

**Case C-461/20****Request for a preliminary ruling****Date lodged:**

24 September 2020

**Referring court:**

Högsta förvaltningsdomstolen (Sweden)

**Date of the decision to refer:**

15 September 2020

**Applicant:**

Advania Sverige AB

Kammarkollegiet

**Defendant:**

Dustin Sverige AB

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SUPREME MINUTES [...]   
ADMINISTRATIVE

COURT 15-09-2020 [...]

Stockholm

[...]

**APPLICANT**

1. Advania Sverige AB [...]

2. Kammarkollegiet (Legal, Financial and Administrative Services Agency)

Statens Inköpscentral (State central purchasing body)

[...]

**DEFENDANT**

Dustin Sverige AB, [...]

## **DECISION UNDER APPEAL**

Judgment of the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) of 16 October 2019 [...]

## **IN THE MATTER OF**

Review of the validity of a contract; request for a preliminary ruling from the Court of Justice of the European Union

[...]

### **[OR. 2]**

The Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden) takes the following

## **DECISION**

A preliminary ruling shall be requested from the Court of Justice of the European Union under Article 267 TFEU in accordance with the attached request for a preliminary ruling (annexed to the minutes).

[...]

### **[OR. 3]**

## **ANNEX**

**Request for a preliminary ruling under Article 267 TFEU concerning the interpretation of Article 72(1)(d)(ii) of Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC ('the Public Procurement Directive')**

### **Introduction**

1. After a supplier was declared insolvent, its insolvency estate transferred four framework agreements to a new supplier. By the request for a preliminary ruling, the Högsta förvaltningsdomstolen (Supreme Administrative Court) seeks clarity on whether the new supplier may be regarded as having succeeded into the position of the initial supplier in such circumstances that it is unnecessary to carry out a new procurement procedure.

### Relevant provisions of EU law

2. Pursuant to Article 72(1)(d)(ii) of the Public Procurement Directive, framework agreements may be modified without a new procurement procedure where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of the directive.
3. Recital 110 of that directive states the following. In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract should be able to undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, takeovers, mergers *and* acquisitions *or* insolvency (emphasis added by the Högsta förvaltningsdomstolen (Supreme Administrative Court)). Such structural changes should not automatically require new procurement procedures.

### Relevant national legislation

4. Under the first subparagraph of Chapter 17, Paragraph 13, of the Lagen (2016:1145) om offentlig upphandling (Law (2016:1145) on public procurement; ‘the LOU’), ‘a contract or a framework agreement may be modified with one contractor being replaced by another, without a new procurement, if:
  1. the new contractor universally or partially succeeds into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, and
  2. the circumstance that a new contractor universally or partially succeeds into the position of the initial contractor does not entail other substantial modifications to the contract or framework agreement.’

### [OR. 4]

It is apparent from the second paragraph that such a replacement of the contractor presupposes that the new service provider is not excluded and that it meets the qualification conditions required in the context of the original contract.

## The facts of the main proceedings

### *Background*

5. The case involves four framework agreements with reopening of competition procured by the Kammarkollegiet through a restricted procedure in accordance with the Lagen (2007:1091) om offentlig upphandling (Law (2007:1091) on public procurement), now repealed. The framework agreements concern the purchase of computers, monitors, tablets, etc. Three of the framework agreements cover various geographical areas and the fourth framework agreement encompasses the national territory. Seventeen candidates qualified and went on to selection. If more than nine candidates qualified to tender, selection was to be based on the highest tendered total added value.
6. Dustin Sverige AB ('Dustin') and Misco AB ('Misco') were among the nine candidates with highest added value that were invited to submit tenders. Advania Sverige AB ('Advania') was not among those nine, but among the 17 that had qualified. Framework agreements were concluded with a total of six suppliers in each field. Misco was awarded contracts in all fields. Dustin was awarded contracts in two fields.
7. By letter of 4 December 2017, Misco requested the Kammarkollegiet to approve the transfer of the framework agreements to Advania. On 12 December 2017, Misco was declared insolvent. On 18 January 2018, the insolvency administrator signed a contract with Advania for the transfer of the framework agreements. The transfer was approved by the Kammarkollegiet in February 2018.

