Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 8 May 2019 [1]

Case C-267/18

Delta Antrepriză de Construcții și Montaj 93 SA
v
Compania Națională de Administrare a Infrastructurii Rutiere SA

(Request for a preliminary ruling from the Curtea de Apel București (Court of Appeal, Bucharest, Romania))

(Reference for a preliminary ruling — Directive 2014/24/EU — Public procurement — Optional grounds for exclusion — Exclusion of an economic operator from participating in a tendering procedure on grounds of the termination of a prior contract on account of subcontracting not communicated to the contracting authority — Concept of significant or persistent deficiencies — Withholding of information on the termination of a prior contract — Information on the participation of subcontractors in the performance of the contract — Objectives and purposes — Seriousness of the withholding of information)

1. Directive 2014/24/EU [2] authorises contracting authorities to exclude from public procurement procedures a tenderer which has exhibited 'significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract … which led to early termination of that prior contract' (Article 57(4)(g)).

2. A Romanian court has raised with the Court of Justice its uncertainty as to whether that provision is applicable in the case where the 'early termination of the prior contract' came about because the successful tenderer had subcontracted some of the work without notifying the administrative authority. That situation was further characterised by the fact that, in the new procurement procedure, the same economic operator also failed to inform the (second) contracting authority that the prior contract had been terminated.

1 Original language: Spanish.

2 Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

I. Legal framework

A. EU law: Directive 2014/24

3. According to recital 101:

'Contracting authorities should further be given the possibility to exclude economic authorities which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. It should be clarified that grave professional misconduct can render an economic operator's integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.

Bearing in mind that the contracting authority will be responsible for the consequences of its possible erroneous decision, contracting authorities should also remain free to consider that there has been grave professional misconduct, where, before a final and binding decision on the presence of mandatory exclusion grounds has been rendered, they can demonstrate by any appropriate means that the economic operator has violated its obligations, including obligations relating to the payment of taxes or social security contributions, unless otherwise provided by national law. They should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies with regard to substantive requirements, for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator. National law should provide for a maximum duration for such exclusions.

In applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator which might justify its exclusion'.

4. Article 57 ('Exclusion grounds') states:

'…

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:

…

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

…

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

(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;

…

5. Contracting authorities shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of its acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs 1 and 2.

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

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.

…’

5. Article 71 (‘Subcontracting’) states:

‘…

2. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

…

5. In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, after the award of the contract and at the latest when the performance of the contract commences, the contracting authority shall require the main contractor to indicate to the contracting authority the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at this point in time. The contracting authority shall require the main contractor to notify the contracting authority of any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services.

Notwithstanding the first subparagraph, Member States may impose the obligation to deliver the required information directly on the main contractor.

Where necessary for the purposes of point (b) of paragraph 6 of this Article, the required information shall be accompanied by the subcontractors' self-declarations as provided for in Article 59. …

6. With the aim of avoiding breaches of the obligations referred to in Article 18(2), appropriate measures may be taken, such as:

…

(b) Contracting authorities may, in accordance with Articles 59, 60 and 61, verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57. In such cases, the contracting authority shall require that the economic authority replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

…'

B. National law: Legea nr. 98/2016 privind achizițiile publice (Law No 98/2016 on public procurement ('Law No 98/2016'))

6. Article 167 states:

'(1) The contracting authority shall exclude from the procedure for the award of a public contract or framework agreement any economic operator that is in one of the following situations:

…

(g) where the economic operator has committed serious or repeated breaches of its principal obligations under a public contract, a sectoral procurement contract or a concession contract concluded previously, and those breaches have led to the early termination of that prior contract, the payment of damages or other comparable sanctions;

(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required by the contracting authority for the purposes of establishing the non-existence of any grounds for exclusion or compliance with the selection or qualifying criteria, has withheld such information or is unable to submit the supporting documents required;

…

(8) Under paragraph 1(g), examples of serious breaches of contractual obligations are, for instance, the failure to perform a contract or the delivery/supply/performance of products/works/services that present significant shortcomings making them unusable for the intended purpose provided for in the contract'.

