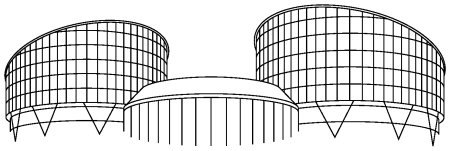

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASES OF UAB PROFARMA AND UAB BONA DIAGNOSIS v. LITHUANIA

(Applications nos. 46264/22 and 50184/22)

JUDGMENT

Art 1 P1 • Peaceful enjoyment of possessions • Proportionate annulment of contracts between the private applicant companies and the State for the purchase of COVID-19 tests and restitution by the companies of a substantial part of the sum received as being overpaid by the State • Wide margin of appreciation afforded to Contracting States with regard to the obligations imposed on participants in public procurement procedures and the consequences of failures to fulfil them • Public procurement procedure failed to comply with the relevant legal requirements • Finding of bad faith on part of the applicant companies based on a thorough assessment of the entirety of the relevant circumstances • Applicant companies had sought to take advantage of the public health emergency in order to make an excessive profit • Authorities' non-compliance with their administrative obligations under public procurement law, in case-circumstances, could not justify exonerating the applicant companies from the breach of obligations imposed on them by the applicable civil law and thus entitling them to retain the excessive profit made at the expense of the public purse • Contractual relations between suppliers and contracting authorities in public procurement not to be assimilated to situations in which public authorities exercised administrative powers entrusted to them in relation to persons or entities in a subordinate position • Absence of financial consequences for the relevant authorities not in itself sufficient to render the interference with the applicant companies' property rights disproportionate •Wide margin of appreciation not overstepped

Prepared by the Registry. Does not bind the Court.

STRASBOURG

7 January 2025

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the cases of UAB Profarma and UAB Bona Diagnosis v. Lithuania,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Arnfinn Bårdsen, *President*,
Saadet Yüksel,
Pauliine Koskelo,
Jovan Ilievski,
Anja Seibert-Fohr,
Peeter Roosma,
Stéphane Pisani, *judges*,
and Dorothee von Arnim, *Deputy Section Registrar*,

Having regard to:

the applications (nos. 46264/22 and 50184/22) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two companies registered in Lithuania, UAB Profarma ("the first applicant company") and UAB Bona Diagnosis ("the second applicant company"), on 16 September and 18 October 2022, respectively;

the decision to give notice to the Lithuanian Government ("the Government") of the complaints concerning the applicant companies' right to peaceful enjoyment of their possessions and to declare inadmissible the remainder of the applications;

the withdrawal from the case of Mr Gediminas Sagatys, the judge elected in respect of Lithuania (Rule 28 § 3 of the Rules of Court), and the decision of the President of the Section to appoint Mr Peeter Roosma to sit as an *ad hoc* judge in the case (Article 26 § 4 of the Convention and Rule 29 § 1 of the Rules of Court);

the parties' observations;

Having deliberated in private on 3 December 2024,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns civil proceedings in which the domestic courts annulled several contracts between the applicant companies and the State concerning the purchase of COVID-19 rapid tests. The applicant companies complained under Article 1 of Protocol No. 1 to the Convention that they had been ordered to return to the State a substantial part of the money that they had received under those contracts.

THE FACTS

2. The first applicant company is a biotechnology and pharmaceutical company established in May 2007 with its registered office in Vilnius. It was represented by Mr L. Lukošiūnas, a lawyer practising in Vilnius.

3. The second applicant company is a retailer of medical and orthopaedic goods established on 18 March 2020 with its registered office in Vilnius. It was represented by Mr T. Jasiulionis, a lawyer practising in Vilnius.

4. The Government were represented by their Agents, Ms K. Bubnytė-Širmenė and Mr R. Dzikovič.

I. PURCHASE OF COVID-19 RAPID TESTS BY THE LITHUANIAN AUTHORITIES

5. On 26 February 2020 a national state of emergency was declared in Lithuania in view of the spread of COVID-19. On 16 March 2020 a nationwide lockdown was announced.

6. The Minister of Health was appointed as the head of emergency operations. He was in charge of implementing the decisions taken by the government relating to the management of the pandemic. The Minister was assisted in that role by a team comprising employees of the Ministry of Health and individuals delegated by the government. Moreover, at the material time daily meetings were held at the Ministry of Health which were attended by the Minister and Deputy Ministers of Health, lawyers working at the Ministry, epidemiologists and other relevant experts and officials. Those meetings were aimed at discussing the evolving situation in the country and distributing tasks to be carried out; it appears that the tasks were distributed in an informal manner and that most instructions were issued orally, without adopting decisions in writing. When there was a need to purchase certain protective equipment or medical supplies the Minister of Health informed the Prime Minister and his relevant advisors accordingly and, after receiving their approval, gave the necessary instructions to other relevant officials or employees. It appears that, at least at the material time, different purchases were coordinated by different officials of the Ministry and that there was no single official in charge of determining the need for any given item.

7. According to the information in the Court's possession, on various dates in March 2020 the Ministry of Health and the National Public Health Surveillance Laboratory (*Nacionalinė visuomenės sveikatos priežiūros laboratorija* – "the NVSPL"), a public entity supervised by the Ministry of Health, received emails from several companies containing information about COVID-19 rapid tests that they were selling. Some of the emails contained general information about the tests, without indicating their prices, whereas others also gave the prices of the tests being offered.

8. On 18 March 2020, at around 12.45 p.m., the chief executive officer (CEO) of the first applicant company, E.M., sent an email to one of the Deputy Ministers of Health, L.J. (hereinafter "the Deputy Minister"), with a leaflet attached containing information about COVID-19 rapid tests which the first applicant company was selling. In the leaflet, the test was called "COVID-19 IgM-IgG rapid test" (*"COVID-19 IgM-IgG Greitasis testas"*). The leaflet stated, *inter alia*, that the tests in question were aimed at identifying the presence of coronavirus antibodies in a blood sample and that they were designed for *in vitro* utilisation. According to the leaflet, the tests could identify the presence of antibodies in blood with a precision rate of over 94%. It also acknowledged certain limitations in the use of rapid tests: they could not be used as the main means of diagnosing coronavirus infections; rapid tests could give a false negative result at a very early stage of infection; a negative result from a rapid test did not rule out the possibility that the individual was infected with coronavirus; and rapid tests could not determine the exact amount of antibodies in the blood. The leaflet did not indicate the price of the tests, their manufacturer or the country in which they were produced.

9. On 18 March 2020 the Minister of Health issued a written decision instructing the NVSPL to urgently organise a purchase of COVID-19 rapid tests. On the same day the Deputy Minister forwarded to the NVSPL the email sent by the first applicant company (see paragraph 8 above), asking the head of the NVSPL to "coordinate an order" (*suderinti užsakymą*) with E.M. It appears that the Deputy Minister telephoned E.M. and asked her to submit an official tender for rapid tests on behalf of the first applicant company.

10. At around 8.10 a.m. on 19 March 2020 the first applicant company submitted, by email, two alternative tenders to the Ministry of Health and the NVSPL: (i) to sell 1,010,000 rapid tests for 9,980,000 euros (EUR) excluding value-added tax (VAT), or EUR 12,075,800 including VAT; or (ii) to sell 510,000 rapid tests for EUR 5,000,000 excluding VAT, or EUR 6,050,000 including VAT. Under both tenders, the tests would be delivered in several stages, a week or two after receipt of payment, with the price per test being different at each stage. Under the first tender, the price per test was between EUR 9 and EUR 16 excluding VAT. Under the second tender, the price per test was between EUR 8.85 and EUR 16 excluding VAT. In both tenders, the test was called "UAB Profarma's rapid test 'COVID-19 express test" (*"UAB Profarma greitasis testas 'COVID-19 Express testas'"*). In both tenders it was also stated that each batch of the tests would be examined by the first applicant company in its certified laboratory in order to verify their quality. The tenders did not indicate the manufacturer of the tests or the country in which they were produced.

11. At around 8.40 a.m. on the same day, in an email addressed to, among others, the head of the NVSPL and the CEO of the first applicant company, the Deputy Minister stated that the second tender had been accepted. The

NVSPL prepared a draft of the procurement contract and sent it to the first applicant company for signature.

12. On the same day the head of the NVSPL informed the Minister of Health that the NVSPL was planning to purchase 510,000 COVID-19 rapid tests for the price of EUR 6,050,000 and asked to be allocated that amount. The Minister issued a written decision allocating the NVSPL EUR 6,050,000 for that purpose.

13. On the same day the Public Procurement Commission of the NVSPL held a meeting in which it adopted a decision to carry out public procurement by a negotiated procedure without publication (*neskelbiamų derybų būdu*), as provided for in Article 71 § 1 (3) and Article 72 § 2 (3) of the Law on Public Procurement (see paragraphs 153 and 154 below), and to urgently purchase COVID-19 rapid tests from the first applicant company. In the minutes of the meeting, it was noted that the NVSPL had received an order from the Ministry of Health to award the procurement contract to the first applicant company.

14. Also on the same day (19 March 2020) the first applicant company and the NVSPL signed a sales and purchase agreement (hereinafter "the procurement contract"), whereby the NVSPL undertook to buy from the first applicant company 510,000 COVID-19 rapid tests for EUR 6,050,000 including VAT. In the text of the contract, the test was called "COVID-19 Express test" (*"COVID-19 Express testas"*). In an annex to the contract it was stated that the tests in question were "COVID-19 IgM-IgG rapid tests" aimed at detecting the presence of coronavirus antibodies in blood and designed for *in vitro* use. The annex also listed the components of each test. The first applicant company was indicated as the manufacturer of the tests. The tests would be delivered in several stages, a week or two after receipt of payment, and the price per test would differ at each stage, ranging between EUR 8.85 and EUR 16 excluding VAT, or EUR 10.709 and EUR 19.36 including VAT.

15. Paragraph 3 of the procurement contract stated that if, owing to circumstances outside its control, the first applicant company was unable to provide the exact items indicated in the contract, at the written consent of both parties it could provide items of a different model, as long as they met the relevant requirements and their quality was not lower than the promised tests, nor their price higher.

16. On the same day the first applicant company signed a sales and purchase agreement with the second applicant company, whereby the first applicant company undertook to buy from the second applicant company 510,000 COVID-19 rapid tests for EUR 5,904,800 including VAT. The text of the contract, the components of the tests and the timeline within which they had to be delivered were essentially the same as those indicated in the procurement contract (see paragraph 14 above), but an annex to it stated that the manufacturer of the tests would be determined in the course of the performance of the obligations laid out in the contract.

17. On the same day (19 March 2020) the second applicant company signed a cooperation agreement with company R., registered in Latvia, whereby company R. undertook to look for potential manufacturers or sellers willing to sell COVID-19 rapid tests to the second applicant company.

18. On 20 March 2020 the first applicant company received EUR 6,050,000 from the State budget in accordance with the procurement contract (see paragraph 14 above). On the same day it transferred EUR 5,904,800 to the second applicant company in accordance with their sales and purchase agreement (see paragraph 16 above).

19. On 20 March 2020 the second applicant company signed a sales and purchase agreement with company A., registered in Austria, whereby the second applicant company undertook to buy from company A. 510,000 COVID-19 rapid tests for EUR 1,135,360.

20. On various dates between 25 and 31 March 2020 the second applicant company paid company R. a total of EUR 454,931 in accordance with their cooperation agreement (see paragraph 17 above).

21. On 28 March 2020 the first applicant company informed the NVSPL that owing to the constantly changing circumstances relating to the spread of the COVID-19 pandemic, which were outside of its control, it was unable to provide tests made by the manufacturer indicated in the procurement contract (see paragraph 14 above). However, in line with paragraph 3 of that contract (see paragraph 15 above), it would provide tests made by a different manufacturer, company A. (see paragraph 19 above), which met all the relevant criteria.

22. On 3 June 2020 the NVSPL sent a letter to the first applicant company stating that the NVSPL considered that the first applicant company had fully and properly fulfilled its obligations under the procurement contract.

II. OPENING OF THE PRE-TRIAL INVESTIGATION

23. On 27 May 2020 the Financial Crimes Investigation Service opened a pre-trial investigation concerning the purchase of COVID-19 rapid tests from the first applicant company by the NVSPL. On unspecified dates several individuals were officially notified that they were suspected of criminal offences.

24. L.J., who at the material time had been one of the Deputy Ministers of Health (see paragraph 8 above), was suspected of abuse of office (Article 228 § 1 of the Criminal Code – see paragraph 139 below). It was alleged that she had issued unlawful and unfounded instructions to the NVSPL and had granted unjustified privileges to the first applicant company in the procurement of COVID-19 rapid tests, which had led to the State sustaining significant pecuniary losses.

25. Furthermore, E.M., who was the CEO of the first applicant company, and R.L., who at the material time had been its chief operating officer (COO),

were suspected of fraud (Article 182 § 2 of the Criminal Code – see paragraph 137 below). It was alleged that they had provided false information during the procurement procedure, in particular as regards the manufacturer of the rapid tests, and had thereby obtained State funds by means of deception.

26. Lastly, E.M. and R.L., as well as L.P., who at the material time had been the CEO of the second applicant company, A.Č., who was a shareholder of the second applicant company, and M.K., who was the CEO of company R. (see paragraph 17 above), were suspected of money laundering (Article 216 § 1 of the Criminal Code – see paragraph 138 below). It was alleged that they had acted in concert with the aim of laundering EUR 6,050,000, obtained from the State by means of deception, and that to that end they had concluded various transactions simulating contracts which had not in fact been fulfilled.

27. During the investigation it was discovered that on 18 March 2020 company P. had sent an email to the Ministry of Health offering to sell various COVID-19 rapid tests, including those produced by company A. (see paragraph 19 above), for EUR 3.65, EUR 3.74 or EUR 3.99 per test including VAT.

28. When questioned during the pre-trial investigation, the Deputy Minister stated that she had been instructed by the Minister of Health and one of the Prime Minister's advisors, L.S., to purchase rapid tests from the first applicant company. The latter were also both questioned but they denied having given such an instruction to the Deputy Minister. Furthermore, the Deputy Minister stated that she had been aware of the offer sent by company P. on 18 March 2020 (see paragraph 27 above) and had tried to call its CEO but the latter had not answered and had not returned her call. The Deputy Minister stated that stopping or pausing the already ongoing negotiations with the first applicant company at that time would have led to the risk of the State not obtaining any tests at all.