### *Application for declaration of invalidity of contracts*

8. Dustin applied to the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm) for a declaration of invalidity of Advania's framework agreements with the Kammarkollegiet. Dustin argued that the transfer of the four framework agreements from Misco to Advania did not constitute an authorised modification of the framework agreements under Chapter 17, Paragraph 13, of the LOU, since Advania had not succeeded into the position of Misco following corporate restructuring. In support of its application, Dustin submitted the following. It is unclear whether Advania has taken over Misco's subcontracting contracts. It can be stated that, apart from certain information, Advania has not taken over any systems, staff, business assets or operational contracts other than the framework agreements themselves. The divestment of the framework agreements therefore has not brought about a substantial structural change of Misco as is required by the LOU. The existing supplier merely sold the agreements in question and the transfer does not constitute corporate restructuring for the purposes of that provision.
9. The Kammarkollegiet submitted the following. It is apparent from the information received by the Kammarkollegiet that Advania purchased Misco's entire business

in respect of its performance of the framework agreements. With regard to Misco's request, the Kammarkollegiet took the view that the transfer at issue had taken place due to a restructuring as result of Misco's insolvency and that there was continued identity between Misco, which submitted tenders, [OR. 5] qualified and signed framework agreements, and Advania, which then performs the framework agreements. That view was based on the fact that Advania had taken over all public framework agreements (including call-off contracts with rights and obligations), the staff of Misco who played a decisive role in the performance of the contracts (in so far as those staff wished to be transferred to Advania), the subcontractors who were relied on to perform Misco's obligations under the contracts, as well as the systems etc. necessary for Misco to be able to perform those contracts. Advania universally succeeded into Misco's position as regards the obligations of the framework agreements and partially as regards the acquisitions made.

*Judgment of the Förvaltningsrätten*

10. The Förvaltningsrätten (Administrative Court) dismissed Dustin's application for a declaration of invalidity. As regards the question of whether the conditions for replacing a contractor set out in the first paragraph of Chapter 17, Paragraph 13, of the LOU were satisfied, the Förvaltningsrätten stated the following. Advania and Misco's insolvency administrator made clear to the Kammarkollegiet what Advania purchases and the Kammarkollegiet then concluded that there was identity between Advania and Misco, such that Advania could succeed into the position of Misco as contractor under the framework agreement. It is the Kammarkollegiet which assumes a risk through the replacement of the supplier and which has a certain interpretive right in the situation that arises. The court considers the circumstances relied on by Dustin not to constitute grounds for challenging Advania's acquisition of Misco's framework agreements and of parts of Misco's business for the performance of the framework agreements in the manner required by Chapter 17, Paragraph 13, of the LOU. The framework agreements have been amended through a replacement of the contractor in a manner that falls within what can be regarded as corporate restructuring.

*Appeal before the Kammarrätten*

11. Dustin lodged an appeal against the judgment of the Förvaltningsrätten (Administrative Court) before the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm), arguing the following. The investigation in the present case does not support the conclusion that Advania took over Misco's assets to the extent assumed by the Kammarkollegiet in its decision to approve the transfer. That agency has not put forward any circumstances to support the claim that any of Misco's employees actually transferred to Advania or that any systems were transferred, with the exception of certain data lists. Of the seven subcontracts submitted to the courts, four were concluded before the transfer contract, that is to say, in Advania's initial activity, and none of them makes any mention of Misco

or states that the contract would entail Advania taking over an existing contractual relationship. Nor did Advania take over any other framework agreements with public clients. Those circumstances show that, apart from certain information lists, Advania merely acquired the framework agreements and therefore did not take over any branch of activity. Such a limited transfer cannot be regarded as giving rise to the succession by Advania into the position of Misco as a result of corporate restructuring.

12. The Kammarkollegiet took the view that the appeal should be dismissed on the merits and stated the following. There is much to support the view that the examination should pertain solely to the question of whether a corporate restructuring has taken place. The fact that the transfer was the result of insolvency — which is explicitly stated in the text of the LOU — indicates that the requirement is satisfied. In its view, insolvency being an extraordinary event, winding up is a particular kind of corporate restructuring. It is unlikely that Misco would have gone into insolvency in order [OR. 6] to trade in framework agreements.
13. Advania was of the view that the appeal ought to be dismissed on the merits and submitted the following. As part of the insolvency, Misco wound up its entire business as regards those parts that could not be transferred, inter alia, to Advania. The precise nature of Advania's acquisition of the insolvency estate is therefore irrelevant.

