying factual situation has, in my view, a significant impact on the legal assessment that the present case requires the Court to carry out and, more in particular, on the manner in which this dispute can be disposed of. I shall come back to this point at the end of this Opinion.

(b) The protection of essential security interests

72. The Polish Government argues that the production of the documents at issue is an activity that is capable of affecting its essential security interests within the meaning of Article 15(2) and (3) of Directive 2014/24. In essence, the Polish Government's main argument is twofold. First, it refers to the need to ensure the continuity of supply of the documents which are necessary for the correct and ongoing functioning of the public administration. Second, it emphasises that producing the documents in question requires the use of confidential (or secret) information which should not be leaked to unauthorised persons, and of specific technologies and know-how which should not be obtained by such persons. In that regard, the Polish Government refers to the security threats posed by phenomena such as cyberwarfare, terrorism, organised crime, human trafficking and smuggling of migrants.

73. I am of the view that it falls within a Member State's margin of discretion to consider that ensuring the continuity of supply of the documents required by its administrative machinery to function properly constitutes one of its essentials security interests. I also have no difficulty in agreeing with the Polish Government that the fight against cyberwarfare, terrorism, organised crime, human trafficking and smuggling of migrants not only falls squarely within the concept of 'national/public security', but can also be regarded as constituting a core – and therefore an 'essential' – component of its security policy.

74. That said, I must observe that – both in the written submissions and at the hearing – the issue was raised as to whether the exclusion of certain specific documents from the public procurement rules was genuinely linked to the fight against the threats mentioned above. It seems to me that the Polish Government was somewhat vague in its answers on the point and, ultimately, referred to other objectives that the exclusions in question would pursue. It referred, in particular, to the following public interests: (i) to protect consumers and public health with regard to permits to work as a doctor or a dentist, (ii) to protect the public offer with regard to excise stamps, (iii) to

guarantee the security of vehicles with regard to the documents concerned with the status thereof, and (iv) to ensure public confidence in the result of the elections with regard to ballot papers and holographic signs on certificates of voting rights.

75. Whereas I agree that ensuring public confidence in the fairness of elections may be regarded as one of the essential security interests of a Member State, I do not find the arguments put forward by the Polish Government in respect of the other interests mentioned in the previous point of this Opinion to be convincing. As mentioned, there may well be circumstances in which threats to public health could be regarded as affecting essential security interests. I would also not exclude that, in very exceptional circumstances, threats to the public finances may be of such a magnitude and seriousness that they could be regarded as having an impact on a Member State's essential security interests. [40] However, it is not easy to envisage the circumstances under which issues of consumer protection or road safety would fit into the concept of 'essential security interests'.

76. Nevertheless, and regardless of the above, I fail to see – nor has the Polish Government referred to – any specific threat or risk to public health, consumer protection, road safety and public finances that, in the present case, could reach the minimum threshold of gravity required to be plausibly considered an 'essential security interest'. For instance, the mere facts – alleged by that government – that the existence of false medical certificates would mean that some individuals would be treated by persons without the proper medical qualifications, and that the existence of false excise stamps would result in losses of receipts for the Polish Treasury are, to my mind, manifestly insufficient to justify the application of the derogations laid down in Article 15(2) and (3) of Directive 2014/24.

77. Among the documents at issue, there are, moreover, some in respect of which the Polish Government did not explain the logical connection with the protection of its security interests. Nor do I see for those documents any such obvious connection. Just to mention a few: legal markings and control stickers referred to in the highway code, seaman's books, documents connected with the civil status records, enforceable titles, judgments or orders issued by courts or judicial officers, aircrew members' certificates, cards certifying disability, driving licences, vehicle booklets, tachograph cards, and service cards of certain public officials such as tax and customs officials or road transport inspectors.