7. Article 171 provides:

'(1) Any economic operator that is in one of the situations referred to in Articles 164 and 167 which entail exclusion from the award procedure may provide evidence to the effect that the measures which it has taken are sufficient to demonstrate its reliability despite the existence of the grounds for exclusion.

(2) If the contracting authority takes the view that the evidence submitted by the economic operator in accordance with paragraph 1 is sufficient to demonstrate its reliability in practice, it shall not exclude the economic operator from the award procedure.

(3) The evidence that an economic operator which is in any of the situations set out in Articles 164 and 167 may provide to the contracting authority, pursuant to paragraph 1, shall be to the effect 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 of the criminal offence or misconduct in a comprehensive manner by actively collaborating with the investigating authorities, and taken concrete and suitable technical, organisational and personnel measures, such as severing ties with persons and organisations involved in the unlawful conduct, taking measures for the reorganisation of personnel, for the implementation of monitoring and reporting systems aimed at establishing an internal auditing structure to verify compliance with laws and regulations, or for the adoption of internal rules on liability and compensation for damage, in order to prevent further criminal offences or other cases of misconduct.

…'

II. Facts of the dispute and question referred for a preliminary ruling

8. On 3 October 2010, the Municipality of Râmnicu Vâlcea (Romania) awarded to Delta Antrepriză de Construcții și Montaj 93 SA ('Delta') and a further two companies with which Delta formed a consortium ('Consortium 1') a works contract for the restoration and modernisation of a leisure facility.

9. On 7 June 2017, the Municipality decided to terminate that contract on the ground that Consortium 1 had breached it by subcontracting large parts of the work without the Municipality's prior authorisation, despite the fact that the tender specifications contained a provision to the effect that subcontractors were not permitted to participate in the performance of the contract without the consent of the contracting authority. [3]

10. On 25 July 2017, the early termination of that contract on grounds attributable to Consortium 1 was communicated to the Sistemul Electronic de Achiziții Publice (Electronic Public Procurement System; 'public e-procurement system') online platform.

11. On 27 July 2017, the Compania Națională de Administrare a Infrastructurii Rutiere SA (National company for the administration of road infrastructure; 'CNAIR') issued a call for tenders for the public construction works contract 'Proiectare și execuție lărgire la 4 benzi DN 7 Bâldana-Titu km 30 + 950 — 52 + 350' (Planning and implementation of the widening to four lanes of National Road DN 7 Bâldana-Titu km 30 + 950 — 52 + 350), with an estimated value of RON 210 627 629 (EUR 46 806 139.78) and a term of 84 months.

3 That decision also calculated consequential losses in the amount of 2 345 299.70 Romanian lei (RON) (EUR 521 000).

12. Delta joined two other companies to form a new consortium ('Consortium 2') and participated as a tenderer in that procedure. In its tender, it stated that it was not affected by any of the grounds for exclusion.

13. When conducting a search on the public e-procurement system, the CNAIR evaluation committee accessed the findings report issued by the Municipality of Râmnicu Vâlcea, which contained a record of the termination of the contract that had existed between Consortium 1 and that municipality.

14. On 18 December 2017, after hearing Delta and the Municipality of Râmnicu Vâlcea, the CNAIR evaluation committee excluded Consortium 2 from the procedure for the award of the national road widening contract. It stated in this regard that the early termination of the prior contract and the failure to disclose it in the course of the second procedure were grounds for exclusion as provided for in Article 167(1)(g) and (h) of Law No 98/2016.

15. Consortium 2 asked the contracting authority to reverse the decision to exclude it and to re-examine its tender. In the absence of any response from the CNAIR, it filed a claim with the National Council for the Resolution of Claims ('NCRC').

16. On 2 February 2018, the NCRC dismissed that claim, after stating that:

– it was competent to examine the lawfulness of the decision to exclude the tender and to establish whether the ground for exclusion provided for by law was present, but not to analyse the lawfulness of the findings report;

– that report, inasmuch as it benefits from the presumption of lawfulness, constituted proof of a serious breach of obligations under a prior public contract;

– Consortium 2 had confined itself to putting forward grounds relating to the unlawfulness of the findings report, without adducing evidence of its own reliability, as required by Article 171 of Law No 98/2016.