29. In September 2020 the prosecutor in charge of the pre-trial investigation sent an official report to the Prosecutor General's Office. The prosecutor noted that the first applicant company had submitted a tender regarding COVID-19 rapid tests to the NVSPL, and that following the instruction from the Deputy Minister of Health the NVSPL had awarded the procurement contract to the first applicant company without carrying out any assessment of the market or of the proposed price of the tests. As a result, the State had paid EUR 6,050,000 to the first applicant company for 510,000 rapid tests. However, on 18 March 2020 the Ministry of Health had received an offer from company P. to sell the same type of tests for a price not exceeding EUR 4 per test. Moreover, the tests which the first applicant company had delivered had in fact been bought from an Austrian company for a much lower price (see paragraph 19 above). That gave reason to believe that the State may have sustained significant pecuniary damage. Given the circumstances, the prosecutor considered that there might be grounds to

institute civil proceedings seeking the annulment of the decisions and contracts at issue.

III. CIVIL PROCEEDINGS AGAINST THE APPLICANT COMPANIES

A. Proceedings before the Vilnius Regional Court

1. The prosecutor's claim

30. In December 2020 the Prosecutor General's Office lodged a civil claim in the public interest against the NVSPL, the two applicant companies and company R. with the Vilnius Regional Court. The prosecutor asked the court, *inter alia*: (i) to annul the procurement contract between the NVSPL and the first applicant company (see paragraphs 14 and 15 above) and to order the first applicant company to pay the State EUR 145,200; (ii) to annul the sales and purchase agreement between the first applicant company and the second applicant company and to order the second applicant company to pay the State EUR 3,542,469 (see paragraph 16 above); and (iii) to annul the cooperation agreement between the second applicant company and company R. (see paragraph 17 above) and to order company R. to pay the State EUR 454,931.

31. The prosecutor submitted that the public procurement procedure had not been carried out in accordance with the law. Instead, the procedure had been simulated and the NVSPL had simply chosen the supplier handpicked by the Ministry of Health, in violation of the principle of transparency enshrined in the Law on Public Procurement (see paragraph 150 below). After the Ministry had ordered the NVSPL to purchase tests from the first applicant company, the NVSPL had not looked for other potential suppliers and had not verified whether the price proposed by the first applicant company had been justified and reasonable. Although both the Ministry and the NVSPL had received offers from other companies, they had not examined them. In particular, company P. had offered to sell COVID-19 rapid tests for a price which had been several times lower than the one proposed by the first applicant company (see paragraph 27 above), which showed that the price paid to the latter had been excessive and that awarding it the procurement contract had breached the principle that public funds must be used rationally (see paragraphs 150 and 159 below). The prosecutor acknowledged that negotiating with other potential suppliers was not obligatory when carrying out procurement by a negotiated procedure without publication. However, in the case at hand, the NVSPL had been instructed to choose a specific supplier.

32. The prosecutor also acknowledged that the applicant companies had not been responsible for the fact that the NVSPL had not negotiated with other potential suppliers. However, the prosecutor contended that the applicant companies had acted in bad faith (*nesąžiningai*) and that, as a result, the contracts at issue were contrary to public morals (see paragraph 142 below).

In particular, the first applicant company had stated that it would be the manufacturer of the tests (see paragraph 14 above), although it did not in fact produce such tests. The reservation clause in paragraph 3 of the procurement contract (see paragraph 15 above) showed that at that time the first applicant company had already known that it would not be able to provide the exact tests indicated in the contract. Furthermore, in a sales and purchase agreement signed on the same day, the first applicant company had transferred all of its obligations to the second applicant company (see paragraph 16 above). The prosecutor emphasised that the second applicant company had only been established on 18 March 2020, its registered headquarters were in a warehouse of 3 sq. m, the value of its share capital had been EUR 2,500 and its only revenue had been received from the contract with the first applicant company. Moreover, the second applicant company had eventually purchased the tests from company A. for a much lower price (see paragraph 19 above). Thus, the applicant companies had provided tests manufactured by company A. to the NVSPL for a price which had been several times higher than the one proposed by company P. (see paragraph 31 above), and the State had paid the applicant companies much more than what they themselves had paid to company A. for the tests (see paragraph 19 above). The prosecutor contended that the applicant companies had sought to profit from the emergency caused by the pandemic and to obtain public funds in bad faith, and that they had signed the various contracts at issue in order to avoid any potential legal consequences. They had failed to act in a socially responsible manner and had breached the general principles of fairness and good faith.

33. The prosecutor further contended that the contract between the second applicant company and company R. (see paragraph 17 above) had been fictitious and that company R. had not provided any actual services to the second applicant company.

34. Accordingly, the prosecutor submitted that the applicant companies should be ordered to return to the State the difference between the amounts which they had received as a result of the contracts at issue and the actual market price of the tests provided (see paragraph 30 above).

35. When lodging the claim, the prosecutor asked the court to order interim measures and seize, *inter alia*, EUR 145,200 from the first applicant company and EUR 3,542,469 from the second applicant company. In January 2021 the Vilnius Regional Court granted that request.

2. The applicant companies' requests to adjourn the civil proceedings

36. The applicant companies lodged several applications with the Vilnius Regional Court seeking the adjournment of the civil proceedings while the criminal proceedings were pending (see paragraph 23 above). They submitted, *inter alia*, that the two sets of proceedings concerned the same factual circumstances and that the civil case could not be properly examined until the criminal case was concluded. They further submitted that the

prosecutor's claim was based on information obtained in the course of the pre-trial investigation and that the prosecutor had the possibility to rely on that information selectively, whereas the applicant companies did not have full access to the investigation material, which put them in an unequal position. The applicant companies pointed out that the prosecutor had the right to lodge a civil claim in the criminal proceedings.

37. The Vilnius Regional Court dismissed the requests to adjourn the civil proceedings. It stated that, according to the case-law of the Supreme Court, the fact that a pre-trial investigation was ongoing did not constitute a mandatory ground for adjourning related civil proceedings. Civil proceedings should be adjourned on that ground only in exceptional cases, where carrying out any procedural measures would be impossible or entirely uneconomical. However, where the relevant circumstances could be determined in the civil proceedings, those proceedings should not be adjourned. The Vilnius Regional Court considered that the applicant companies' requests had not been sufficiently specific and that it was unclear which particular circumstances warranted adjourning the case. Lastly, it stated that although the applicant companies had not been allowed to access certain documents in the pre-trial investigation file, that fact did not constitute grounds for adjourning the proceedings because those documents did not relate to them and the prosecutor's claim against the applicant companies was not based on them.

3. The applicant companies' replies to the prosecutor's claim

(a) The first applicant company

38. The first applicant company disputed the prosecutor's claim. It submitted that the procurement procedure had been carried out in accordance with Article 71 § 1 (3) of the Law on Public Procurement (see paragraph 153 below) and that conducting procurement by a negotiated procedure without publication had been justified in view of the national emergency caused by the coronavirus pandemic (in this connection, the first applicant company referred to the guidance issued by the European Commission, quoted in paragraph 168 below). In any event, the first applicant company had not been in charge of conducting the public procurement procedure; ensuring compliance with the relevant law and the principles of public procurement had been the responsibility of the NVSPL and that responsibility should not be transferred onto private companies.

39. The first applicant company further contended that when buying COVID-19 rapid tests the main criterion was not their price but their quality, as some tests available on the market were unable to accurately detect the presence of coronavirus antibodies. The first applicant company had had the capacity to provide high-quality tests within a short time and it was the only company in Lithuania which examined the quality of all imported tests in its

certified laboratory in order to detect those which were deficient or ineffective. Indeed, the NVSPL had not had any complaints regarding the quality of its tests (see paragraph 22 above). The first applicant company also submitted that during the procurement procedure there had not been a requirement to provide tests by any specific manufacturer – the only requirements for the tests had concerned their quality. Moreover, at the time when the procurement contract was signed, it had not been possible to ensure that the tests would be produced by a specific manufacturer because of the constantly changing situation.

40. The first applicant company further contended that the price for which it had sold the tests to the NVSPL had not been excessive. Prices both lower and higher than theirs could be found on the market, and there had not been any expert assessment of what price would have been reasonable. In any event, the prosecutor had not demonstrated that any of the other companies which had sent offers to the Ministry of Health or the NVSPL, including company P., had had the capacity to deliver the required quantity of tests and that those tests would have been of equivalent quality to the ones delivered by the first applicant company.

41. It further submitted that it had cooperated with the second applicant company because the latter had experience and contacts in the area of sales and purchases, whereas the expertise of the first applicant company was in the field of testing and certifying medical reagents.

42. Lastly, the first applicant company submitted that allowing the prosecutor's claim and ordering it to return part of its earnings would be unfair in the absence of an order for the NVSPL to return the tests which it had bought, as otherwise the NVSPL would in fact be using goods for which it had not paid. Nor would it be fair to retroactively reduce the price of the tests because the first applicant company had never offered to sell tests for the price determined by the prosecutor.

(b) The second applicant company

43. The second applicant company disputed the prosecutor's claim as well, presenting similar arguments to those presented by the first applicant company (see paragraphs 38-42 above). It further submitted that the prosecutor had failed to show that the second applicant company had breached any legal requirements, and that the law did not provide for any restrictions on contracts between private entities regarding the price of goods they wished to buy from and sell to one another.

44. In addition, it contended that what the prosecutor was seeking was not restitution but a reduction of the price of the tests. If the contracts at issue were annulled, the tests could not be returned to the applicant companies because their shelf life was short, and, in any event, the applicant companies would no longer be able to sell those tests at a comparable price because the market price had since fallen.

45. It further submitted that the contract between the two applicant companies had been signed because the shareholders of the second applicant company had relevant experience and had been able to form a team capable of obtaining goods which had been especially scarce at that time.

46. Lastly, the second applicant company contested the prosecutor's assertion that its agreement with company R. had been fictitious (see paragraph 33 above).

4. Submissions by the NVSPL and the Ministry of Health

47. The NVSPL supported the prosecutor's claim. It submitted that it was subordinate to the Ministry of Health and therefore could not have exercised control over the public procurement procedure. It had followed the instructions received from the Ministry of Health because it had considered them to be binding. The NVSPL further stated that it did not have any complaints vis-à-vis the first applicant company regarding its compliance with the procurement contract.

48. The Ministry of Health, which was a third party in the proceedings, also supported the prosecutor's claim.

5. Expert assessment

49. An expert assessment was delivered by the Public Procurement Service (hereinafter "the PPS"), a public entity. It submitted that even when the circumstances justified conducting public procurement by a negotiated procedure without publication, the contracting authority (*perkančioji organizacija*) was still under an obligation to conduct the procurement process in a transparent manner. While the contracting authority was entitled to a certain margin of discretion as regards the number of suppliers with which it should negotiate, the PPS always recommended that negotiations be held with more than one potential supplier in order to ensure competition, equality of treatment and a rational use of public funds.

50. The PPS observed that in the case at hand, the Ministry of Health had issued an unconditional order for the NVSPL to award the contract to one specific supplier, which had been contrary to the principle of transparency enshrined in the Law on Public Procurement (see paragraph 150 below). There was no information to suggest that the NVSPL had contacted other potential suppliers or that it had sought to verify whether the price proposed by the first applicant company had been reasonable and justified. At the same time, the PPS stated that it could not provide an answer as to whether the price proposed by the first applicant company had been reasonable because it had not carried out such an assessment.

51. Lastly, it submitted that where the principles of public procurement had been breached, the contracting authority had to be held accountable.

However, in the case at hand, no individuals had incurred administrative liability for any such breaches.

6. Decision of the Vilnius Regional Court

52. On 2 February 2022 the Vilnius Regional Court allowed the prosecutor's claim in part.

(a) Whether the procurement procedure had been conducted in accordance with the law

53. The court noted that in the case at hand there was no dispute that the grounds provided by law for the NVSPL to conduct public procurement by a negotiated procedure without publication had been present and that negotiating with multiple potential suppliers had therefore not been mandatory.

54. Turning to the question whether the public procurement procedure had been conducted in accordance with the law, the Vilnius Regional Court referred to the case-law of the Supreme Court, according to which any violation of the principles of public procurement had to be considered material, regardless of any additional considerations (see paragraph 161 below).

55. The Vilnius Regional Court observed that the testimonies of several employees of the NVSPL and other available evidence revealed that the decision of 19 March 2020 of the Public Procurement Commission of the NVSPL, whereby it had decided to award the procurement contract to the first applicant company (see paragraph 13 above), had been a mere formality because the NVSPL had been following the instruction to that effect given by the Ministry of Health. Although the NVSPL had received offers from other potential suppliers, it had not compared them with the first applicant company's tender and had awarded that company the contract without any further assessment.

56. The court noted that, according to the guidance issued by the European Commission, although a negotiated procedure without publication allowed contracting authorities to negotiate directly with potential contractors, a direct award to a preselected economic operator had to remain the exception, applicable if only one undertaking was able to deliver within the technical and time constraints imposed by a situation of extreme urgency (see paragraph 168 below).

57. Accordingly, the court concluded that the NVSPL had not conducted an actual procurement procedure and had thereby breached the principle of transparency enshrined in the Law on Public Procurement (see paragraph 150 below), as well as the requirement to use public funds rationally, provided for in the Law on the Management, Use and Disposal of State and Municipal Assets (see paragraph 159 below). As a result, the procurement contract had

not complied with imperative legal norms and was contrary to public order (see paragraphs 140 and 142 below).

(b) Whether there were grounds to annul the procurement contract between the NVSPL and the first applicant company

58. The Vilnius Regional Court stated that when determining whether the procurement contract should be annulled and restitution should be ordered, it was necessary to examine whether that contract had been fulfilled and to assess the first applicant company's conduct.

59. It held that, according to the established domestic case-law, the obligation to clearly set out the terms and conditions of public procurement and to bear the negative consequences of a failure to fulfil that obligation fell on the contracting authorities. However, suppliers were not exempt from the duty to fulfil contracts in good faith and to cooperate with the contracting authorities, and they were not entitled to profit from mistakes made by the contracting authorities.

60. The Vilnius Regional Court noted that the prosecutor had not argued or provided any evidence to show that the procurement contract had been awarded to the first applicant company because of any improper actions on its part. The first applicant company had merely sent its tender to the Ministry of Health and the NVSPL, as had several other companies, and none of the officials of the NVSPL heard by the court had alleged that they had experienced any pressure from the first applicant company.

61. At the same time, the court noted that, according to the procurement contract, the first applicant company had undertaken to deliver rapid tests which it had produced itself (see paragraph 14 above). However, the first applicant company had not denied that it had not been producing such tests at the time when the contract was signed. Moreover, from the terms of its contract with the second applicant company it could be deduced that, at that time, the first applicant company had not known which exact manufacturer would provide the tests that it had undertaken to deliver to the NVSPL (see paragraph 16 above). In addition, the first applicant company's letter to the NVSPL of 28 March 2020 (see paragraph 21 above) showed that it understood that it had undertaken to deliver tests which it had produced itself. Accordingly, the court considered that, by undertaking to provide tests which it produced itself while knowing that it would not be able to do so, the first applicant company had acted in bad faith.