78. In the light of the above, I take the view that the Republic of Poland may, in the present case, validly invoke the derogations at issue in so far as the exclusions from the rules on public procurement are aimed at: (i) protecting that Member State from the threats posed by cyberwarfare, terrorism, organised crime, human trafficking and smuggling of migrants, (ii) ensuring public confidence in the results of elections, and (iii) ensuring supply of documents that are necessary for the proper functioning of the public administration. Conversely, I am of the view that other alleged risks to the security of the Republic of Poland – such as those to public health, consumer protection, road safety and public finances – are not such as to justify the application of the derogations at issue.

[40] The case-law on this point is very restrictive: interests of an economic nature do not, in principle, constitute essential security interests. See, to that effect, judgment of 16 September 1999, *Commission* v *Spain* (C-414/97, EU:C:1999:417, paragraph 22).

(c) Prejudice to the security interests

79. As regards the likelihood and seriousness of the prejudice to the security interests at stake, I am of the view that the Polish Government can reasonably consider that the activity of production of the documents at issue could, if entrusted to a company that does not comply with high security standards, create threats to its essential security interests which are both real and significant.

80. In some circumstances, the damage which might ensue from leaks could be – as the Polish Government argues and as the Commission acknowledges – of an almost irreversible nature. The damage could indeed be lasting and difficult to repair: the falsified documents could continue to circulate for some time and new ones could be easily produced. It cannot be ruled out that, in extreme circumstances, certain changes to the procedures and techniques used to issue some of the documents at issue may be required to avoid more threats in the future.

81. However, I have doubts that a possible disruption in the production of each and every document among those in the list in question could be regarded as posing a sufficiently serious threat to the proper functioning of the Polish public administration. The need to ensure the continuity of supply can, in my view, be validly invoked only with regard to those documents that are strictly indispensable and irreplaceable to the administration machinery with regard to essential State functions, so that even a relatively small delay in the delivery of those documents could not be tolerated. The vast majority of the documents at issue do not seem to me to fulfil those criteria.

(d) The principle of proportionality

82. Third, it is necessary to determine whether the decision of the Polish Government to exclude the public contracts in question from the application of the rules of public tender is consistent with the principle of proportionality. However, in the light of the very wording of the provisions at issue,[41] in order to respect the Member States' competence in the field of national/public security, it seems to me that only a two-step proportionality test is warranted.[42] This means that the Court is merely required to verify whether the national legislation at issue is suitable to achieve the stated objective and does not go beyond what is strictly necessary to do so.

(1) Suitability of the measure

83. First, as regards the suitability of the exclusion to achieve its stated objective, the assessment can be relatively simple: it is for me rather obvious that the centralisation of the production of the documents at issue in a single entity, fully owned and directly controlled by the State, which operates in the Polish territory, is capable of reducing the risks that (i) unauthorised personnel might have access to sensitive material and confidential (or secret) information and thus falsify

[41] See points 8 and 59 above.

[42] The full proportionality test would require the Court to check whether the national measure strikes a fair balance between the interests at stake: the interest pursued by the State with the measure in question and the interest of the persons adversely affected by it. See, to that effect, judgment of 6 October 2020, *Commission* v *Hungary (Higher education)* (C-66/18, EU:C:2020:792, paragraphs 178 and 179 and the case-law cited).

the documents in question or replicate the technology and know-how required to do so,[43] and (ii) the company might run into financial difficulties which could threaten the continuity of supply of the documents at issue.

84. Indeed, the public authorities can intervene in – and, possibly, have the final word – all the key choices (operational, commercial, technical, human resources, etc.) made by the entity in question. The powers of control (for example on the premises of the company or over the entity's staff) can also be exercised, if appropriate, by using the powers conferred on police forces. The fact that the contractor is wholly owned by the Treasury (and that national law provides for certain limitations with regard to the sale of its shares) is also an assurance that the ownership of the contractor may not 'fall in the wrong hands', which could potentially occur for companies whose shares are publicly traded in stock markets. In addition, public control should allow the competent authorities to detect more easily and rapidly situations of financial difficulty of the company, and thus be able to adopt appropriate measures of redress in a timely fashion.

85. Therefore, the national legislation at issue appears capable of giving a meaningful contribution to the protection of the security interests invoked by the Republic of Poland.