17. The NCRC's decision was challenged before the referring court on 16 February 2018. In the application, it was claimed, in essence, (a) that the findings report was not a suitable means of proving that Delta had committed a serious and repeated breach of its contractual obligations, and (b) that the information contained in that report, even if it were true, could not be brought within the scope of the ground for exclusion consisting in a serious or repeated breach of contractual obligations. [4]

18. In those circumstances, the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania) has referred the following question to the Court of Justice for a preliminary ruling:

'Can Article 57(4)(g) of [Directive 2014/24] be interpreted as meaning that the termination of a public works contract on the ground that part of the works was subcontracted without the contracting authority's authorisation constitutes a significant or persistent deficiency in the performance of a substantive requirement under a prior public contract leading to an economic operator being excluded from participation in a public procurement procedure?'

III. Procedure before the Court of Justice

19. The order for reference was received at the Court of Justice on 17 April 2018.

4 Delta went on to say that both the findings report and the alleged breaches referred to had been challenged before the courts.

20. Written observations have been lodged by Delta, the Romanian Government and the European Commission. The hearing, which was held on 27 February 2019, was attended by Delta, the Austrian Government and the Commission.

IV. Assessment

A. Preliminary observation

21. The question from the referring court is confined to the interpretation of Article 57(4)(g) of Directive 2014/24. I take the view, however, that, in keeping with the Court's consistent practice,[5] its reply can be extended to include other provisions of that directive that relate to the same facts so as to provide the referring court with material that will make its adjudication easier.

22. In particular, it is true that the ground for exclusion relating to the early termination of the contract is dealt with in Article 57(4)(g) of Directive 2014/24. However, the order for reference itself[6] states that, according to the contracting authority's evaluation committee, 'Article 167(1)(h) of Law No 98/2016 was also applicable to the tender in question'. As that provision transposes into national law the ground for exclusion contained in Article 57(4)(h) of Directive 2014/24, the Court's answer will be more comprehensive if it addresses the presence of that ground for exclusion in the facts at issue.[7]

B. The ground for exclusion under Article 57(4)(g) of Directive 2014/24

23. As I pointed out in my Opinion in *Meca*,[8] Article 57(4) of Directive 2014/24 refers under the heading of conduct on the part of economic operators that may justify their exclusion from a procurement procedure both to 'grave professional misconduct which renders [their] integrity questionable' (point (c)) and to 'significant … deficiencies in the performance of a substantive requirement under a prior public contract … which led to early termination of that prior contract' (point (g)).

24. Recital 101 of Directive 2014/24 supports the inference that the professional misconduct referred to in point (c) is predominantly *non-contractual* in nature, which is to say that it is improper conduct that generally takes place outside the scope of the contractual relationship. This is the case with misconduct involving a breach of environmental or social obligations or an infringement of competition rules or intellectual or industrial property rights, or with a failure to comply with tax or social security obligations. The conduct provided for in point (g), on the other hand, is a typical breach *of contract*.

25. It is true, however, that some breaches of contract can at the same time constitute a form of grave professional misconduct, which is to say misconduct committed within the context of a prior administrative contract the significance of which was sufficient to warrant the breakdown of the contractual relationship.

5 Judgment of 22 October 2015, *Impresa Edilux and SICEF* (C-425/14, EU:C:2015:721), paragraph 20: 'the fact that the referring court's question refers only to certain provisions of EU law does not mean that the Court may not provide the national court with all the guidance on points of interpretation that may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to these points in its question. It is, in this regard, for the Court to extract from all the information provided by the referring court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute'.

6 Paragraph 15.

7 The analysis of the breach of contract might even include the ground for exclusion provided for in Article 57(4)(c) of Directive 2014/24 (that is to say, grave professional misconduct). I shall not, however, be looking at that possibility.

8 Opinion of 7 March 2019 (C-41/18, EU:C:2019:183), points 38 to 45.

26. From that point of view, the link between those two points (of Article 57(4)) would be that between a *lex generalis* (point (c)) and a *lex specialis* (point (g)), in which case the principles that must govern the interpretation of the rule contained in point (g) could be identified by reference to the aims of, and justifications for, the general provision.