62. However, the Vilnius Regional Court emphasised that, when deciding on the validity of the procurement contract, it was necessary to determine to what extent the first applicant company's conduct had affected the decision to award it the procurement contract and the performance of that contract.

63. In that connection, the court observed that the procurement contract had been performed, the NVSPL had not had any complaints vis-à-vis the

first applicant company, and there was no indication that the delivered tests had not met the relevant requirements (see paragraphs 22 and 47 above).

64. The court further noted that the text of the procurement contract had been prepared by the NVSPL (see paragraph 11 above). That fact, together with the fact that the Public Procurement Commission of the NVSPL had not assessed the first applicant company's tender before awarding it the procurement contract (see paragraph 55 above), confirmed that the NVSPL had not considered the identity of the manufacturer to be an essential term of the contract. Moreover, the NVSPL had not asked the first applicant company to justify the need to change the manufacturer and had accepted the tests produced by company A. The court stated that the prosecutor had not provided any evidence to show that the identity of the manufacturer of the tests had been essential to the NVSPL and that, had company A. been indicated as the manufacturer from the very beginning, the NVSPL would not have awarded the procurement contract to the first applicant company. Given the circumstances, the court concluded that the first applicant company had provided inaccurate information about the manufacturer of the tests and had thereby acted in bad faith, but that that was not the reason why the procurement contract had been found to be unlawful.

65. The court then turned to the prosecutor's argument that the price of the rapid tests which the State had paid to the first applicant company had exceeded the market price of such tests. It observed that the NVSPL had never asked the first applicant company to justify the price which it had proposed and had not attempted to negotiate. Furthermore, the first applicant company was a private, for-profit entity. The freedom to engage in economic activity was enshrined in the Constitution (see paragraph 136 below). Accordingly, the price set out in any contract had to be determined by the free agreement of the parties, and the supplier could not be held liable for proposing a price which the other party accepted; that was even more true given the fact that the NVSPL and the Ministry of Health had received offers from other suppliers. Moreover, the market for COVID-19 rapid tests was not regulated by the State and the prices of such tests were determined by free-market forces. The court noted that there was no information that the first applicant company had exerted any pressure on the NVSPL with regard to the terms of the procurement contract. Thus, to assess whether the price had been justified after the procurement contract had already been performed would be contrary to the principles of free enterprise and the freedom of contract.

66. The court further held that the prosecutor had failed to show that the price for which the tests had been purchased from the first applicant company had significantly exceeded the market price of analogous items. It noted that in March 2020 the Ministry of Health and the NVSPL had received several offers from various companies regarding rapid tests and that they had therefore had an opportunity to compare those offers with the one submitted by the first applicant company. Thus, contrary to the prosecutor's assertion,

the extraordinary situation caused by the coronavirus pandemic had not limited the contracting authority's ability to analyse the market and promptly carry out procurement by a negotiated procedure without publication.

67. Turning to the prosecutor's argument that analogous tests could have been bought from company P. for a much lower price (see paragraph 31 above), the court found that company P. had sent an offer to the Ministry of Health before it had been decided how many tests would be purchased and what the time-limits for their delivery would be. Thus, it could not be said that company P. had offered to sell items meeting the relevant conditions. Although, according to the available information, on 26 March 2020 the Ministry of Defence had awarded a procurement contract to company P. concerning 15,000 rapid tests for the price of EUR 3.63 per test including VAT, the court agreed with the arguments presented by the applicant companies to the effect that it had to be very carefully assessed whether any given supplier would have been able to deliver a large quantity of rapid tests in view of the fact that the demand for such tests had been especially high in March 2020 and that their price had been constantly increasing, which in turn increased the risk of suppliers not being able to meet their contractual obligations.

68. The court also examined the documents provided by the prosecutor concerning other offers which had been submitted to the Ministry of Health by different companies. It noted that the prices proposed in those offers had ranged between EUR 10.08 and EUR 14.04 per test, and thus had not differed significantly from the price proposed by the first applicant company (see paragraph 14 above). The court further noted that determining the market price of a given item was a question which required specialist knowledge, but the prosecutor had not provided any relevant expert assessment in that regard.

69. Accordingly, although the procurement contract had been signed in violation of the law, there were no grounds to hold the applicant companies, which were for-profit entities, accountable for the said violation. Thus, transferring social responsibility and the obligation to use public funds rationally from the NVSPL onto the private, for-profit entities would be disproportionate and contrary to the principles of the free market. The court emphasised that the contracting authority had been aware of offers made by other suppliers to sell rapid tests for lower prices but had awarded the procurement contract to the first applicant company of its own free will.

(c) Whether there were grounds to annul the remaining contracts

70. Turning to the prosecutor's claim against the second applicant company and company R. (see paragraph 30 above), the Vilnius Regional Court observed that neither of those companies had participated in the public procurement procedure and that they could not be held responsible for how public funds had been used. It stated that contracts signed between private companies and the business decisions which the first applicant company had

taken in order to perform its obligations under the procurement contract and to obtain a profit while doing so could not be held to be contrary to public order or good morals, particularly when the other party to that contract (the NVSPL) had not required any justification for the proposed price, requested a breakdown of it or inquired as to what had been the profit margin, but had simply agreed to it. Moreover, although implementing a contract with the help of sub-contractors undoubtedly affected the price of the goods, doing so was not an unusual business practice and it was not prohibited by law, and so could not be held to be contrary to good morals either.

71. The court reiterated that it had not been proved that the unlawfulness of the procurement contract had resulted from any unlawful or dishonest actions on the part of the first applicant company. Thus, since the prosecutor's claim concerning the other contracts had been derived from the claim concerning the procurement contract, there were no grounds to annul those contracts.

72. As to the cooperation agreement between the second applicant company and company R., it stated that any disputes regarding that agreement had to be resolved in the Latvian courts in accordance with Latvian law. Thus, the Vilnius Regional Court discontinued the case in that part for lack of jurisdiction.

(d) Determining the consequences of the unlawful public procurement procedure

73. In accordance with the Law on Public Procurement, when a procurement contract had been signed in violation of the law, that contract could be declared null and void or the court could decide to preserve it and instead impose an alternative penalty (see paragraphs 156-158 below).

74. The Vilnius Regional Court observed that in the case at hand there was no dispute that the procurement contract had been entirely fulfilled and that more than half of the 510,000 rapid tests had already been used – according to the information provided by the NVSPL, the number of the tests which had not been used at that time was 146,875. The tests had been purchased urgently because of the existence of a pressing need, and there was no indication that the remaining tests would not be used, since the pandemic had not then ended. Moreover, the second applicant company had provided information from the manufacturer of the tests to the effect that, in view of their short shelf life and the fact that they had to be stored in special conditions, the tests could not be returned to the manufacturer.

75. The court emphasised that restitution should not be applied in a formalistic manner, but that account had to be taken of the relevant legal provisions and the circumstances of the case, and that it had to be determined whether restitution would serve its purpose – namely, to return the parties to the situation which existed before the impugned transaction (*status quo ante*). As provided in the Civil Code, the court had to firstly determine whether

restitution should be applied at all, and, if so, determine the manner of its application (paragraphs 147 and 148 below).

76. The Vilnius Regional Court held that applying restitution in kind in the case at hand would be contrary to the principles of fairness, reasonableness and good faith enshrined in the Civil Code, and that it would not restore the situation which had existed before the impugned transaction. Instead, it found that it was reasonable to preserve the validity of the procurement contract and to impose alternative penalties.

77. Having regard to the nature of the violation and the specific factual circumstances – namely, the fact that the tests had been purchased during an extraordinary situation and it had been necessary to purchase them with particular urgency – the court fined the NVSPL EUR 20,000, which amounted to approximately 0.3% of the value of the procurement contract. It considered that fine to be in line with the established case-law, proportionate and dissuasive, and that it would encourage compliance with the rules of public procurement in future.

(e) Litigation costs and interim measures

78. The first applicant company claimed approximately EUR 10,150 in litigation costs, and the second applicant company – approximately EUR 22,300. The court observed that, on the one hand, the case was complicated, but that on the other hand, it had been established that the first applicant company had acted in bad faith when concluding the procurement contract (see paragraph 61 above). It also noted that although the second applicant company had not been a party to the procurement contract, it had been aware of the public procurement procedure and it had known the purpose for which the rapid tests were being purchased and the terms of the procurement contract, including the identity of the manufacturer indicated therein. Accordingly, the court considered that there were grounds to depart from the rule established in the Code of Civil Procedure, whereby the party in whose favour the case had been decided had the right to have its litigation costs reimbursed by the other party, and to reduce the award to be made in respect of the applicant companies' litigation costs. It awarded each of them EUR 5,000 under that head.

79. Lastly, the court lifted the interim measures which had previously been ordered in the proceedings (see paragraph 35 above).

B. Proceedings before the Court of Appeal

1. The appeal lodged by the prosecutor

80. The prosecutor lodged an appeal against the Vilnius Regional Court's decision, submitting essentially the same arguments as in the initial claim (see paragraphs 30-34 above). Furthermore, the prosecutor submitted that the

procurement contract could only be preserved after a finding that the procurement procedure had been unlawful if that was in the public interest (see paragraph 157 below). However, in the case at hand, it would have been in the public interest to return to the State the money which it had overpaid for the tests, whereas the decision of the Vilnius Regional Court had given primacy to the interests of the companies which had acted in bad faith, rather than the general interest of society.

81. The applicant companies contested the prosecutor's appeal, relying on essentially the same arguments as those which they had presented before the first-instance court (see paragraphs 38-46 above). In particular, they submitted that the State had to bear the burden of any negative consequences arising from the mistakes made by the public authorities. Since the NVSPL had been responsible for properly conducting the public procurement procedure it had to bear all the consequences of its failure to conduct that procedure in accordance with the law.

2. The appeal lodged by the first applicant company

82. The first applicant company also lodged an appeal against the Vilnius Regional Court's decision. It contested that court's finding that it had acted in bad faith (see paragraph 61 above) and the decision to reduce the award in respect of litigation costs for that reason (see paragraph 78 above).

83. The first applicant company submitted that the Law on Public Procurement allowed the parties to a procurement contract to change the terms and conditions of that contract, as long as the change was not substantial (see paragraph 155 below). It contended that by informing the NVSPL that it would deliver rapid tests produced by company A. (see paragraph 21 above) it had in fact proposed a change to the procurement contract and that the proposed change had not been substantial (see paragraph 155 below). By confirming that the first applicant company had properly performed the procurement contract (see paragraph 22 above), the NVSPL had confirmed that it had accepted the proposed change.

84. The first applicant company further submitted that at the time when it had submitted a tender to the Ministry of Health and the NVSPL it could not have known who the manufacturer of the tests would be – otherwise it would have indicated it in the tender. At that time, against the background of the extraordinary global demand for rapid tests and the fast changing situation, it had been considering various possibilities for obtaining rapid tests. One such possibility had been to buy tests from another manufacturer and sell them under its own label; that business practice was known as private-labelling and it was lawful and widespread. However, that had eventually proved to be impossible because of the continuing pandemic and the need to obtain the tests as rapidly as possible. For those reasons, the first applicant company had decided to offer to the NVSPL rapid tests produced by another manufacturer, tests which fully met the requirements indicated in the procurement contract.

It emphasised that it had not only delivered the tests but had also verified their quality, and that employees of the NVSPL who had been heard by the first-instance court had confirmed that the delivered tests had been of good quality.

85. Accordingly, the first applicant company contended that the Vilnius Regional Court had erred when finding that it had acted in bad faith. It asked the Court of Appeal to remove the relevant passages from the court's decision and to grant its claim in respect of litigation costs in full.

86. The second applicant company supported the appeal lodged by the first applicant company.

3. Decision of the Court of Appeal

87. On 16 May 2022 the Court of Appeal overturned the decision of the Vilnius Regional Court and adopted a new decision.

(a) Whether the procurement procedure had been conducted in accordance with the law

88. The Court of Appeal agreed with the lower court that the NVSPL had had the right to conduct public procurement by a negotiated procedure without publication (see paragraph 53 above). It also emphasised that, notwithstanding that finding, the NVSPL had not been exempt from the obligation provided by law to conduct public procurement in a transparent manner and to use public funds rationally (see paragraph 150 below).

89. The Court of Appeal also endorsed the lower court's findings that the procurement contract had not been signed in accordance with imperative legal norms (see paragraphs 55 and 57 above). It noted, in particular, that although the NVSPL had been aware that there had been other potential suppliers, it had not contacted any of them, had not sought to identify the most advantageous tender, and had not assessed the price proposed by the first applicant company or any of the other terms and conditions of the procurement contract, but instead had decided to award it the contract based solely on the instruction given by the Deputy Minister of Health.

90. The Court of Appeal further noted that the first applicant company's tender had been selected in the absence of clear information about the manufacturer of the tests, even though other companies which had contacted the Ministry of Health and the NVSPL (see paragraph 7 above) had indicated the manufacturers of the tests which they were offering, and the identity of the manufacturer had been important for the price of the tests – for example, the price of tests produced in China had been lower. Moreover, in the various documents presented by the first applicant company the name of its tests had been different – in the leaflet which it had initially sent to the Ministry of Health, the tests had been called "COVID-19 IgM-IgG rapid test" (see paragraph 8 above), whereas in its subsequent tenders they had been called

"COVID-19 express test" (see paragraph 10 above). Neither of those documents had indicated the manufacturer. The email correspondence between the NVSPL and the first applicant company showed that the NVSPL had asked the company to provide such information only after its tender had already been *de facto* accepted. After the first applicant company had indicated that it would produce the tests itself the NVSPL had not verified that information or asked it to provide any supporting documents.

91. Accordingly, the Court of Appeal held that the public procurement had not been conducted in line with the principle of transparency and the requirement to use public funds rationally. As a result, it had to be declared null and void as being contrary to the imperative legal norms (see paragraph 140 below). The court noted that the first applicant company had not disputed the part of the first-instance court's judgment in which it had reached the same conclusion.

(b) Whether there were grounds to annul the procurement contract between the NVSPL and the first applicant company

92. The Court of Appeal noted that, according to the Civil Code, when exercising their rights and fulfilling their obligations, everybody had to respect the law, the rules of living together and the principles of good morals, act in good faith and follow the principles of reasonableness and fairness (see paragraph 144 below). The requirement to act in good faith applied to both contractual and pre-contractual relations (see paragraph 145 below). Moreover, according to the Supreme Court's case-law, a contract had to be annulled as being contrary to good morals when the main and only intention of the parties to a contract was to achieve a purpose that was contrary to public order or good morals (see paragraph 160 below).

