



## The CJEU states that the technical requirements should not refer to the key features of a company's products or services

*Judgment of the Court of Justice of the European Union (CJEU), 25 October 2018, in the Case C-413/17 Roche v Polyclinic Dainava Kaunas*

### Background

In this judgment, the CJEU resolves a preliminary ruling raised in a dispute against the specifications of a public contract for renting laboratory diagnostic material called by Polyclinic Dainava Kaunas, in Lithuania. One of the tenderers, Roche, appealed against the tender specifications due to considering that the technical requirements of the tender contained restrictions on competition because of their high specificity and because they were adapted to the products of certain manufacturers.

Roche's appeals were rejected at first instance or at the Court of Appeal because both courts ruled that the contracting authority had made a proper use of its discretionary powers when setting the tender technical specifications. After receiving these unfavourable rulings, Roche decided to bring an action before the Supreme Court of Lithuania. The Supreme Court decided to ask the CJEU for a preliminary ruling in order to clarify what were the limits set by the European Union law on the discretionary powers that the contracting authorities have when establishing the technical characteristics of products or services in a tender.

### A clarification was needed

On its answer to this preliminary ruling, the CJEU begins its analysis by determining that European Union law grants broad discretionary powers to contracting authorities to formulate the technical specifications, as each authority is the one who best knows which supplies are needed and which requirements these supplies

must meet. However, according to the CJEU, the use of such discretionary powers must not violate the obligation that technical specifications must respect the principles of equal treatment, non-discrimination and transparency. The CJEU adds that the technical requirements cannot create unjustified obstacles to the opening of public procurement to competition or unduly unjustified favourable conditions for an economic operator.

The CJEU states that such requirements must not contain key features of the products or services offered by an operator; and it stresses that only when the contracting authority cannot make a precise description of the object of the contract the specifications may refer to a concrete manufacture, source, process, trademark or patent, provided that any such reference includes the phrase 'or equivalent'.

Moreover, according to CJEU, the details of the technical requirements must respect the principle of proportionality, especially when dealing with a sensitive matter such as public health. This involves examining whether the level of detail of the specifications is necessary to achieve the objectives sought with the public tender.

This Judgement is of interest because it establishes very useful guidelines on what limits the contracting authorities should take into account when formulating the technical requirements of a tender. The criteria established in this Judgement may serve as guidance for economic operators, contracting authorities and courts in order to avoid tenders which restrict competition.