27. Both grounds for exclusion rest on an essential ingredient in the relationship between the supplier awarded the contract and the contracting authority, that is to say the *reliability* of the former, on which the trust which the latter has in the former is founded. Although Directive 2004/18/EC[9] made no express reference to that factor, the Court of Justice took it took it into account in its case-law.[10]

28. Directive 2014/24 makes reliability a key component of that relationship in the very context of grave professional misconduct. According to the first paragraph of recital 101, contracting authorities can exclude 'economic operators which have proven unreliable'. The second paragraph of that recital provides for activities under prior contracts that '[cast] serious doubts as to the reliability of the economic operator'.

29. The importance given to the economic operator's *reliability* is apparent in a number of paragraphs (6 and 7) of Article 57 of Directive 2014/24, inasmuch as these allow the economic operator to demonstrate that it is worthy of trust, notwithstanding the presence of a ground for exclusion. In this way, the *reliability* ingredient is integral to the grounds for exclusion that relate to the candidate's subjective circumstances.

30. Now, according to the scheme of Article 57 of Directive 2014/24, the contracting authority must have the freedom to evaluate that component (the candidate's reliability) without necessarily being bound by the findings of other public bodies. It is for contracting authorities and them alone to assess the extent of any misconduct entailing a substantive breach of contract so serious as to justify the termination of a prior contract on grounds of loss of trust.

31. As has already been explained, the ground for exclusion under Article 57(4)(g) of Directive 2014/24, which is being invoked in this case, applies where, under a prior contract, the operator has shown significant or persistent deficiencies[11] in the performance of a substantive requirement which led to the early termination of that contract.

32. The most important point to be drawn from the foregoing is that the irregularity committed by the tenderer must have been serious ('significant') enough to make it justifiable, in the light of the principle of proportionality, to terminate the contract early.

9 Directive 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).

10 Judgments of 20 March 2018, *Commission* v *Austria* (State printing office) (C-187/16, EU:C:2018:194), paragraphs 88 and 91; of 14 December 2016, *Connexxion Taxi Services* (C-171/15, EU:C:2016:948), paragraph 28; and of 9 February 2006, *La Cascina and Others* (C-226/04 and C-228/04, EU:C:2006:94), paragraph 21.

11 This article refers to *deficiencies* in the plural. It is my view, however, that the criterion is qualitative rather than quantitative, meaning that a single deficiency could trigger exclusion in its own right. This point was also made by the Commission and the Austrian Government at the hearing. Recital 101 of Directive 2014/24, when giving some examples of the 'major deficiencies' it has in mind, uses the singular to refer to 'failure to deliver or perform' or 'misbehaviour that casts serious doubt as to the reliability of the economic operator'. Everything hangs, I would emphasise, on the proportionality of the measure to the seriousness of the conduct.

33. A comparison of certain language versions of the provision in question [12] shows that that ground for exclusion requires there to have been a breach of an essential obligation under a prior public contract. That obligation can be either material or formal, there being no reason why formal obligations should not be essential to the performance of a public contract. [13]

34. For the exclusion to apply, it is not therefore sufficient for the prior public contract simply to have been unilaterally terminated. The contracting authority will have to carry out the additional task of assessing the breach for which the contractor was held responsible at the time in order to establish whether or not the requirements of Article 57(4)(g) of Directive 2014/24 are met.

35. The Court of Justice must not replace with its own the referring court's assessment of the facts or its evaluation of the seriousness of the breach on account of which Delta was excluded. It therefore falls to the referring court to determine whether, in this case, the unauthorised subcontracting [14] of the leisure facility construction work constituted a significant deficiency in the performance of the contract between Consortium 1 and the Municipality of Râmnicu Vâlcea.

36. The Court of Justice may nonetheless provide the referring court with some guidance that will be useful to it when it comes to carry out its own assessment.