93. The court held that the actions of the NVSPL, namely conducting a public procurement process contrary to the requirements of transparency and the rational use of public funds, had to be considered as being manifestly contrary to its duty to act with care and diligence, and therefore as being in bad faith. It further noted that, although the duty to ensure compliance with the imperative legal norms relating to a public procurement process was first and foremost the responsibility of the contracting authorities, the Supreme Court had held that the suppliers also had an obligation to act in a responsible manner (see paragraph 163 below).

94. The Court of Appeal found that the Vilnius Regional Court had not properly assessed whether the applicant companies had acted in good faith. It observed that, according to the Law on Public Procurement, the contracting authority had to present a detailed technical specification of the goods which it was seeking to purchase. The court stated that, in return, every supplier participating in the procurement procedure had to offer items which met the requirements indicated in the procurement documents. An honest and socially responsible supplier was under an obligation to seek information about the

goods that the contracting authority was seeking to purchase, and when presenting a tender, to propose corresponding goods which it had a realistic prospect of delivering. Although in the case at hand, in view of the extreme urgency, the procurement had been conducted by a negotiated procedure without publication and therefore procurement documents, including a technical specification, had not been prepared, the court considered that that had not exempted the first applicant company from the requirement to act in a socially responsible manner.

95. It reiterated that, as could be seen from the offers sent to the Ministry of Health and the NVSPL by other companies, the identity of the manufacturer of the tests had been an important feature of the tests that had also had an impact on their price, yet the first applicant company had not indicated the manufacturer of the tests or the country in which the manufacturer was based, and had referred to the tests by different names in different documents (see paragraph 90 above). Furthermore, the case material gave grounds to believe that, when it presented the tender, the first applicant company had not made any agreements with possible manufacturers of tests or ensured, even in a preliminary manner, that it would be able to meet the contractual obligations which it was about to undertake. That led the court to conclude that the first applicant company had presented an abstract tender, without indicating, and without having the knowledge of, the exact goods that it had intended to sell. Even though neither the Ministry of Health nor the NVSPL had sought to clarify those circumstances before awarding the procurement contract to the first applicant company, the Court of Appeal held that its actions could not be considered as being in good faith and socially responsible and that instead it had sought, first and foremost, to have its tender chosen and the contract signed as soon as possible.

96. In the court's view, the above-mentioned conclusion was further strengthened by the fact that the first applicant company had provided the NVSPL with inaccurate information about the manufacturer of the tests when the procurement contract was being drafted: it had presented itself as the manufacturer, but, as found by the first-instance court, that had not been true (see paragraph 61 above). The court considered that the arguments provided by the first applicant company in its appeal (see paragraphs 82-85 above) did not change that conclusion – on the contrary, they confirmed that when the first applicant company signed the procurement contract it had not known which manufacturer's tests it would deliver and had provided inaccurate information in that respect.

97. The Court of Appeal further held that the lower court had not properly assessed the price proposed by the first applicant company. The fact that that price had been especially high was confirmed by the offers made by other companies to the Ministry of Health and the NVSPL at around the same time: according to the available information, several companies had offered to sell tests produced in the United Kingdom, China, Portugal or France for prices

ranging between EUR 3.60 and EUR 12.16 per test excluding VAT. Moreover, company P. had proposed to sell tests produced by company A. – the same manufacturer whose tests the first applicant company had eventually delivered to the NVSPL – for the prices of EUR 3.65 to EUR 3.99 per test including VAT (see paragraph 27 above). Although some of those offers had been submitted before the quantity of the tests which the NVSPL sought to purchase had been known, some companies had indicated that, if a high quantity was purchased, the price per test would be even lower.

98. The court further observed that the Ministry of Defence had purchased 15,000 rapid tests, produced by company A., from company P. for the price of EUR 3.63 per test including VAT (see paragraph 67 above). According to the information provided by the Ministry of Defence, it had assessed the market before conducting that purchase and had found that the market price of one rapid test ranged between EUR 4.79 and EUR 15.49 including VAT. By contrast, the price per test proposed by the first applicant company had been between EUR 10.709 and EUR 19.36 including VAT (see paragraph 14 above). The Court of Appeal considered that the applicant company had not shown that the latter price had corresponded to the market price at the relevant time.

99. The court further noted that the first applicant company had presented a tender with a price after it had already been *de facto* selected as the supplier (see paragraphs 9 and 10 above). In the court's view, at that time the first applicant company had had good reasons to believe that it would be awarded the procurement contract. Therefore, by proposing an especially high price for goods which had not been clearly identified, it had sought to obtain the highest possible profit.

100. The court considered that the latter conclusion was also confirmed by the fact that the first applicant company had not provided any information to show that its proposed price had been based on reasonable economic calculations – for example, how much it had been planning to pay for the tests and for the logistics of their delivery, or what had been its intended profit margin. On the contrary, some of the email correspondence between the representatives of the two applicant companies gave grounds to believe that, before submitting its tenders to the NVSPL, the first applicant company had been aware that tests could be purchased for a much lower price. The Court of Appeal stated that those circumstances further showed that the first applicant company had not "followed the common pattern of market behaviour" (*neveikė pagal įprastą rinkoje elgesio modelį*) and had sought to sign the procurement contract for an especially high price and obtain the highest possible profit.

101. The court dismissed the first applicant company's argument that the price of its tests had been higher because it had tested their quality at its laboratory (see paragraph 39 above). It held that the first applicant company

had not provided any documents showing the cost of such testing or that the laboratory testing had been performed at all.

102. It further noted that the tests in question had been purchased from company A. for EUR 1,135,360 (see paragraph 19 above), which amounted to 18.79% of the price which the NVSPL had paid to the first applicant company (EUR 6,050,000). That showed a manifest and significant difference between the market price at the material time and the price proposed by the first applicant company.

103. In the light of the foregoing, the Court of Appeal concluded that the first applicant company had not acted in good faith and as a socially responsible supplier, and that its conduct had not followed the common pattern of market behaviour. It had sought to benefit from the extraordinary situation caused by the urgent need to purchase rapid tests by a negotiated procedure without publication and to obtain, in bad faith, a profit which was unreasonably high and economically unjustified. Such conduct did not conform to good morals. In view of the fact that the NVSPL had failed to act in a transparent manner and to ensure the rational use of public funds, and had thereby also acted in bad faith (see paragraph 93 above), the procurement contract had to be declared null and void as being contrary to good morals.

(c) Whether there were grounds to annul the remaining contracts

104. Turning to the sales and purchase agreement between the two applicant companies, the Court of Appeal agreed with the lower court that, in general, implementing a contract with the help of sub-contractors was not an unusual business practice and not prohibited by law (see paragraph 70 above). The choice of the sub-contractor could be determined by various factors relating to the market conditions such as, for example, the sub-contractor's experience in a certain field or its business contacts. When signing any contract, the reliability of the business partner and the assurance that the contractual obligations would be met were particularly important.

105. The court held that, in the circumstances at hand, the signing of the agreement between the two applicant companies had not corresponded to usual business practices. In particular, after signing a high-value procurement contract, the first applicant company had chosen as its sub-contractor a newly established company with no experience, staff or actual headquarters (see paragraph 32 above). There was no indication that the first applicant company had assessed the second applicant company's reliability before concluding that agreement, or that it had obtained any guarantee that the latter would be able to fulfil its contractual obligations before paying the second applicant company EUR 5,904,800. Moreover, the first applicant company had undertaken to buy tests from the second applicant company without having any information about the manufacturer of the tests, although that information was crucial for determining their price. The court considered that such actions did not correspond to usual business practices either.

106. Furthermore, the case material showed that the two applicant companies had shared all the information concerning the procurement contract, the second applicant company's contract with company A. (see paragraph 19 above) and other relevant contracts. Representatives of the two applicant companies had discussed which of them should sign which contracts, and representatives of the first applicant company had been included in the correspondence with company A. The close link between the two applicant companies was further demonstrated by the fact that the CEO of the second applicant company was the former COO of the first applicant company; the second applicant company's only source of revenue had been the payment received from the first applicant company; and in March 2020 the second applicant company had twice transferred money to the CEO of the first applicant company.

107. Accordingly, the Court of Appeal held that all the aforementioned circumstances (see paragraphs 105 and 106 above) showed that the two applicant companies had colluded with an intention to benefit from the extraordinary situation that existed at the relevant time and to obtain, in bad faith, an unreasonable and economically unjustified profit, as well as to avoid any possible consequences of that behaviour if questions concerning the lawfulness of the impugned transactions were to arise. As a result, the sales and purchase agreement between the two applicant companies was contrary to good morals and it had to be declared null and void.

108. The Court of Appeal also quashed the Vilnius Regional Court's decision to discontinue the part of the case concerning the prosecutor's claim against company R. (see paragraph 72 above) and remitted that part for a fresh examination.

(d) Determining the consequences of the unlawful public procurement procedure

109. The Court of Appeal held that, in the case at hand, the public interest had been violated on account of the fact that public procurement had not been conducted in a transparent manner, the supplier had been selected in advance, without any assessment of whether its tender had been the most advantageous to the contracting authority, and the applicant companies, acting jointly, had sought to benefit from the extraordinary situation and obtain unjustified profit in bad faith. As a result, the State had paid the applicant companies more than the market price of the goods in question. Accordingly, the Court of Appeal considered that preserving the procurement contract and applying alternative penalties, as the lower court had done (see paragraph 76 above), would not be in the public interest, nor would it be in line with the principles of fairness, reasonableness and good faith, but on the contrary would legitimise the aims pursued by the unlawful contracts.

110. The court acknowledged that both the procurement contract and the sales and purchase agreement between the two applicant companies had been fulfilled, and that the majority of the tests had already been used (see

paragraph 74 above). Accordingly, restitution in kind was not possible. In such circumstances, the NVSPL would normally have to be ordered to pay monetary compensation equal to the value of the goods which remained in its possession (see paragraph 148 below). However, the court emphasised that restitution could not lead to unfairly improving or worsening the situation of any of the parties to the annulled transaction (see paragraph 147 below), and that neither of the parties should acquire anything at the expense of the other after a transaction had been declared null and void. In the case at hand, it had been established that the price which the State had paid to the first applicant company for the rapid tests had been excessive and unjustified. Therefore, ordering the NVSPL to pay monetary compensation equal to the value of the remaining tests would not be appropriate.

111. The Court of Appeal held that a fair way of applying restitution in the case at hand, which is to say one which would strike a fair balance between the interests of the parties without allowing them to achieve unlawful goals, was to order the applicant companies to return the money which the State had overpaid for the tests. When determining the amount that had been overpaid, the court considered it appropriate to rely on the offer sent to the Ministry of Health by company P. on 18 March 2020, in which analogous tests produced by company A. were priced at EUR 3.74 per test including VAT (see paragraph 27 above). The fact that at around the same time company P. had sold similar tests to the Ministry of Defence for EUR 3.63 per test including VAT (see paragraph 98 above) further justified the reasonability of that price.

112. The Court of Appeal then turned to the applicant companies' argument that the State had to bear the burden of any negative consequences arising from the mistakes made by the public authorities (see paragraph 81 above). It observed that that principle had indeed been established in the case-law of the Supreme Court (see paragraph 167 below). However, the Court of Appeal stated that in such cases it could only be decided not to apply restitution when the main reason for the annulation of a transaction had been mistakes made by the public authorities rather than dishonest actions by private parties. In the case at hand, it had been established that both applicant companies had acted in bad faith. Therefore, the fact that the NVSPL had breached the imperative legal norms of the Law on Public Procurement did not eliminate the possibility of applying restitution with regard to the applicant companies.

113. Accordingly, the Court of Appeal concluded that restitution had to be applied in the present case. It found that the market price of 510,000 tests had been EUR 1,907,400 and that the State should be reimbursed for the amount which it had overpaid – namely EUR 4,142,600. Accordingly, it ordered the first applicant company to return to the State EUR 145,200 and the second applicant company to return to the State EUR 3,997,400, with a default annual interest rate of 5%.

C. Proceedings before the Supreme Court

1. Appeals on points of law lodged by the first applicant company and related decisions

(a) The first appeal on points of law

114. The first applicant company lodged an appeal on points of law with the Supreme Court. It contended, firstly, that the principle of transparency implied an obligation on the contracting authority to disclose to potential suppliers any essential requirements which their tenders had to meet. However, in the case at hand, the NVSPL had not prepared procurement documents or a technical specification of the tests which it had been seeking to buy, nor had it informed the first applicant company that the rapid tests which it had proposed to sell did not meet certain requirements. The first applicant company submitted that it had provided detailed information about its tests in the leaflet which it had sent to the Ministry of Health (see paragraph 8 above) and that the names of the tests used in the leaflet and in its later tenders (see paragraphs 8 and 10 above) had been analogous. Moreover, it had proposed a price which it had considered to be economically justified. It also repeated its earlier arguments concerning the reasons why in the tenders it had been identified as manufacturer of the tests (see paragraph 84 above). Accordingly, the first applicant company contended that the Court of Appeal's finding that it had acted in bad faith had been unfounded.

115. The first applicant company further contended that the Court of Appeal had shifted all the responsibility for the proper conduct of public procurement, including the obligation to rationally use public funds, onto suppliers, which was unjustified and incompatible with the Supreme Court's case-law.

116. Moreover, it argued that an obligation for suppliers participating in public procurement procedures to propose a "reasonable" price was not provided in any legal instruments and that imposing such an obligation on private entities would be contrary to the principles of the free market.

117. Lastly, it submitted that the way in which the Court of Appeal had applied restitution (see paragraphs 111-113 above) had been contrary to the principle, established in the case-law of the Supreme Court and the European Court of Human Rights, that the burden of any mistakes made by the public authorities must be borne by those authorities themselves and that such mistakes cannot be remedied at the expense of individuals. It contended that the Court of Appeal had in fact obliged it, against its will, to sell tests to the NVSPL for a price for which it had never intended to sell them.

118. On 28 June 2022 the Supreme Court refused to accept the appeal on points of law on the ground that it did not raise any important legal issues.

(b) The second and third appeals on points of law

119. The first applicant company lodged a second appeal on points of law, in which it reiterated some of the arguments raised in its previous appeal (see paragraphs 114-117 above). In addition, it submitted that the Court of Appeal had not properly determined the market price of rapid tests at the relevant time. Namely, it had chosen the lowest proposed price, even though that price had been proposed in a different public procurement procedure, in which company P. had offered to sell a much lower quantity of tests to a different ministry. Thus, the first applicant company argued that the transactions at issue were not comparable and that the Court of Appeal had violated the rules of the assessment of evidence.