(2) Necessity of the measure

86. The second aspect – that of necessity of the measure – raises, in my view, more complex issues.

87. The crucial question is whether the Polish Government has shown that the application of the derogations at issue was *necessary* in order to protect its essential security interests. To that end, that government was required to establish that the protection of such interests *could not have been attained* within a competitive tendering procedure as provided for by Directive 2014/24.[44]

88. In this context, it must be borne in mind that, according to what the Polish Government alleged in this procedure, the level of protection of the interests at stake chosen by that government is particularly high. This is an element that, as mentioned in points 60 to 62 above, must be taken into account when assessing the existence of less restrictive measures.

89. The Commission suggests, essentially, that a combination of stringent technical specifications (under Article 42 of Directive 2014/24)[45] and selection criteria (under Article 58 of Directive 2014/24)[46] would be as effective in protecting the interests invoked by the Polish Government as

[43] Similarly, the Opinion in *Commission* v *Austria*, point 56.

[44] See, to that effect, the judgment in *Commission* v *Austria*, paragraphs 78 and 79 and the case-law cited.

[45] In particular, Article 42(1) of Directive 2014/24 reads: 'The technical specifications … shall be set out in the procurement documents. The technical specification shall lay down the characteristics required of a works, service or supply'.

[46] Article 58 of Directive 2014/24, entitled 'Selection criteria', provides, in its first paragraph, that the selection criteria may relate to: (a) suitability to pursue the professional activity; (b) economic and financial standing; and (c) technical and professional ability. The third paragraph of that provision provides that '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'. In turn, the fourth paragraph of that provision states that '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'.

the exclusion from public tendering. The Commission also points to the provisions which enable the contracting authorities to modify the public contracts (Article 72 of Directive 2014/24) [47] and to terminate them (Article 73 of Directive 2014/24) [48] in specific circumstances.

90. I am of the view that, to a certain extent, the Commission has a valid argument. Indeed, as regards ensuring the continuity of supply, there is no ground to believe that private companies would, by definition, offer lower guarantees. As confirmed at the hearing by the Polish Government, PWPW is a 'public limited company', that is, a limited liability company that – at least formally – is not unlike many other privately owned companies. As such, that company may encounter financial difficulties and, if its financial situation gravely deteriorates, could even go bankrupt.

91. I obviously understand that the Polish Government would do its utmost to keep that company financially viable and, where necessary, save it from bankruptcy proceedings. However, as the Commission rightly points out, there may be some limits to that government's ability to do so. Inter alia, the EU State aid control rules could be applicable. It should not be overlooked, in this context, that PWPW is active in a range of activities (graphic design, production and personalisation of a variety of documents, offer of IT solutions, etc.) and geographic markets (both within and outside the European Union), where it competes against other companies.

92. In my view, a number of measures could easily be envisaged to minimise the risks to the continuity of supply alleged by the Polish Government. For example, nothing precludes that government from requiring tenderers/contractors to, inter alia, (i) meet strict financial criteria for participating in the tender, (ii) periodically transmit detailed financial statements and reports in order to allow the administration to monitor the 'health' of the company, and (iii) engage in the transferral of production in the event of bankruptcy (or the supervening inability to duly perform the contract).

93. Therefore, I take the view that the national legislation at issue, in so far as it aims at securing the continuity of supply of the documents at issue, goes beyond what is necessary to ensure the protection of the essential security interests invoked by the Polish Government. The same level of protection of those interests could be achieved even if the production of the documents in question were to be entrusted to one or more companies via a competitive tender procedure.

94. Conversely, it seems to me that the measures suggested by the Commission are not as effective as the exclusion from public tendering with regard to the need to avoid leaks of information or technology. In other words, those alternative measures would not, in my view, reach the same degree of protection chosen by the Polish Government.