37. In the first place, it will be necessary to look at the content of the procurement documents and, in particular, the extent to which those documents laid down a duty for the contractor to communicate its intention to subcontract some of the work and to obtain the contracting authority's authorisation to do so. According to the Romanian Government, there were specific clauses pursuant to which no subcontractor could participate in the performance of the contract without the contracting authority's consent. [15]

38. It should not be forgotten that Article 71(2) of Directive 2014/24 provides that, 'in the procurement documents, the contracting authority may ask … the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors'. It is only on the basis of this information that the contractor will be able to gauge whether the subcontractor is itself reliable. [16]

39. A clause in the procurement documents requiring a prior indication to that effect thus has a sound legal basis in EU law. What is more, the introduction of such a clause is of a piece with the scheme of Directive 2014/24, in so far as this is concerned with mechanisms for communicating any intention to subcontract and the identity of the subcontractor.

12 The Spanish version uses the expression *requisito de fondo*, but the other versions refer rather to the *substance* of that requirement: to wit the French (*obligation essentielle*); the English (*substantive requirement*); the German (*einer wesentlichen Anforderung*); and the Italian (*requisito sostanziale*).

13 The malicious concealment of participation by a subcontractor, which the tenderer chooses not to mention in order to evade those provisions of the contract that reflect the binding rules of Directive 2014/24, notwithstanding that it appears to be formal, may bring about serious losses and be classified, by reference to these and to the fraudulent intent behind it, as significant.

14 Delta states that, in actual fact, there was no subcontracting, only a relationship with another undertaking for the provision of services and the supply of materials. The order for reference, the statement of facts contained in which the Court must take as read, seems to start from the premiss that subcontracting did indeed take place.

15 Paragraph 17 of its written observations. The content of this clause (point 23.6) was the subject of debate at the hearing, Delta having acknowledged its existence.

16 Recital 115 of Directive 2014/24: '… Furthermore, it should be stated explicitly that Member States should be able to go further, for instance by extending the transparency obligations … or by enabling or requiring contracting authorities to verify that subcontractors are not in any of the situations in which exclusion of economic operators would be warranted …'

40. While Directive 2004/18 said little in this regard,[17] inasmuch as it simply mentioned the advisability of including provisions on subcontracting in order to encourage the involvement of small and medium-sized undertakings in the public contracts procurement market,[18] Directive 2014/24 emphasises why 'transparency in the subcontracting chain' is so important.

41. In particular, the preamble to Directive 2014/24 explains that 'this gives contracting authorities information on who is present at building sites … It should be clarified that the obligation to deliver the required information is in any case incumbent upon the main contractor, either on the basis of *specific clauses, that each contracting authority would have to include in all procurement procedures*, or on the basis of obligations which Member States would impose on main contractors by means of generally applicable provisions'.[19]

42. From a strictly prescriptive point of view, Article 71(6)(b) of Directive 2014/24 provides that 'contracting authorities may … verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57'. It is only logical that, in order for such verification to be possible, the contractor must first have informed the contracting authorities that it is proposing to subcontract part of the work.

43. That premiss having been established, it falls to be ascertained in addition whether, pursuant to the procurement documents, the failure to comply with the duty to notify the contracting authority of the existence of the subcontractor triggered the early termination of the contract. In that event, the contracting authority, in terminating the contract, would simply be 'comply[ing] strictly with the criteria which it has itself laid down' within the meaning of the judgment in *Connexxion Taxi Services*.[20]

44. In the second place, it will be necessary to assess whether performance by the contractor itself and by it alone was an obligation *essential* to the attainment of the objective pursued by the contracting authority. If not, that is to say if the use of subcontractors under that works contract seems viable, albeit subject to the duty of prior notification and subsequent administrative authorisation, it will be necessary to gauge whether the absence of that notification (and, hence, of the required authorisation) was nothing more than a mere administrative error that was otherwise insignificant and could be made good afterwards.[21]

45. In the third place, the referring court will be able to consider to what extent the subcontracting affected a large part of the municipal leisure facility construction works and whether the subcontractor's involvement had an adverse impact on the performance of those works.[22]

46. Such assessments will be relevant to the examination of the exclusion measure from the point of view of the principle of proportionality.[23] If the conduct of the economic operator which infringed its obligations under the first contract was not of at least some significance (that is to say, if it was only *de minimis*), its exclusion from the second contract may have been inappropriate because disproportionate.