120. On 10 August 2022 the Supreme Court refused to accept the appeal on points of law on the grounds that it had been lodged outside of the one-month time-limit applicable to cases concerning public procurement and it had not been signed by an authorised representative of the first applicant company.

121. The first applicant company lodged a third appeal on points of law, in which it raised essentially the same arguments as those presented in its previous appeal (see paragraph 119 above). It also submitted that in the case at hand the time-limit for lodging an appeal on points of law was three months and the appeal had therefore been lodged on time (see paragraph 120 above), and it provided an authority form issued in respect of the representative who had signed the appeal. On 5 September 2022 the Supreme Court refused to accept the appeal on points of law on the ground that it did not raise any important legal issues.

2. Appeals on points of law lodged by the second applicant company and related decisions

(a) The first appeal on points of law

122. The second applicant company lodged an appeal on points of law against the Court of Appeal's decision. It raised similar arguments to those which had been presented by the first applicant company in its appeals on points of law (see paragraphs 114-117 and 119 above).

123. In addition, it submitted that it had not been demonstrated that the second applicant company, which had not even participated in the procurement procedure, had acted in bad faith. There was no evidence that the two applicant companies had agreed to sign a fraudulent or fictitious contract or that they had carried out any other dishonest actions. They were distinct legal entities, with different shareholders, CEOs and decision-making bodies. Moreover, there was no evidence that the first applicant company had undertaken to buy tests only from the second applicant company – on the contrary, it had considered various other possibilities (see paragraph 82 above). The second applicant company further stated that, in line with the

freedom of economic activity guaranteed by the Constitution (see paragraph 136 below), private for-profit entities were free to agree on a price for selling and buying any given goods and such agreements could not be considered as being contrary to the public order or good morals.

124. On 28 June 2022 the Supreme Court refused to accept the appeal on points of law on the ground that it did not raise any important legal issues.

(b) The second and third appeals on points of law

125. The second applicant company lodged a second appeal on points of law, in which it raised essentially the same arguments as those presented in its previous appeal (see paragraphs 122 and 123 above). On 28 July 2022 the Supreme Court refused to accept that appeal on points of law on the ground that it did not raise any important legal issues.

126. The second applicant company lodged a third appeal on points of law, in which it raised essentially the same arguments as those presented in its previous appeal (see paragraphs 122 and 123 above). In addition, it submitted that the circumstances which the Court of Appeal had considered as demonstrating that the applicant companies had acted in bad faith (see paragraphs 105 and 106 above) had not in any way affected the decision by the NVSPL to buy the tests from the first applicant company, nor had they impeded the implementation of the contracts at issue. On 5 September 2022 the Supreme Court refused to accept the appeal on points of law on the ground that it did not raise any important legal issues.

IV. OTHER CIVIL PROCEEDINGS

127. In the civil proceedings concerning the cooperation agreement between the second applicant company and company R. (see paragraphs 17 and 108 above), on 27 October 2022 the Vilnius Regional Court declared the agreement null and void and ordered company R. to return to the second applicant company EUR 454,931 which it had received under that agreement. On 21 February 2023 the Court of Appeal upheld that decision, as did the Supreme Court on 4 January 2024.

V. DECISIONS TAKEN IN THE PRE-TRIAL INVESTIGATION

A. The part of the investigation in respect of the Deputy Minister of Health

128. On 5 April 2022 the investigation in respect of the Deputy Minister of Health (see paragraph 24 above) was separated into a different investigation. On 11 August 2022 the Prosecutor General’s Office drew up an indictment against the Deputy Minister charging her with abuse of office which had caused significant damage to the State and the Ministry of Health,

under Article 228 § 1 of the Criminal Code (see paragraph 139 below). At the time of the parties' latest submissions to the Court (on 21 March 2024), that case was still awaiting examination by the first-instance court.

B. The part of the investigation concerning alleged fraud

129. On 21 July 2023 the prosecutor discontinued the investigation in respect of E.M. (the CEO of the first applicant company) and R.L. (the COO of the first applicant company) in the part concerning suspicions of fraud under Article 182 § 2 of the Criminal Code (see paragraph 25 above).

130. Firstly, the prosecutor observed that, according to a number of medical experts questioned during the investigation, rapid tests were not a proper means for diagnosing the coronavirus infection because they only showed whether someone had been infected in the past but not whether he or she was infected when tested. Moreover, they required a blood sample and could not be performed by individuals themselves. Thus, those medical experts were in agreement that the State should not have bought such tests at all.

131. Furthermore, the prosecutor noted that in its communication with the Ministry of Health, the first applicant company had claimed that it had selected its tests from among various manufacturers and had verified their quality, although the available evidence showed that at the time of submitting the tender and signing the procurement contract it had not yet known where it would obtain the tests which it had undertaken to sell to the State and that it had started looking for a manufacturer capable of delivering the required number of tests only after signing the contract with the NVSPL. Thus, its tender had not been based on fact.

132. Moreover, the prosecutor stated that there had been no objective reasons which might have explained the signing of the contract between the two applicant companies, other than the wish to make it more difficult for the State to ever retrieve the money that they had received from it. During the investigation E.M. had stated that the second applicant company had been hired in order to take care of the logistics because the first applicant company did not have such experience. However, that made it unclear what exactly had been the first applicant company's role in the transactions at issue – it had not produced any tests, nor obtained them from elsewhere or actually verified their quality. In the prosecutor's view, the first applicant company had merely used its name as an experienced and reliable company, as well as the reputation of its CEO, E.M., in order to sign a contract with the State.

133. According to the prosecutor, had the circumstances indicated in paragraphs 130 and 131 above been known, the State would not have purchased the rapid tests, especially not in such a great quantity and for such a high price. Accordingly, there were grounds to believe that, in the general context of inadequate knowledge, panic and urgency, E.M. and R.L. had

overstepped the limits of honest business activity and had sold rapid tests to the State by means of deception, namely by relying on the first applicant company's established reputation, presenting inaccurate information to the State, and relying on the authority of some well-known medical experts who had publicly spoken in favour of rapid tests.

134. At the same time, the prosecutor noted that the State and its officials had had ample possibilities to learn about the exact nature of the tests that the first applicant company had offered to sell, to request documents regarding their quality and certification and to obtain any other necessary information. In particular, the Deputy Minister of Health, L.J., who herself had a medical background, ought to have understood the importance of obtaining that information. Since there was no information that there had been any agreements between the individuals involved in the purchase of tests, the prosecutor concluded that it had not been shown that E.M. and R.L. might have committed the crime of fraud.

C. The part of the investigation concerning the remaining suspicions

135. On 26 July 2023 the prosecutor discontinued the investigation in respect of E.M., R.L., A.Č., L.P. and M.K. concerning suspicions of money laundering under Article 216 § 1 of the Criminal Code (see paragraph 26 above). In particular, the prosecutor stated that there was insufficient evidence to find that the property in question had been acquired by criminal means, in view of the fact that the investigation against E.M. and R.L. in the part concerning allegations of fraud had been discontinued (see paragraph 129 above). Moreover, it had not been established that all of the transactions examined during the investigation had been fictitious. Thus, without sufficient evidence that the property had been acquired by criminal means, the laundering of such property could not be proved either.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution

136. The relevant provisions of the Constitution read:

Article 23

"Property shall be inviolable.

The rights of ownership shall be protected by law.

Property may be taken only for the needs of society according to the procedure established by law and shall be justly compensated for."

Article 46

"The economy of Lithuania shall be based on the right of private ownership, freedom of individual economic activity, and economic initiative.

The State shall support economic efforts and initiative that are useful to society.

The State shall regulate economic activity so that it serves the general welfare of the Nation.

The law shall prohibit the monopolisation of production and the market, and shall protect freedom of fair competition.

The State shall defend the interests of the consumer."

B. Criminal Code

137. At the material time, Article 182 § 2 of the Criminal Code provided, *inter alia*, that anyone who had obtained, by deception, either for his or her own benefit or for the benefit of others, property of high value belonging to someone else, had to be punished by up to eight years' imprisonment.

138. At the material time, Article 216 § 1 provided, *inter alia*, that anyone who – with the aim of hiding or legalising his or her or another person's property while knowing that it had been obtained by criminal means – acquired, managed, used or transferred that property to others, carried out financial operations relating to it, otherwise rearranged it, or falsely indicated that it had been obtained lawfully, had to be punished by a fine or up to seven years' imprisonment.

139. Article 228 § 1 provides, *inter alia*, that a civil servant or a person having a status equivalent thereto who abuses his or her position or exceeds his or her authority, where this results in significant damage to the State, is to be punished by a fine, detention or up to five years' imprisonment.

C. Civil Code

140. Article 1.80 § 1 of the Civil Code provides that a transaction which is contrary to imperative legal norms is null and void.

141. Article 1.80 § 2 provides that when a transaction is declared null and void, its parties have to return to one another anything that they received as a result of that transaction (restitution) or, if restitution in kind is not possible, pay monetary compensation of an equal value, unless the law provides otherwise.

142. Article 1.81 § 1 provides that a transaction which is contrary to public order or good morals is null and void.

143. Article 1.81 § 2 provides that when a transaction is null and void because it is contrary to public order or public morals and both parties to the transaction ought to have been aware of it, the rules provided for in Article 1.80 § 2 (see paragraph 141 above) are not applicable.

144. Article 1.137 § 2 states that when exercising their rights and fulfilling their obligations, everybody must respect the law, the rules of living together and the principles of good morals, act in good faith and follow the principles of reasonableness and fairness.

145. Article 6.158 § 1 states that the parties to contractual relations must act in good faith. Article 6.163 § 1 states that the obligation to act in good faith also applies with respect to pre-contractual relations.

146. Article 6.145 § 1 provides that restitution is applicable in cases where one person must return to another property which has been obtained unlawfully or by mistake, or because the transaction on the basis of which the property at issue was transferred has been declared null and void *ab initio*, or where the obligation in question cannot be fulfilled for reasons of *force majeure*.

147. Article 6.145 § 2 states that, in exceptional cases, the court may change the manner in which restitution is applied or not apply it at all, where applying it would unfairly and unjustifiably worsen the situation of one of the parties and improve that of the other.

148. Article 6.146 provides that restitution is applied in kind, unless that is impossible or would cause great inconvenience to the parties. In such cases, restitution must be applied by the payment of monetary compensation of an equal value.

D. Law on Public Procurement

149. The Law on Public Procurement was enacted on 13 August 1996 and amended on a number of occasions.

150. Article 17 § 1 provides that, when conducting procurement, the contracting authority must ensure compliance with, *inter alia*, the principles of equality, non-discrimination, proportionality and transparency. Article 17 § 2 (1) provides that the contracting authority must seek to use the funds designated for procurement rationally.

151. Article 37 § 1 provides, *inter alia*, that the characteristics of the goods, services or works which are sought to be purchased have to be described in a technical specification included in the procurement documents.

152. Article 55 § 1 provides, *inter alia*, that when selecting the most economically advantageous tender, the contracting authority must have regard to the following criteria: (i) the price-quality ratio; (ii) the expenses which the contracting authority is likely sustain in relation to the use of the goods or services purchased; and (iii) the price.

153. Article 71 § 1 (3) states that procurement may be conducted by a negotiated procedure without publication when it must be conducted with particular urgency, owing to circumstances which the contracting authority could not have foreseen, and when it is impossible to do so by any of the other

procedures provided for by the Law. The circumstances justifying the urgency cannot be attributable to the contracting authority.

154. Article 72 § 3 provides, *inter alia*, that when conducting procurement in accordance with Article 71 § 1 (3) of the Law (see paragraph 153 above), the contracting authority is not required to follow the requirements laid out in the Law with regard to the procurement procedure and the form and contents of the procurement contract.

155. Article 89 § 1 provides for various circumstances in which the terms of a procurement contract may be modified without conducting a new procurement procedure. Under Article 89 § 1 (5), the terms of a procurement contract may be modified when the modification in question, irrespective of its monetary value, is not considered substantial, according to the criteria established in the Law.

156. Article 105 § 1 (4) provides that a court must declare a procurement contract to be null and void if it was signed in grave violation of the material norms of the Law.

157. Article 106 § 2 provides, *inter alia*, that a court may decide not to declare a procurement contract to be null and void, even if it was signed unlawfully, and instead impose alternative penalties laid out in Article 106 § 3 (see paragraph 158 below) if it is essential to safeguard the effects of that contract for reasons of the public interest, including economic interests unrelated to the procurement contract which would be disproportionately affected by its annulment.

158. Article 106 § 3 provides that alternative penalties imposed by the court must be effective, proportionate and dissuasive. The available penalties are: (i) reducing the duration of the validity of the procurement contract, and/or (ii) giving the contracting authority a fine not exceeding 10% of the value of the procurement contract. Article 106 § 4 states that when imposing alternative penalties the court must take account of all the relevant circumstances, including the seriousness of the violation and the conduct of the contracting authority, and that the decision to impose such a penalty must be duly reasoned, as must be the size of the penalty.

E. Law on the Management, Use and Disposal of State and Municipal Assets

159. Article 9 of the Law on the Management, Use and Disposal of State and Municipal Assets provides that when managing, using and disposing of the assets in question, the following principles must be respected: (i) public benefit – State and municipal assets must be managed and used with care and in pursuit of the public interest; (ii) efficiency – the relevant decisions must seek to obtain the largest possible benefit for society; (iii) rationality – the assets at issue must be cared for and not wasted and they must be managed

and used rationally; and (iv) public law – any transactions concerning State and municipal assets must be in accordance with the relevant law.

F. Case-law of the Supreme Court

1. On transactions contrary to public order or good morals

160. In a decision of 28 December 2015 in case no. 3K-3-689/2015 and a decision of 15 January 2019 in case no. e3K-3-89-915/2019 the Supreme Court pointed out that, when assessing whether a transaction was contrary to public order or good morals, it had to be assessed according to criteria relating to moral values, such as good and bad or honesty and dishonesty. The law did not define either "public order" or "good morals", but according to the Supreme Court's case-law, those notions were manifold and they related not only to certain actions but also to intentions and the consequences of one's actions. When determining whether a contract had to be declared null and void under Article 1.81 of the Civil Code (see paragraph 142 above), the parties' intentions were of particular importance. It had to be established that the main and only intention of the parties had been to attain a purpose that was contrary to public order or good morals. The burden of proving such intentions was on the person challenging the contract.