95. To begin with, it is clear to me that the mere introduction in the contract of rules regarding disciplinary or financial liability and compensation in case of leaks or other breaches of the security rules are not of comparable effectiveness: the very rationale of excluding certain contracts from public tenders is to minimise the risk that the damage may occur. An *ex post facto* financial compensation by the contractor, or imposition of disciplinary penalties upon the persons concerned, appears of very little use to the Republic of Poland and, consequently, is no valid

[47] According to point (c) of Article 72(1) of Directive 2014/24, contracts and framework agreements may be modified without a new procurement procedure when, inter alia, a number of cumulative conditions are fulfilled. One of those conditions (point (i)) is that 'the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee'.

[48] Article 73 of Directive 2014/24 concerns the circumstances in which the contracting authorities have the possibility to terminate a public contract during its term.

substitute for more robust *ex ante* measures that could avert the breaches. I am obviously aware that compensation and liability clauses are also intended to dissuade would-be infringers. However, when it comes to deterring persons that may be connected to, for example, terrorist groups, foreign secret services or powerful criminal organisations from attempting to access highly sensitive information, the preventive effects of such clauses appear rather limited.

96. The Commission suggested that, in order to ensure the capacity of the Polish Government to make use, if necessary, of the public powers of police forces for controls on the company in question and its staff, the contractor could be required to carry out its operations in Poland. In that context, the Commission refers to the fact that other companies established in the country already have the required security certificates to carry out activities such as those carried out by PWPW.

97. Some of the Commission's arguments have a certain force. The contractor could indeed be requested to produce the most sensitive documents in Poland in order to permit a more effective monitoring and, if need be, enforcement by the public authorities.

98. However, the Polish Government may – legitimately, in my view – consider it important to be able to influence or supervise some key decisions made by the company which could have a direct or indirect impact on the security of the activities carried out by that company (hiring of staff, just to give one example). It is hardly disputable that the degree of intervention that the public administration could exercise when dealing with a publicly owned company is greater than that which it could exercise vis-à-vis a privately owned company, irrespective of the clauses and safeguards that could be included in the contract. As repeatedly stated, it is in principle for the Republic of Poland to choose the appropriate level of protection of the interests at stake.

99. The same considerations may apply, *mutatis mutandis*, to the production of ballot papers and holographic signs on certificates of voting rights.

100. Therefore, I am of the view that the Republic of Poland can rely on Article 15(2) and (3) of Directive 2014/24 in so far as the exclusions from public tendering concern documents the falsification of which may have an adverse impact on that State's fight against cyberwarfare, terrorism, trafficking in human beings, smuggling of migrants and organised crime, as well as those that may have an impact on the correctness and fairness of the elections (or the public perception thereof).

3. Conclusions: disposing of the present case

101. The above analysis leads me to the following conclusions.

102. First, some of the interests invoked by the Polish Government in the present procedure can be regarded as being 'essential security interests' within the meaning of Article 15(2) and (3) of Directive 2014/24. I am referring to the needs to (i) fight against cyberwarfare, terrorism, trafficking in human beings, smuggling of migrants and organised crime, (ii) ensure the continuity of supply of the documents that are necessary for the proper functioning of the public administration, and (iii) ensure public confidence in the fair result of elections. By contrast, in the present case I do not find any element which would justify treating interests relating to public health, consumer protection, road safety and the protection of public finances as 'essential security interests' for the purposes of Directive 2014/24.

103. Second, I take the view that the Republic of Poland has reasonable grounds to consider that the threats which it intends to prevent or minimise with the national legislation at issue are real and sufficiently serious. However, I see no such threat where the documents the continuity of supply of which the Republic of Poland intends to ensure are not irreplaceable or indispensable for the proper functioning of the State administration.

104. Third, the national legislation at issue – by centralising the production of the documents at issue in a single entity, fully owned and directly controlled by the State – only partly complies with the principle of proportionality. More specifically, it may be regarded as being necessary to achieve the appropriate level of protection chosen by the Polish Government solely with regard to the documents the falsification of which may actually impair the Republic of Poland's fight against cyberwarfare, terrorism, trafficking in human beings, smuggling of migrants or organised crime, or undermine the public confidence in the result of elections. By contrast, there exist alternative, less intrusive measures to avert the risks, invoked by that government, to the continuity of supply of the documents at issue.