*Judgment of the Kammarrätten*

14. The Kammarrätten (Administrative Court of Appeal) upheld Dustin's appeal and declared the four framework agreements between Advania and the Kammarkollegiet invalid. The Kammarrätten found that the Kammarkollegiet's approval of the transfer of the framework agreements had been given due to Misco's insolvency. The Kammarrätten also stated the following. Under the contract in question, Misco transferred, in addition to the framework agreements, the right to the undertaking's staff, customer and supplier data, product statistics and history, as well as the right to take over the undertaking's subcontractors and Advania declared itself prepared to offer a number of 'key employees' employment under market conditions. It is apparent from the investigation in the case that one employee subsequently transferred to Advania. It is also apparent that, according to Advania, Misco's customer list was not fully updated or relevant and that Misco's customers had already changed supplier. There is no indication that, as a result of the transfer contract, some of Misco's subcontractors were taken over by Advania. Nor is there any indication that any other public framework agreements were transferred. On the contrary, Dustin has submitted evidence showing that Misco was a party to at least one other public framework agreement and that that framework agreement was not transferred to Advania. The investigation shows that Misco did not, for the most part, transfer any business to Advania, with the exception of the framework agreements at issue. Advania therefore cannot be regarded, in the Kammarrätten's view, as having universally

or partially succeeded into Misco's position within the meaning of Chapter 17, Paragraph 13, of the LOU. It is therefore a substantial modification. The Kammarkollegiet ought not to have approved the replacement of the supplier. It is accordingly an unauthorised direct procurement.

### **Positions of the parties**

#### *Advania*

15. Advania claims that the judgment of the Kammarrätten (Administrative Court of Appeal) be set aside and that the judgment of the Förvaltningsrätten (Administrative Court) be upheld and submits the following. Advania does not call into question the Kammarrätten's assessment of what was included in the transfer from the insolvency estate. In the present case, the question at issue is one of a restructuring of the previous contractor due to insolvency and subsequent winding up, which means that the insolvency estate sold parts of the existing business to, inter alia, Advania. The remaining parts of the insolvent undertaking's business were wound up. Advania agreed to take over all of Misco's contractual obligations and Advania thus universally succeeded into Misco's position as regards the framework agreements. Neither the LOU nor the Public Procurement Directive requires that activities of a certain nature or scope be transferred to the new contractor. This is evidently not a case where only a procured contract has been transferred and the initial contractor's business has continued as usual. [OR. 7]

#### *The Kammarkollegiet*

16. The Kammarkollegiet claims that the judgment of the Kammarrätten (Administrative Court of Appeal) should be set aside and the framework agreements be declared valid and submits the following. The central issue is how the expression 'universal or partial succession into the position of the initial contractor' is to be interpreted. The Kammarkollegiet is of the view that it should be interpreted as meaning that the acquiring contractor succeeds into the position of the initial contractor as regards the rights and obligations laid down in the framework agreement or the contract that has been transferred. If it is interpreted as requiring some type of business transfer and transfer of assets, the application of the provision will be severely limited. It is highly unlikely that a new contractor will continue to operate in the same way as the previous contractor. The key issue is that the new contractor be able to perform the contract in accordance with the conditions and requirements that were originally laid down. If an agreement is partially taken over, it does not necessarily mean that other substantial modifications to the agreement are made.

*Dustin*

17. Dustin disputes that the appeal should be upheld and submits the following. That the new contractor has universally or partially succeeded into the position of the initial contractor as a result of corporate restructuring cannot reasonably pertain to the new contractor's takeover of the procured agreement. If that were the case, it would be possible to acquire individual procured agreements without simultaneously taking over any part of the business to which the agreements relate. Such an approach provides almost free rein to trade in procured agreements. With such an interpretation, it would also be possible to take over only partially the rights and obligations arising under the agreement, which would be difficult to reconcile with the requirement that the replacement of the contractor may not entail other substantial modifications to the agreement. The exception covering replacement of the contractor in corporate restructuring may be assumed to be subject to the condition that the main purpose of the transaction is the taking over of all or part of the business to which the agreement relates and that the transfer of the agreement itself, namely the replacement of the contractor, is ancillary to the transfer of the business. The fact that the new contractor enters into the agreement in question is the consequence of the modification and does not constitute the precondition for its taking place.

**The need for a preliminary ruling**

18. In the case before the Högsta förvaltningsdomstolen (Supreme Administrative Court), it is of crucial importance how the provision on replacement of contractor in Article 72(1)(d)(ii) of the Public Procurement Directive is to be interpreted. The examination of the case requires an interpretation of what is meant by 'universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency'.
19. The Court of Justice has not ruled on the interpretation of that article in the current context. The Högsta förvaltningsdomstolen (Supreme Administrative Court) is of the view that the correct interpretation of the provision is unclear.
20. Against that background, the Högsta förvaltningsdomstolen (Supreme Administrative Court) deems it necessary to request a preliminary ruling from the Court of Justice. **[OR. 8]**

**Question**

21. Does the circumstance that a new contractor has taken over the initial contractor's rights and obligations under a framework agreement, after the initial contractor has been declared insolvent and the insolvency estate has transferred the agreement, mean that the new contractor will be deemed to have succeeded into the position of the initial contractor under conditions such as those referred to in Article 72(1)(d)(ii) of the Public Procurement Directive?