2. On the compliance with legal provisions relating to public procurement

161. In a decision of 14 February 2017 in case no. e3K-7-23-248/2017 the Supreme Court held that, according to its established case-law, a violation of the principles of public procurement amounted to a violation of imperative legal norms because those principles, like other imperative norms of the Law on Public Procurement, were aimed at protecting the public interest. Violations of the principles of public procurement were objective, which was to say that the finding of a violation did not depend on such considerations as a lack of experience on the part of the contracting authority's employees, their level of guilt or the amount of damage caused. Moreover, violations of the principles of public procurement were of an absolute nature: any such violation meant that the contracting authority had acted unlawfully and any violation had to be considered material. When the courts established that there had been a violation of the principles of public procurement, they had to conclude that the contracting authority had acted unlawfully and to determine the consequences of that unlawfulness.

3. On the obligations of the contracting authorities

162. In a decision of 1 July 2022 in case no. e3K-3-146-916/2022 the Supreme Court summarised its case-law relating to the duty of the contracting

authorities to clearly define the terms and conditions of public procurement as follows:

> "48. It is first and foremost the contracting authorities which are responsible for the organisation of public procurement procedures and for their results (see the Supreme Court's decision of 8 July 2011 in civil case no. 3K-3-320/2011). This is not affected by the fact that the suppliers are professional participants of public procurement because the contracting authorities are also subjected to requirements of professionalism (see the Supreme Court's decision of 5 April 2011 in civil case no. 3K-3-158/2011). In any event, suppliers submit tenders on the basis of the terms and conditions of public procurement and they therefore do not have an obligation to seek additional information about the aims of the contracting authorities, especially if those aims are not specified in the procurement documents (see the Supreme Court's decision of 21 September 2018 in civil case no. e3K-3-325-469/2018).
>
> 49. The legal framework and the courts' practice clearly show that the contracting authorities have an obligation to formulate clear and specific requirements for suppliers. This obligation stems from the general duty of the contracting authorities to conduct public procurement procedures in an objective and thorough manner and to ensure compliance with the principles of public procurement and the achievement of its goal (see the Supreme Court's decision of 11 December 2013 in civil case no. 3K-3-656/2013). Responsibility for proper compliance with the Law on Public Procurement and for the results achieved lies first and foremost with the contracting authority. If it fails to comply with its duties under the Law on Public Procurement, or carries them out improperly, it has to bear the negative consequences of that (see the Supreme Court's decision of 18 January 2021 in civil case no. 3K-3-178-469/2021, paragraphs 32 and 33).
>
> 50. In the case-law of the [Supreme Court] it has been held that the risk of negative consequences resulting from the terms of procurement documents which are unclear, lacking in specificity or ambiguous must be borne by the contracting authority itself (see the Supreme Court's decision of 16 November 2007 in civil case no. 3K-3-502/2007 and its decision of 16 May 2019 in civil case no. e3K-3-180-469/2019, paragraph 38).
>
> ...
>
> 55. The [Supreme Court] has held that any requirements which were not disclosed in the terms and conditions of public procurement, even when they were provided in legal regulation which was known (or ought to have been known) to the general public or to a defined group of subjects, cannot be applied to the detriment of suppliers (see the Supreme Court's decision of 8 July 2017 in civil case no. e3K-3-369-916/2017, paragraph 39, and the case-law cited therein)."

4. On the obligations of suppliers

163. On a number of occasions the Supreme Court held that not only the contracting authorities in a public procurement process but also the suppliers had an obligation to act in a responsible manner, respect the general requirements of fairness and good faith, and avoid creating unjustified negative consequences to other individuals or to society (see the decision of 21 October 2015 in case no. 3K-3-541-690/2015, the decision of 9 March

2020 in case no. e3K-3-56-248/2020 and the decision of 19 March 2020 in case no. e3K-3-67-248/2020).

164. In a decision of 19 March 2020 in case no. e3K-3-67-248/2020 the Supreme Court held that, according to its established case-law, the obligation of suppliers to act with care and an increased standard of professionalism applicable to them in the context of a procurement process meant that they had, when submitting a tender, an obligation to make sure that the information provided therein was accurate, that the proposed items met the relevant requirements, and so on. At the same time, the suppliers' obligation to act cautiously did not eliminate the obligation of the contracting authorities to define those requirements as clearly and precisely as possible (the Supreme Court relied on its decision of 13 June 2019 in case no. e3K-3-211-969/2019 and its decision of 9 March 2020 in case no. e3K-3-56-248/2020).

5. On restitution

165. In a decision of 25 November 2021 in case no. e3K-3-296-969/2021 the Supreme Court held as follows:

"...

33. When restitution is applied as a consequence of a transaction being declared null and void *ab initio*, its essence is that the parties that obtained certain property as a result of the impugned transaction must return it to one another, thereby restoring the *status quo ante* (the situation which previously existed). The aim of restitution is to restore the situation which existed before the violation of the law, as if the transaction in question had never taken place. Restitution is based on the idea that the balance between the material situation of the parties has to be restored by returning the property which has been transferred as a result of the annulled transaction, either in kind or by payment of equivalent monetary compensation. This means that, as a result of restitution, no one may receive either less or more than what was taken from him/her (see the Supreme Court's decision of 10 March 2015 in civil case no. 3K-3-124-706/2015 and its decision of 11 October 2018 in civil case no. e3K-3-363/421/2018, among other authorities).

34. Restitution must be applied in accordance with the provisions of Book 6 of the Civil Code, taking into account the conditions for its application, provided by law, and the relevant circumstances of the particular case. Articles 6.145 § 2, 6.146 and 6.147 of the Civil Code provide for various modifications in the application of restitution, and their aim is to ensure a fair and justified balance between the interests of the parties and to enable the court, in exceptional cases, to change the manner in which restitution is applied or to not apply it at all, if applying it would unfairly and unjustifiably worsen the situation of one of the parties and improve that of the other.

...

36. Restitution in kind [is the type of restitution which] best reveals the essence of this legal institute and [best] fulfils its aim ... [The Supreme Court] has held that restitution in kind, in the most general sense, means obliging the parties to a transaction to carry out the opposite actions to those which were carried out when performing that transaction (see the Supreme Court's decision of 16 May 2019 in civil case no. e3K-3-86-969/2019) ...

37. On the other hand, as expressly stated in Article 6.146 of the Civil Code, restitution is not required in every case and a decision not to apply it is linked to [one or both of the following] aspects: first, the impossibility of restitution in kind (for example, because the item which was the object of the annulled transaction was destroyed, irreparably damaged, transferred, or there are other reasons for which restitution in kind is objectively impossible); second, the creation of great inconvenience to the parties (for example, because restitution in kind would unfairly aggravate the legal situation of both parties and would be a disproportionate way of defending civil rights).

38. Restitution should not be applied in a formalistic manner, but having regard to the conditions for its application, provided by law, and the relevant circumstances of the particular case, on the basis of which it must be determined whether restitution in kind would achieve its purpose – namely, to restore the situation of the parties which existed before the impugned transaction. When deciding on the application of restitution, the court must first determine whether it should be applied at all (Article 6.145 § 2 of the Civil Code). If so, it has to determine the manner of its application (Article 6.146 of the Civil Code) and assess whether there may be grounds to modify its application (Article 6.145 § 2 of the Civil Code; see the Supreme Court's decision of 27 November 2015 in civil case no. 3K-3-627-686/2015). If the entirety of the relevant circumstances of the case gives ground to believe that the *status quo ante* would be restored by restitution in kind, then preference must be given to that way of applying restitution. However, if no such circumstances are established, then it must be assessed whether an alternative means of restitution – by payment of equivalent monetary compensation – should be chosen.

39. As stated in paragraph 33 above, when restitution is applied as a consequence of a transaction being declared null and void *ab initio*, its main purpose is restoring the situation which existed before the impugned transaction. When, as a result of a sales and purchase agreement which was subsequently annulled, an individually defined item has been transferred, that purpose could be achieved by returning that item to the seller, where the market price of that object corresponds to its market price at the time of the impugned contract. However, the market price of an item may have decreased because of its use, improper storage, partial destruction or other circumstances.

40. If the item which is the object of the restitution cannot be returned in kind in the same state in which it was at the time of the signing or fulfilment of the impugned contract because that item was used for a long time and its value has decreased significantly, restitution in kind would not be a proper way of defending civil rights. In such cases restitution should be applied by the payment of monetary compensation equal to the value of the item, calculated in accordance with Article 6.147 § 1 of the Civil Code, ... on the basis of the prices applicable at the time when the [transaction occurred] ..."

166. In the above-mentioned case, the Supreme Court found that the contracting authority had not conducted the public procurement procedure in accordance with the law and that the procurement contract had to be declared null and void. Under that contract the contracting authority had bought a certain piece of equipment and had used it for several years; as a result, its value had significantly depreciated. In such circumstances, the Supreme Court held that restitution of the *status quo ante* was not possible. Accordingly, in line with the principle that restitution should not unfairly worsen or improve the situation of either of the parties, it found that the

contracting authority should be allowed to keep the equipment, but that it was necessary to determine its market price at the time of the purchase and that the supplier should be entitled to compensation corresponding to that price.

167. In a decision of 16 May 2019 in case no. e3K-3-86-969/2019, the Supreme Court, relying on several judgments of the Court (see *Trgo v. Croatia*, no. 35298/04, 11 June 2009; *Moskal v. Poland*, no. 10373/05, 15 September 2009; *Lelas v. Croatia*, no. 55555/08, 20 May 2010; and *Pyrantienė v. Lithuania*, no. 45092/07, 12 November 2013), stated that it was first and foremost the State which had to bear the burden of any negative legal consequences arising from mistakes made by its authorities. Accordingly, when the need to apply restitution had arisen because of mistakes of the public authorities, the decision whether or not to apply restitution could be resolved in one of the following ways: (i) by applying restitution in kind; (ii) by applying an alternative mode of restitution – such as payment of monetary compensation of an equal value; or (iii) by choosing not to apply restitution. The circumstances which had to be taken into account when taking that decision included the object of restitution, the nature and gravity of the violation committed, the nature and significance of the public interest which needed to be defended, the duration of the legitimate expectations which had been created by the mistake at issue, and the delay in identifying the mistake and in taking measures to correct it.

II. RELEVANT EUROPEAN UNION LAW

168. On 1 April 2020 the European Commission published a communication, 2020/C 108 I/01, entitled "Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis". Its relevant parts read (references omitted):

> "COVID-19 is a health crisis that requires swift and smart solutions and agility in dealing with an immense increase of demand for similar goods and services while certain supply chains are disrupted. Public buyers in the Member States are at the forefront for most of these goods and services. They have to ensure the availability of personal protective equipment such as face masks and protective gloves, medical devices, notably ventilators, other medical supplies, but also hospital and IT infrastructure, to name only a few.
>
> ...
>
> To further tailor its assistance to this emergency situation the Commission explains in this guidance, which options and flexibilities are available under the EU public procurement framework for the purchase of the supplies, services, and works needed to address the crisis.
>
> Public buyers have several options they can consider:
>
> - Firstly, in cases of urgency they can avail themselves of possibilities to substantially reduce the deadlines to accelerate open or restricted procedures.

- Should those flexibilities not be sufficient, a negotiated procedure without publication can be envisaged. Eventually, even a direct award to a preselected economic operator could be allowed, provided the latter is the only one able to deliver the required supplies within the technical and time constraints imposed by the extreme urgency.

- In addition, public buyers should also consider looking at alternative solutions and engaging with the market.

...

Concretely, the negotiated procedure without publication allows public buyers to acquire supplies and services within the shortest possible timeframe. Under this procedure, as set out in Art. 32 of Directive 2014/24/EU (the 'Directive'), public buyers may negotiate directly with potential contractor(s) and there are no publication requirements, no time limits, no minimum number of candidates to be consulted, or other procedural requirements. No procedural steps are regulated at EU level. In practice, this means that authorities can act as quickly as is technically/physically feasible – and the procedure may constitute a *de facto* direct award only subject to physical/technical constraints related to the actual availability and speed of delivery.

...

Contracting authorities may award public contracts by a negotiated procedure without publication 'insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.' (Article 32(2)(c) of the Directive).

As contracting authorities derogate in this case from the basic principle of the Treaty concerning transparency, the European Court of Justice requires that the use of this procedure remains exceptional. All the conditions have to be met cumulatively and are to be interpreted restrictively (see, for instance cases C-275/08, *Commission v Germany*, and C-352/12, *Consiglio Nazionale degli Ingegneri*). A 'negotiated procedure without publication' allows contracting authorities to negotiate directly with potential contractors; a direct award to a preselected economic operator remains the exception, applicable if only one undertaking is able to deliver within the technical and time constraints imposed by the extreme urgency.

Each contracting authority will have to evaluate whether the conditions for using such a 'negotiated procedure without prior publication' are met ..."

THE LAW

I. JOINDER OF THE APPLICATIONS

169. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

170. The applicant companies complained that the decisions taken in the civil proceedings, whereby they had been ordered to return part of the money

which they had received as a result of the public procurement procedure, had violated their property rights. They relied on Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

Applicability of Article 1 of Protocol No. 1 to the Convention

171. The parties did not dispute the applicability of Article 1 of Protocol No. 1 to the Convention in the present case. However, the Court reiterates that the applicability *ratione materiae* of the Convention defines the scope of its jurisdiction. Therefore, the Court is not prevented from examining this question of its own motion (see *Béláné Nagy v. Hungary* [GC], no. 53080/13, § 71, 13 December 2016, and *Vegotex International S.A. v. Belgium* [GC], no. 49812/09, § 59, 3 November 2022).

172. It reiterates that Article 1 of Protocol No. 1 to the Convention applies only to a person's existing possessions and does not create a right to acquire property (see, among many other authorities, *Stummer v. Austria* [GC], no. 37452/02, § 82, ECHR 2011). In cases concerning Article 1 of Protocol No. 1, the issue that needs to be examined is normally whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by that provision (see *Béláné Nagy*, cited above, § 76, and the cases cited therein).

173. In the present case, the first applicant company was paid EUR 6,050,000 by the State under the procurement contract which it had signed with the NVSPL (see paragraphs 14 and 18 above), and the second applicant company was paid EUR 5,904,800 by the first applicant company under the sales and purchase agreement signed between them (see paragraphs 16 and 18 above). It was not disputed that both applicant companies fulfilled the obligations which they had undertaken under the respective contracts. The Court further notes that it has not been alleged, either in the domestic proceedings or in the proceedings before the Court, that there were any reasons for the applicant companies to question the validity of those contracts prior to their annulment (see, *mutatis mutandis*, *Kurban v. Turkey*, no. 75414/10, § 64, 24 November 2020).

174. Accordingly, it is satisfied that the amounts which the applicant companies received under the contracts at issue constituted their "possessions" within the meaning of Article 1 of Protocol No. 1 to the

Convention, regardless of the fact that those contracts were subsequently annulled. Accordingly, Article 1 of Protocol No. 1 is applicable.