105. All of the above means that – in my view – both the Commission and the Republic of Poland have been partly successful and partly unsuccessful in the present procedure. If that is so, the crucial question becomes, obviously, to what extent this action should be upheld, and to what extent it should be rejected.

106. To address this question, I must now come back to the issue I touched upon in my preliminary remarks: both the Commission and the Polish Government mostly developed their arguments in a rather general fashion, whereas the national legislation at issue excludes from public procurement the production of a rather large and diverse series of documents and other objects. [49]

107. Asked at the hearing whether they considered having duly taken into account the specific features of each document, both parties claimed that they were not required to do so. The Polish Government reiterated the view that all the documents at issue are of crucial importance for the protection of its security interests and, consequently, can be excluded from public procurement. For its part, the Commission stated that, so far, the Polish Government had refused to engage in any meaningful discussion on the point and, at any rate, it should have been for that government to explain to the Court the specificities of each document.

108. I cannot conceal having felt some frustration when receiving those answers. Indeed, because of that approach by the parties, and despite a careful assessment of the Commission's pleas and the Republic of Poland's objections, as well as a review of the evidence submitted by both parties, I am unable to precisely 'draw a line' between the documents that can be legitimately excluded from the public procurement rules, and those that cannot.

109. Usually, in the context of a direct action, a party's failure to substantiate its claims does not give rise to any major procedural problem: the principles on the allocation of the burden of proof [50] may guide the Court to rule on the various issues in dispute. In the present case, however, I find it particularly hard to identify, in respect of some aspects of the dispute, the party on which the burden of proving (or disproving) a certain fact rested. In this sort of procedural ping-pong in which the burden shifts each time a party has made a prima facie case, it may at times be difficult to decide who scored the point – metaphorically speaking.

[49] See points 9, 10, 69 and 70 of this Opinion.

[50] The main principles in this matter have been recalled above, in points 63 to 65 of this Opinion.

110. Moreover, I would feel a certain uneasiness in suggesting to the Court to adjudicate on the present dispute on the basis of an automatic (and thus, dare I say, blind) application of the rules on the burden of proof. True, it is for each a party to carefully choose the approach it wishes to adopt as its litigation strategy, given that choices made in that regard are often consequential. When a court or tribunal gives a final ruling on a matter and there is no possibility to appeal that decision, the matter becomes *res judicata* and, as such, cannot be subject to further litigation.

111. Thus, once a judicial procedure is over, procedural reality replaces any other 'alternative' reality.

112. However, whereas that may normally be considered a simple fact of life, I would be hesitant to endorse an extreme application of this approach – which could, *in extremis*, lead the judges to abandon common sense and adopt unreasonable decisions – in the context of infringement proceedings.

113. As the Court has consistently stated, in the context of such proceedings it is its role to verify the alleged infringements, even where the defendant does not contest them.[51] That may be explained, in my view, because of the potentially far-reaching consequences that may flow, for a Member State, from an adverse judgment given under Articles 258 or 259 TFEU: that Member State will be required to amend the challenged national measure. That is also true regardless of whether, with a better defence, it could have shown that that measure was actually in compliance with EU law.[52] A failure to amend the challenged national measure could expose that Member State to financial penalties[53] and to actions for liability.[54]

114. Thus, my view is that, where it is not entirely clear who was required to prove what, because both parties appear to be responsible for the incompleteness of the case file, it may be a sensible approach on the part of the Court to avoid ruling on those issues that are not strictly indispensable for adjudicating the dispute. This seems to me particularly important in a case such as the present one, where upholding one argument of the applicant or of the defendant could have immediate repercussions on the protection of certain essential security interests of a Member State.