17 A comparison of the subcontracting rules in Directive 2004/18 (Article 25) and those in Directive 2014/24 (Article 71) shows that, in essence, the latter retains the duty, if so provided for in the procurement documents, to let the contracting authority know how much of the work is to be subcontracted and the identity of the proposed subcontractors.

18 Recital 32 of Directive 2004/18.

19 Recital 105 of Directive 2014/24. My emphasis.

20 Judgment of 14 December 2016 (C-171/15, EU:C:2016:948), paragraph 38 and the case-law cited there.

21 This is one of the possibilities noted by the Commission in its written observations (along with others, such as the hypothesis that Consortium 1 sought to mislead the contracting authority as to the identity of the subcontractor).

22 The Romanian Government takes the view that, although the order for reference does not specify whether there were any defects in the performance of those works, the declaration as to the liability of Consortium 1 would indicate that there were.

23 Directive 2014/24 requires the measure to be proportionate, even in the context of mandatory exclusion grounds such as the non-payment of taxes or social security contributions (second subparagraph of Article 57(3)).

47. In the fourth place, if that ground for exclusion is found to be present, Article 57(6) of Directive 2014/24 (transposed in Article 171 of Law No 98/2016) still allows the tenderer to provide evidence to the effect that, since its previous conduct, it has shown itself to be reliable. [24]

48. Finally, Delta's submission with respect to the pending disputes in connection with the decision of the Municipality of Râmnicu Vâlcea to terminate Consortium 1's contract [25] does not, in and of itself, preclude the application of that ground for exclusion. As I maintained in my Opinion in *Meca*, [26] the mere fact that a decision to terminate a contract early has been challenged cannot be regarded as an obstacle preventing the contracting authority from assessing the conduct that prompted that decision and the operator's subsequent reliability.

C. The ground for exclusion under Article 57(4)(h) of Directive 2014/24

49. The situations provided for in Article 57(4)(h) of Directive 2014/24 as grounds for excluding an economic operator from a public procurement procedure include the following:

– where it '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'; and

– where it 'has withheld such information'. [27]

50. The Court of Justice was confronted with the first of those situations when, in the judgment in *Esaprojekt*, [28] it interpreted the provision in Directive 2004/18 (that is to say, Article 45(2)(g)) which similarly made it possible to exclude an economic operator from participation in a public contract on account of its false declarations to the contracting authority.

51. In that judgment, it held that the false declaration did not have to be intentional, it being sufficient for there to be 'some degree of negligence which may have a decisive effect on the decisions to exclude candidates from being selected or awarded a public contract'. Since this was the case in those proceedings, the economic operator could be regarded as being guilty of 'serious misrepresentation', a fact which justified 'the decision of the contracting authority to exclude that operator from the public contract concerned'. [29]

52. The second situation was addressed in the judgment in *Impresa di Costruzioni Ing. E. Mantovani and Guerrato*, [30] in relation to the corresponding provision of Directive 2004/18. [31] In that case, the tenderer had chosen not to disclose in its tender information relating to the criminal record of a director who had been convicted of a number of offences. The Court took the view that such a circumstance formed a sufficient basis on which to exclude the tenderer from the award procedure. [32]

24 Paragraph 21 of the order for reference asserts that Consortium 2 'relied exclusively on grounds relating to the unlawfulness of the findings report, without providing any evidence of its reliability …'. At the hearing, Delta did not claim to have taken corrective measures aimed at rectifying its conduct and thus restoring its reliability (it simply stated that it had tried to make good its failure to give notice of its intention to subcontract).

25 The order for reference mentions that pending litigation in paragraph 12.

26 C-41/18, EU:C:2019:183.

27 Although the various language versions which I have consulted differ in the use of verbs in the affirmative or the negative (in Italian, *non ha trasmesso*; in English, *has withheld*; in French, *a caché*; in German, *zurückgehalten*; in Portuguese, *tiver retido*; in Romanian, *nu a divulgat*), it is my view that they are, in essence, all describing the same conduct.

28 Judgment of 4 May 2017 (C-387/14, EU:C:2017:338).

29 *Ibidem*, paragraphs 71 and 77.