175. The Court further notes that the applications are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant companies

(i) The first applicant company

176. The first applicant company submitted that, according to the Law on Public Procurement and the relevant case-law, contracting authorities were under an obligation to thoroughly assess the tenders received during a public procurement procedure and, where necessary, ask suppliers to provide additional information or to revise their tenders (see paragraphs 152 and 162 above). Moreover, the duty to comply with the principles of public procurement, such as the principles of transparency and the rational use of public funds, also rested with the contracting authorities (see paragraphs 150 and 159 above).

177. The principle of transparency required the contracting authorities to, *inter alia*, ensure that suppliers participating in the procurement procedures had sufficient opportunities to learn about the needs of the contracting authority. However, in the case at hand, the NVSPL had not prepared procurement documents or a technical specification of rapid tests (see paragraph 151 above). As a result, potential suppliers had not had any possibility of knowing what exact tests it had been seeking to purchase.

178. The first applicant company had never been informed, by either the NVSPL or the Ministry of Health, that the rapid tests which it had proposed to sell had not corresponded to the needs of the contracting authority – after it had sent the Ministry of Health a leaflet containing information about its tests, the Ministry had neither confirmed that the proposed tests were suitable, nor asked the first applicant company to revise its proposal to better meet the needs of the NVSPL, but had simply asked it to submit a tender (see paragraphs 8 and 9 above). Without having any information about the tests that the NVSPL had been seeking to purchase, the first applicant company had submitted a tender with an abstract title "COVID-19 express test" (see paragraph 10 above). However, it contended that doing so could not be considered unfair because it had already provided detailed information about the tests in the leaflet. The first applicant company also disputed the findings of the Court of Appeal regarding the difference in the names of the tests provided in the leaflet and in the tender (see paragraph 90 above): it argued that the name "COVID-19 express test", indicated in the tender, was

analogous to "COVID-19 IgM-IgG rapid test", indicated in the leaflet – the word *rapid* had been changed to its English version *express*, and IgM-IgG antibodies had not been mentioned in the tender because it had been obvious that the first applicant company would deliver the tests which had been indicated in the leaflet.

179. The first applicant company further submitted that it was a private entity whose main objective was to seek profit. In its tender it had proposed a price which it had considered reasonable; the price had been calculated after considering all the costs that the company would incur in acquiring the tests, testing their quality and delivering them to the NVSPL, as well as taking into account the risks which had existed at a time when the worldwide demand for such tests had been exceptionally high. The NVSPL had accepted that price. In any event, the price had not been excessive and it had not differed significantly from the prices indicated in several other proposals received by the Ministry of Health (see paragraph 97 above) and the Ministry of Defence (see paragraph 98 above).

180. Furthemore, if the identity of the manufacturer of the tests had been of material importance to the NVSPL it should have asked the first applicant company to provide such information, but it had not done so. In that connection, the first applicant company submitted that, at the relevant time, it had been impossible to provide the exact name of the manufacturer of the tests in advance: its tenders had concerned very large quantities of rapid tests (see paragraph 10 above) in a context where the COVID-19 pandemic had been at its initial stage (March 2020) and the production and supply of rapid tests had not yet been fully developed. As a result, there had been a real risk that the first applicant company might not have been able to obtain the required type and quantity of tests at all. The first applicant company also reiterated the arguments which it had made in the domestic proceedings concerning the possibility of private-labelling (see paragraph 84 above); it stated that neither the domestic courts nor the Government in their observations had addressed those arguments.

181. It further contended that the requirement that public funds be used rationally could not be equated to an obligation to always award the procurement contract to the supplier who offered the lowest price, especially when purchasing goods or services relating to healthcare. It pointed to various examples in Lithuania and elsewhere where procurement contracts relating to COVID-19 tests or vaccines that had been awarded solely on the basis of the lowest price had had to be suspended because of the inadequate quality of the goods or services provided.

182. Moreover, in a free market it was normal that some suppliers proposed higher prices and others proposed lower prices, and the buyers were free to choose those offers which they considered most beneficial. However, the Court of Appeal had essentially rejected the free market model by stating that suppliers participating in public procurement were under an obligation to

propose a "reasonable" price. Such an obligation was not provided in any legal instrument. Furthermore, determining whether the price was reasonable was the duty of the contracting authority, which alone was responsible for the rational use of public funds.

183. The first applicant company emphasised that increasing the price of essential goods during crisis situations was not prohibited under Lithuanian law and that during the COVID-19 pandemic the price of tests and personal protective equipment had increased in many countries because of the shortage of such goods.

(ii) The second applicant company

184. The second applicant company submitted that it had not participated in the public procurement procedure and had not been a party to the procurement contract. Moreover, it was a distinct legal entity from the first applicant company, and the findings of the Court of Appeal, whereby it had essentially regarded the two applicant companies as a single entity or as acting jointly (see paragraph 107 above), had been unfounded. Accordingly, there had been no legal grounds to hold it liable for any irregularities in the public procurement procedure and the domestic decisions had been unforeseeable in that respect.

185. The second applicant company also made submissions similar to those of the first applicant company to the effect that it had not been shown that the price of the tests had been excessive (see paragraph 179 above). It further contended that the price set for a transaction could not be taken as proof of bad faith.

(iii) Common submissions of both applicant companies

186. Both applicant companies contended that, according to the domestic case-law and the case-law of the Court, the State had to bear the risk of any mistakes made by its institutions and those mistakes could not be corrected at the expense of individuals. However, in the case at hand the Court of Appeal had shifted the entire responsibility for compliance with the principles of transparency and the rational use of public funds onto the suppliers. The applicant companies emphasised that they had not exerted any pressure or influence over any public authorities with regard to the awarding of the procurement contract, and their employees had not been found guilty of any criminal offences (see paragraphs 129 and 135 above). Thus, they could not be held responsible for the fact that the contracting authority had failed to properly fulfil its duties.

187. The applicant companies further submitted that they had been made to bear a disproportionate burden of the correction of the mistakes made by the public authorities. Under domestic law, restitution could not be applied if that would lead to unfairly and unjustifiably worsening the situation of one

of the parties and improving that of the other (see paragraph 147 above), and when restitution was not possible the Law on Public Procurement provided for alternative penalties (see paragraphs 157 and 158 above). In the case at hand the procurement contract had been fully performed – the NVSPL had received the agreed quantity of rapid tests and their quality had never been called into question (see paragraphs 22 and 47 above). However, although the Court of Appeal found that both parties to the procurement contract had acted in bad faith (see paragraphs 93 and 103 above), it had applied unilateral restitution, whereby the applicant companies had been ordered to return more than half of the payment which they had received, whereas the NVSPL had kept all of the tests and had not sustained any negative consequences. The decision of the Court of Appeal had in fact obliged the first applicant company, retroactively, to sell the rapid tests for the price of EUR 3.74 per test, a price at which it had never proposed or agreed to sell them, and which amounted to 31.5% of the price which it had proposed (see paragraph 14 above). The applicant companies submitted that the manner in which the Court of Appeal had applied restitution was not provided for by law and was contrary to established domestic case-law, and thus unforeseeable.

188. Lastly, the applicant companies submitted that the Court of Appeal had failed to properly determine the market price of the tests – it had not ordered an expert assessment but had instead relied on a single transaction between company P. and the Ministry of Defence, which could not be considered comparable to the purchase at issue (see paragraphs 40 and 119 above).

(b) The Government

189. At the outset the Government emphasised that, at the time when the contracts at issue were signed, Lithuania, like the entire world, had been facing an unprecedented crisis created by the COVID-19 pandemic. The State had been faced with an obligation to take urgent measures in order to protect the lives of its citizens and in such exceptional circumstances the probability of mistakes being made, including in public procurement procedures, had been increased.

190. Turning to the circumstances of the case, the Government acknowledged that the decisions of the domestic courts annulling the procurement contract between the first applicant company and the NVSPL and the sales and purchase agreement between the two applicant companies had interfered with the applicant companies' right to peaceful enjoyment of their possessions, guaranteed by Article 1 of Protocol No. 1 to the Convention. However, they contended that the interference had been in line with the requirements of that provision.

191. The Government submitted that the impugned interference had been prescribed by law – namely Article 17 of the Law on Public Procurement and Articles 1.80 and 1.81 of the Civil Code (see paragraphs 140-143 and 150

above) – and that those legal provisions had been sufficiently accessible, precise and foreseeable in their application. Although during the pandemic some provisions of the Law on Public Procurement had been amended, those amendments had not concerned the obligations of suppliers relevant to the present case. In the case at hand the courts had assessed the applicant companies' actions from the standpoint of the general obligation to act in good faith, which was established in the Civil Code and in the case-law of the domestic courts (see paragraphs 163 and 164 above).

192. Furthermore, the interference had pursued legitimate aims in the public interest – namely the prevention of collusive practices and the protection of public funds.

193. The Government further submitted that the annulment of the contracts at issue had entailed a reasonable relationship of proportionality between the aims pursued and the means employed. They referred in that connection to the findings of the Court of Appeal that the applicant companies had acted in bad faith – and in particular that the first applicant company had provided inaccurate information about the manufacturer of the tests and had proposed a price which had been extremely high (see paragraphs 94-103 above), and that the contract between the two applicant companies had not corresponded to usual business practices (see paragraphs 105-107 above).

194. The Government stated that they did not wish to speculate why the procurement contract had been awarded to the first applicant company, but that "it might be concluded that collusion between the representatives of [the first applicant company] and presumably [the Deputy Minister of Health] had greatly contributed to it".

195. The Government further submitted that the impugned measures had been taken in the area of public procurement and they had been related to economic and social strategy, which meant that the State had enjoyed a wide margin of appreciation. They also reiterated that the emergency situation caused by the coronavirus pandemic had required the authorities to act with extreme urgency, which had increased not only the likelihood of mistakes being made but also the number of actors seeking to unfairly benefit from the situation.

196. The Government emphasised that, in the context of social policy, the authorities should not be precluded from correcting their own mistakes, even those resulting from their own negligence, because holding otherwise would be contrary to the doctrine of unjust enrichment. Nonetheless, they contended that the interference with the applicant companies' property rights had not imposed an excessive and disproportionate burden on them. The domestic courts had thoroughly assessed all the relevant circumstances and had adopted well-reasoned decisions; the applicant companies had been heard and their arguments had been addressed. Although the Court of Appeal had examined the possibility of not applying restitution and instead imposing alternative penalties, it had held that doing so would be contrary to the public

interest (see paragraphs 109 and 110 above). The Government submitted that the way in which the Court of Appeal had applied restitution (see paragraphs 111-113 above) could not be considered arbitrary.

2. The Court's assessment

(a) Existence of an interference and the applicable rule

197. The Government acknowledged that the order for the applicant companies to return part of the money which they had received under the respective contracts had amounted to an interference with their right to peaceful enjoyment of their possessions (see paragraph 190 above). The Court sees no reason to reach a different conclusion.

198. The Court considers that the present case should be examined in the light of the general principle laid down in the first rule of Article 1 of Protocol No. 1, which enunciates the principle of peaceful enjoyment of property (see, *mutatis mutandis*, *Kurban*, cited above, §§ 74-75, and the cases cited therein).

(b) Whether the interference was provided by law

(i) As to the annulment of the two contracts

199. The Court of Appeal held that the procurement contract between the NVSPL and the first applicant company had to be declared null and void as being contrary to imperative legal norms and good morals (see paragraphs 89 and 103 above) and that the sales and purchase agreement between the two applicant companies had to be declared null and void as being contrary to good morals (see paragraph 107 above).

200. The possibility of annulling contracts on the grounds of them being contrary to imperative legal norms or to good morals is provided for in, respectively, Article 1.80 and Article 1.81 of the Civil Code (see paragraphs 140 and 142 above).

201. When finding that the procurement contract had not complied with imperative legal norms, both the Vilnius Regional Court and the Court of Appeal held that the principles of transparency and the rational use of public funds, laid down in Article 17 §§ 1 and 2 of the Law on Public Procurement and Article 9 of the Law on the Management, Use and Disposal of State and Municipal Assets (see paragraphs 150 and 159 above), had been breached during the public procurement procedure at issue (see paragraphs 57 and 89 above). Article 105 § 1 (4) of the Law on Public Procurement provides that a procurement contract signed in grave violation of material norms of the Law must be declared null and void (see paragraph 156 above), and according to the case-law of the Supreme Court any breach of the principles of public procurement amounts to a violation of imperative legal norms (see paragraph 161 above).

202. With regard to the two contracts being contrary to good morals, the Court of Appeal held that in the procurement procedure the NVSPL and both

applicant companies had acted in bad faith (see paragraphs 93, 103 and 107 above). The Civil Code establishes a general obligation to act in good faith when exercising one's rights and fulfilling one's obligations, which is applicable to both pre-contractual and contractual relations (see paragraphs 144 and 145 above). Moreover, according to the case-law of the Supreme Court, the parties' intentions and their good faith is of particular importance when assessing whether a transaction was contrary to good morals (see paragraph 160 above).

203. While the applicant companies disputed the applicability of the aforementioned legal provisions in the case at hand and disagreed with the domestic courts' conclusion that they had acted in bad faith (see paragraphs 178-182, 184 and 185 above), the Court considers that those submissions do not concern the quality of the law and that it is therefore more appropriate to address them when assessing the proportionality of the interference.

204. Accordingly, the Court is satisfied that the annulment of the contracts at issue as being contrary to imperative legal norms and/or to good morals was provided by law and that therefore the impugned interference was lawful for the purposes of its analysis under Article 1 of Protocol No. 1 to the Convention.

(ii) As to the manner in which restitution was applied

205. Under Article 1.80 § 2 of the Civil Code, when a transaction is declared null and void its parties have to return to one another anything that they received as a result of it or to pay monetary compensation of an equal value (see paragraph 141 above). The rules for applying restitution have been further elaborated in the Supreme Court's case-law (see paragraph 165 above).

206. In the case at hand, the Court of Appeal held that restitution in kind was not possible because the majority of the rapid tests had already been used and the remainder could not be returned to the seller for various reasons. Therefore, it considered that the State should be allowed to keep the tests but that the applicant companies should return to the State the amount which, in the Court of Appeal's view, had been overpaid (see paragraphs 111-113 above).

207. The Court of Appeal did not refer to any legal provisions which might provide for such a manner of restitution, and the applicant companies argued that it had not had any basis in domestic law (see paragraph 187 above). However, the Court takes note of the case-law of the Supreme Court, adopted before the impugned decisions in the applicant companies' case, where the Supreme Court established that when, in the circumstances of a particular case, the items purchased under a contract subsequently declared null and void could not be returned to the supplier, the latter should be entitled

to compensation corresponding to the market price of those items at the time of the purchase (see paragraph 166 above).