115. Against this backdrop, I believe that the Court has, fundamentally, two options.

116. On the one hand, the Court could – as it has done in some early cases in which it considered that the information provided by both parties did not enable it to make a sufficiently accurate appraisal of the issues at stake – deliver an *interim judgment*. In such judgments, the Court ordered the parties to re-examine certain issues arising from the dispute in the light of the guidance contained in those judgments, and to report to it by a certain date, after which the Court would deliver a final judgment.[55]

[51] See, for example, judgment of 16 January 2014, *Commission* v *Spain* (C-67/12, EU:C:2014:5, paragraph 30 and the case-law cited).

[52] In this context, it must not be overlooked that, in the context of infringement proceedings, there is a single level of jurisdiction: the parties thus have only one shot before the EU Courts, so to speak.

[53] See Article 260(2) TFEU.

[54] See, in that regard, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 57), and of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 120).

[55] See, for example, judgments of 27 February 1980, *Commission* v *United Kingdom* (170/78, EU:C:1980:53), and of 17 December 1980, *Commission* v *Belgium* (149/79, EU:C:1980:297).

117. On the other hand, the Court could simply declare that, by excluding the production of certain documents, printed matter and stamps and markings from the rules on public procurement provided for in Directive 2014/24, the Republic of Poland has failed to fulfil its obligations under Article 1(1) and (3) and Article 15(2) and (3) of that directive, read in conjunction with Article 346(1)(a) TFEU. Indeed, my analysis has shown that, undoubtedly, the national legislation at issue excludes from the rules on public procurement a (probably large) number of documents with regard to which the derogations set out in Article 15(2) and (3) of Directive 2014/24 are not applicable.

118. For reasons of judicial economy, I would favour the second option. In that regard, I would emphasise that, in the light of the form of order sought by the Commission,[56] the Court would neither rule *ultra petita* nor *infra petita*. At the same time, the judgment of the Court would give sufficient guidance to the Polish Government as to how the national legislation in question should be amended to achieve compliance with EU law. Indeed, it must be borne in mind that, according to settled case-law, the operative part of the judgment, which describes the failure to fulfil obligations established by the Court in an action under Article 258 TFEU, must be construed in the light of the grounds of the judgment.[57]

119. Furthermore, any disagreement in the future between the Commission and the Republic of Poland as to whether the latter succeeded in achieving full compliance with the judgment of the Court could be resolved, if necessary, (i) in the context of an infringement procedure under Article 260(2) TFEU and, should it persist even after that, (ii) in the context of an action for annulment brought, under Article 263 TFEU, by the Republic of Poland against any decision of the Commission determining the necessity and amount of the penalties due by that Member State.[58]

120. For all those reasons, I take the view that the Court should rule that the national legislation at issue, as it currently stands, does not satisfy the conditions laid down in Article 15(2) and (3) of Directive 2014/24 and, therefore, infringes the provisions of that directive.

VI. Costs

121. In conformity with Article 138(3) of the Rules of Procedure of the Court of Justice, where each party succeeds on some and fails on other heads, the parties are to bear their own costs unless, if it appears justified in the circumstances of the case, the Court orders that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

122. In this case, both the Commission and the Republic of Poland applied for costs against the other party and have succeeded on some claims and failed on others. Accordingly, I find it correct that each of the parties should be ordered to bear its own costs.

[56] See point 18 of this Opinion.

[57] See, among many others, judgment of 22 October 2013, *Commission* v *Germany* (C-95/12, EU:C:2013:676, paragraphs 37, 40 and 45 and the case-law cited).

[58] Point (c) of Article 51 of the Statute of the Court of Justice of the European Union – as recently amended – reserves these actions to the jurisdiction of the Court.

VII. Conclusion

123. In the light of the foregoing, I suggest that the Court of Justice:

– declare that, by excluding the production of certain documents, printed matter and stamps and markings from the rules on public procurement provided for in 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, the Republic of Poland has failed to fulfil its obligations under Article 1(1) and (3) and Article 15(2) and (3) of Directive 2014/24, read in conjunction with Article 346(1)(a) TFEU; and

– order the European Commission and the Republic of Poland to each bear their own costs.