30 Judgment of 20 December 2017 (C-178/16, EU:C:2017:1000).

31 In accordance with Article 45(2)(g) of Directive 2004/18, 'any economic operator may be excluded from participation in a contract where that economic operator … has not supplied [the] information [required under this Section]'.

32 Judgment of 20 December 2017 (C-178/16, EU:C:2017:1000), paragraph 48: 'Thus, failure to inform the contracting authority of the criminal conduct of the former director may also make it possible to exclude, under that provision, a tenderer from participating in a procedure for the award of a public works contract'.

53. Although it might seem from the wording of Article 57(4)(h) of Directive 2014/24 that 'seriousness' is required only in relation to the provision of false information and not in relation to the withholding of information, that is not the case in my view. Whether the conduct is active (falsification) or passive (concealment), the important point is that the information, whether false or concealed, should have a bearing on the decision adopted by the contracting authority. To my mind, this, once again, is a consequence of the principle of proportionality.

54. In this reference, as I have already said, the national court does not concern itself with the ground for exclusion which I am analysing, unlike the contracting authority, which did.[33] After all, as Delta refrained from informing the CNAIR that its previous public contract had been terminated because of its failure to comply with the subcontracting clause, the CNAIR chose to apply (in conjunction with the ground for exclusion already examined in the preceding section) Article 167(1) of Law No 98/2016, that is to say the national provision transposing Article 57(4)(h) of Directive 2014/24.

55. In that context, if the referring court considers it advisable to look at the second ground for exclusion applied by the CNAIR, it will have to take into account the particular circumstances in which the information in question was concealed and the seriousness of that conduct.

56. More specifically, in order to assess the seriousness of the information concealed from the contracting authority, it will not be sufficient to establish whether the tenderer chose not to disclose the presence of a possible ground for exclusion. It will be essential to consider also the significance of the information omitted.

57. In a case such as this, where there has been a formally declared prior termination of a contract,[34] the principle of fair dealing compelled Delta to notify the contracting authority of that objective fact at the outset, a course of action which would not have prevented it from providing as much information as it might have thought necessary to demonstrate that, in its view, the breach of obligations did not exist or was of scant significance.[35]

58. In any event, it will be for the national court to consider the factual circumstances of the dispute in order to determine, in the light of the principle of proportionality, whether the tenderer's exclusion on either ground was adequately justified.

33 At the hearing, the Commission raised the possibility that Article 57(4)(h) might serve as the basis for the exclusion.

34 At the hearing, the Austrian Government submitted that the early termination of a public contract is a factor the relevance of which cannot be underestimated and which must necessarily be highlighted in later award procedures.

35 At the hearing, Delta acknowledged that it did not include this fact in the European Single Procurement Document, giving as its reason the fact that there was no space on the form for comments. However, there would have been nothing to stop it, had it wished to explain the details of the termination of its contract, to provide that explanation in a separate document.

V. Conclusion

59. In the light of the foregoing lines of reasoning, I propose that the Court's answer to the question referred for a preliminary ruling by the Curtea de Apel București (Court of Appeal, Bucharest, Romania) should be as follows:

(1) Article 57(4)(g) 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:

– a contracting authority is in principle authorised to exclude from a procedure for the procurement of public works an economic operator which has been the subject of a decision to terminate a prior public contract early on the ground that it breached the clause imposing on it the obligation to inform the contracting authority, as a condition of the authorisation required to do so, of its intention to award some of those works to a subcontractor;

– it is for the national court to determine, in the light of the particular circumstances of the dispute and in accordance with the principle of proportionality, whether the early termination of the (first) public contract was due to a significant deficiency in the performance of a substantive requirement applicable under that contract that is sufficient to warrant the economic operator's exclusion from the (second) contract.

(2) Article 57(4)(h) of Directive 2014/24 does not preclude the contracting authority from excluding from a (second) public contract a tenderer which has concealed from it the fact that a prior contract awarded to it was terminated early on the ground of the existence of significant deficiencies in the performance of a substantive requirement applicable under that (first) contract. It is for the national court to consider, in the light of the principle of proportionality, the seriousness of that concealment of information.