208. The Court reiterates that the concept of "law" under Article 1 of Protocol No. 1 to the Convention comprises statutory law as well as case-law (see *Bežanić and Baškarad v. Croatia*, nos. 16140/15 and 13322/16, § 62, 19 May 2022, and the cases cited therein). It therefore rejects the applicant companies' argument that the manner in which restitution was applied in their case had not had any legal basis (see paragraph 187 above).

209. It further reiterates that, in order to meet the requirement of foreseeability, a norm must enable citizens – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Such consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 141, ECHR 2012).

210. In the light of the foregoing, the Court accepts that the manner of restitution chosen by the Court of Appeal had a legal basis which was sufficiently accessible, precise and foreseeable in the circumstances. Accordingly, the interference in question was provided by law, as required under Article 1 of Protocol No. 1 to the Convention.

(c) Whether the interference pursued a legitimate aim

211. The Government submitted that the impugned interference sought to prevent collusive practices and protect public funds (see paragraph 192 above). The applicant companies did not dispute that those were legitimate aims in the public interest, and the Court sees no reason to hold otherwise (see *Kurban*, cited above, § 78).

(d) Whether the interference was proportionate to the aim pursued

212. The Court reiterates that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State. In each case involving an alleged violation of Article 1 of Protocol No. 1 to the Convention the Court must, therefore, ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden (see *Lekić v. Slovenia* [GC], no. 36480/07, § 110, 11 December 2018, and the cases cited therein).

213. The present case concerns a dispute arising in the context of public procurement. The Court notes that regulating public procurement procedures requires the Contracting States to make policy choices aimed at ensuring that those procedures are carried out in an appropriate manner so as to produce results which serve the public interest. It is the Court's established case-law that, because of their direct knowledge of their society and its needs, the

national authorities are in principle better placed than the international judge to appreciate what is "in the public interest" (see, among many other authorities, *Jahn and Others v. Germany* [GC], nos. 46720/99 and 2 others, § 91, ECHR 2005-VI). Accordingly, the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one (ibid., and the cases cited therein).

214. The Court has previously held that the margin of appreciation of Contracting States is substantially broader when the issues involve an assessment of candidates for public procurement and the policy choices as to mandatory or discretionary exclusion of candidates (see *Kurban*, cited above, § 81). It considers that that margin must also be deemed to be wide in cases which, like the present one, concern the choices facing the Contracting States with regard to the obligations imposed on participants in public procurement procedures and the consequences of failures to fulfil those obligations.

215. Furthermore, the Court has held on multiple occasions that the authorities should not be prevented from correcting their mistakes, even those resulting from their own negligence, because holding otherwise would be contrary to the doctrine of unjust enrichment (see, among many other authorities, *Moskal v. Poland*, no. 10373/05, § 73, 15 September 2009, and *Agro Frigo OOD v. Bulgaria*, no. 39814/12, § 51, 5 September 2019). It has held that the same principle holds equally true with regard to procurement authorities, which may be required to take measures in the public interest aimed at correcting their mistakes. Nonetheless, the correction of such mistakes should not lead to a situation where the individual concerned is required to bear an excessive burden (see *Kurban*, cited above, § 82).

216. In the present case, the domestic courts established that the public procurement procedure had not been conducted in accordance with the law: even though the NVSPL had had the right to conduct procurement by a negotiated procedure without publication in view of the extraordinary circumstances created by the COVID-19 pandemic, it had nonetheless been required to comply with the principles of transparency and the rational use of public funds. However, the domestic courts found that it had failed to carry out an assessment of the offers made by different suppliers and had awarded the procurement contract to the supplier handpicked by the Ministry of Health (see paragraphs 53-57 and 88-91 above). The Court has no reason to question the interpretation and application of the domestic law by the national courts (see, among many other authorities, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 83, ECHR 2007-I). It therefore considers it established that the public procurement procedure was not conducted in accordance with the relevant legal requirements.

217. There was no dispute that it was the responsibility of the contracting authority to conduct the public procurement procedure and ensure compliance with the relevant legal requirements and the general principles of

public procurement (see the case-law of the Supreme Court cited in paragraph 162 above).

218. At the same time, however, the Court notes that Lithuanian civil law establishes certain general obligations which are also applicable to suppliers in the context of public procurement (see the case-law of the Supreme Court cited in paragraphs 163 and 164 above and the decisions taken by the domestic courts in the applicant companies' case in paragraphs 59, 92 and 94 above). It considers that the imposition of such obligations falls within the wide margin of appreciation granted to the national authorities in this field (see paragraph 214 above), and the applicant companies have not put forward any arguments to the contrary. Furthermore, it notes that under domestic law, the obligations and responsibilities incumbent on the contracting authority as regards the conduct of the procurement procedure (see paragraph 162 above) do not override or supersede the general norms and principles governing the contractual and pre-contractual relationship between a supplier and a contracting authority as set out under the applicable civil law (see paragraphs 140-145 and 160 above).

219. The Vilnius Regional Court and the Court of Appeal both found that the applicant companies had acted in bad faith. In particular, both courts held that the first applicant company had provided the authorities with inaccurate information regarding the manufacturer of the tests (see paragraphs 61, 95 and 96 above). Furthermore, the Court of Appeal found that the first applicant company had proposed a price which had not been reasonable and had exceeded the market price of such tests (see paragraphs 97-102 above), and that the two applicant companies had acted jointly in their pursuit of an unreasonably high profit during a time of emergency (see paragraphs 105-107 above).

220. The first applicant company submitted that, at the relevant time, it had been impossible for it to provide the exact name of the manufacturer of the tests in advance, that it had been considering various possibilities for obtaining the tests, and that, in any event, the identity of the manufacturer had not been of material importance to the NVSPL (see paragraph 180 above). However, the Court has no reason to adopt a different approach than that of the Court of Appeal, which held that the arguments presented by the first applicant company as to the impossibility of indicating an exact manufacturer or the exact way in which it would obtain the tests demonstrated that by indicating itself as the manufacturer it had provided the authorities with inaccurate information (see paragraph 96 above). Furthermore, the Court of Appeal, relying on the other offers received by the Ministry of Health and the NVSPL, concluded that the identity of the manufacturer and the country in which the manufacturer was based had been an important feature of the tests, as it had an impact on their price (see paragraph 95 above). The Court sees no grounds to call that assessment into question.

221. The first applicant company further contended before the Court that there was no obligation under the law for suppliers participating in public procurement procedures to propose a "reasonable" price (see paragraph 182 above), and, moreover, that the price which it had proposed had not been excessive (see paragraph 179 above). Both applicant companies also challenged the way in which the Court of Appeal had determined the market price of the tests (see paragraph 188 above).

222. In that connection, the Court firstly reiterates that it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). Thus, it is not its role to determine what the market price of rapid tests was at the relevant time or to assess whether or not the price proposed by the first applicant company was excessive. In the Court's view, the findings made in that regard by the Court of Appeal, which were based on tenders involving similar tests made by other companies, including a tender involving tests produced by the same manufacturer, and on the assessment of the market conducted by the Ministry of Defence (see paragraphs 97 and 98 above), cannot be considered arbitrary or manifestly unreasonable.

223. The Court notes the applicant companies' argument to the effect that the obligation to use public funds rationally is incumbent on the public authorities and that suppliers, which are usually private, for-profit entities, cannot be considered as having acted in bad faith solely on account of the price which they propose in their tenders (see also the reasoning of the Vilnius Regional Court in paragraph 65 above). It is clear from the decision of the Court of Appeal, however, that the court did not find that the first applicant company had acted in bad faith solely on account of the fact that the price of its tests had been higher than that proposed by other companies. Instead, the Court of Appeal assessed the first applicant company's tender in the light of the entirety of the relevant circumstances, namely: the first applicant company had presented a tender with a price after it had already been *de facto* selected as the supplier (see paragraph 99 above); it had not provided any information to the authorities or the domestic courts to show what had been the basis for its proposed price, when there were grounds to believe that it had been aware that the tests could be purchased from the manufacturer for a much lower price (see paragraph 100 above); another company had proposed to sell tests made by the same manufacturer for a price which was several times lower (see paragraph 97 above); there was no indication that the first applicant company had tested the quality of the tests at its laboratory, which might have justified the higher price (see paragraph 101 above); and the difference between the price proposed by the first applicant company and the price for which the tests had been purchased from the manufacturer had been manifest and significant (see paragraph 102 above). In the light of those

circumstances, the Court of Appeal concluded that the first applicant company had sought to benefit from the extraordinary situation caused by the pandemic (see paragraph 103 above).

224. Accordingly, contrary to the applicant companies' submissions (see paragraphs 182 and 186 above), the Court concludes that the domestic court did not establish an obligation for suppliers to propose a "reasonable" price and that it did not shift the obligation to use public funds rationally from the authorities onto private entities. The Court finds that the Court of Appeal thoroughly assessed the entirety of the relevant circumstances, including the overall conduct of the applicant companies in the extraordinary situation created by the public health crisis, and reached a conclusion which this Court in its role has no valid grounds to contest.

225. The Court next turns to the argument raised by the second applicant company that it had not participated in the public procurement procedure and thus should not have been held liable for any irregularities in that procedure (see paragraph 184 above). It takes note of the entirety of the circumstances established in the domestic proceedings with regard to the second applicant company (see paragraphs 32, 105 and 106 above) and the close links between the two applicant companies (see paragraphs 78 and 106 above; see also the findings of the prosecutor in the criminal proceedings in paragraph 132 above), which they did not dispute. Given the circumstances, although the second applicant company did not participate in the public procurement procedure at issue, the Court sees no grounds to call into question the view of the Court of Appeal that the two applicant companies acted together and in concert. Consequently, the reasons which justified the annulment of the procurement contract were equally relevant for the annulment of the sales and purchase agreement between the applicant companies, by which the first applicant company transferred to the second applicant company most of the funds received under the procurement contract.

226. Accordingly, having regard to the reasons provided by the domestic courts and the parties' submissions, and considering that it has only limited power to deal with alleged errors of fact or law committed by the national courts, the Court sees no grounds for substituting its view for that of the domestic courts (see, *mutatis mutandis*, *Jantner v. Slovakia*, no. 39050/97, § 32, 4 March 2003), which found that the applicant companies had acted in bad faith.

227. The Court observes that it is not its role to determine what the consequences should be of a procurement contract and/or any related contracts being declared null and void. It reiterates that, because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds (see, among many other authorities, *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 98, 25 October 2012, and, in the context of public procurement, *Kurban*, cited

above, § 80). What the Court must assess is whether the decisions taken by the domestic courts when seeking to correct the mistakes made in the public procurement procedure imposed an individual and excessive burden on the applicant companies.

228. The Vilnius Regional Court and the Court of Appeal both acknowledged that, in the circumstances of the present case, it was not possible to apply restitution in kind and restore the situation which had existed before the impugned transactions because the procurement contract had been entirely fulfilled and the State had already used the majority of the tests received under that contract (see paragraphs 74-76 and 110 above). The Court has no reason to question that conclusion.

229. The Vilnius Regional Court considered that the circumstances of the case warranted preserving the procurement contract and imposing a fine on the NVSPL for failure to conduct public procurement in accordance with the law (see paragraphs 76 and 77 above). However, the Court of Appeal took a different approach: it held that maintaining the contracts at issue would be contrary to the public interest, and ordered the applicant companies to repay to the State the amount which, in its view, the State had overpaid for the tests (see paragraphs 109, 111 and 113 above). The applicant companies contended that, as a result of the latter decision, the NVSPL had not had to bear the consequences of its failure to comply with the legislation on public procurement and that the burden of those consequences had been shifted entirely on the applicant companies (see paragraphs 186 and 187 above).

230. However, the Court reiterates that, in the present case, the relevant domestic court has found that the applicant companies acted in bad faith (see paragraphs 220-226 above) and sought to take advantage of the public health emergency in order to make an excessive profit (see paragraphs 103 and 107 above). It has previously acknowledged that the good faith of the parties to a contract is a relevant factor when determining any compensation to be awarded after the annulment of the contract at issue (see, *mutatis mutandis*, *Demiray v. Türkiye*, no. 61380/15, §§ 61-62, 18 April 2023). There is no dispute that the public authorities did not act in compliance with their administrative obligations under public procurement law (see paragraph 216 above). However, in the circumstances of the present case, the Court cannot accept the view that the latter fact could justify exonerating the applicant companies from the breach of obligations imposed on them by the applicable civil law, so that they would have been entitled to retain the excessive profit made at the expense of the public purse.

231. In this regard, the Court notes that the context in the present case is characterised by the concurrence of an administrative procedure for the selection of a supplier on the one hand, and a contractual transaction between the selected supplier and the contracting authority on the other hand. The procurement procedure, which is the responsibility of the relevant public authorities, concerns the search for potential suppliers and the selection of the

optimal supplier, while ensuring transparent and competitive access to the procurement process. At the same time, however, it is necessary to take into account the fact that the suppliers bidding for public contracts are economic operators actively pursuing their own commercial interests. Accordingly, the contractual relations between suppliers and contracting authorities in the field of public procurement cannot be assimilated to situations in which public authorities exercise administrative powers entrusted to them in relation to persons or entities in a subordinate position (see, *mutatis mutandis*, *Klimat Inkom V § Co OOD and Others v. Bulgaria* (dec.), no. 61324/09, § 51, 12 December 2017).

232. The Court takes due note of the applicant companies' argument that the NVSPL, which was responsible for ensuring compliance with the law but failed to do so, did not have to bear the consequences of its own failure, since the fine imposed on it by the Vilnius Regional Court was subsequently annulled by the Court of Appeal (see paragraph 186 above; see also the expert opinion submitted by the Public Procurement Service in the proceedings before the Vilnius Regional Court, cited in paragraph 51 above). In this connection, the Court considers it important to point out that the public procurement procedure at issue took place during the COVID-19 pandemic, when the authorities had to find rapid and intelligent solutions to the public health crisis (see paragraph 168 above), and it is aware that the need to act with particular expediency increased the likelihood of mistakes being made (see the Government's submissions in paragraph 189 above). In any event, having regard to its above-mentioned findings as to the conduct of the applicant companies, the Court is unable to conclude that the absence of financial consequences for the NVSPL is in itself sufficient to render the interference with the applicant companies' property rights disproportionate.

233. In the light of the foregoing, the Court finds that the domestic authorities did not overstep the wide margin of appreciation afforded to them in the present context.

234. There has therefore been no violation of Article 1 of Protocol No. 1 to the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention in respect of both applicant companies.

Done in English, and notified in writing on 7 January 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim Deputy Registrar	Arnfinn Bårdsen President