Case C-263/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

28 March 2019

Referring court:

Fővárosi Törvényszék (Budapest High Court, Hungary)

Date of the decision to refer:

7 March 2019

Applicants:

T-Systems Magyarország Zrt.

BKK Budapesti Közlekedési Központ Zrt.

Közbeszerzési Hatóság Közbeszerzési Döntőbizottság (Board of appeal of the Public Procurement Office)

Defendants:

Közbeszerzési Hatóság Közbeszerzési Döntőbizottság

BKK Budapesti Közlekedési Központ Zrt.

T-Systems Magyarország Zrt.

Subject-matter of the case in the main proceedings

Proceedings concerning a decision in relation to public procurement and seeking a declaration of invalidity of a contract.

Subject-matter and legal basis of the reference

The liability of the successful tenderer for an unlawful failure to hold a public tendering procedure; Article 267 TFEU.

Questions referred

1. Do Articles 41(1) and 47 of the Charter of Fundamental Rights of the European Union, as well as recitals 10, 29, 107, 109 and 111 and Articles 1(2) and 72 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, preclude a national rule or a practice in relation to the interpretation and application of that rule which, taking into account the contractual legal relationship between the contracting parties, stipulates that an infringement for an unlawful failure to hold a public tender, allegedly violating the rules concerning the modification of contracts, and a failure to comply with the provisions governing the modification of contracts, is committed not only by the contracting entity, but also by the successful tenderer which concluded the contract with it, on the basis that the unlawful modification of the contracts requires joint action by the parties?

2. In the event that the first question is answered in the negative, taking into account the provisions of Articles 41(1) and 47 of the Charter of Fundamental Rights of the European Union and recitals 10, 29, 107, 109 and 111 and Articles 1(2) and 72 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, do recitals 19, 20 and 21 of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, and Article 2(2) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, preclude a national rule or a practice in relation to the interpretation and application of that rule which allows a penalty (fine) — other than a reduction in the duration of the contract — for unlawful failure to hold a public tendering procedure and for failure to comply with the rules on the modification of contracts to be imposed also on the successful tenderer which concluded the contract with the contracting entity?

3. If the first two questions are answered in the negative, the referring court asks the Court of Justice of the European Union to also provide it with guidance as to whether, in order to determine the amount of the penalty (fine), it is sufficient that there is a contractual legal relationship between the parties, without it being necessary to examine the action and the contribution of the parties which led to the modification of the contract.

Provisions of EU law relied on

Articles 41(1) and 47 of the Charter of Fundamental Rights of the European Union

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31).

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

Relevant provisions of national law

A közbeszerzésekről szóló 2011. évi CVIII. törvény (Law CVIII of 2011 on Public Procurement; 'the former Public Procurement Law');

A közbeszerzésekről szóló 2015. évi CXLIII. törvény (Law CXLIII of 2015 on Public Procurement; 'the Public Procurement Law')

Brief summary of the facts and the procedure in the main proceedings

1 BKK Budapesti Közlekedési Központ Zrt. ('the contracting entity') is a public limited liability company operating in a closed field — and not quoted on the stock exchange — established by the Fővárosi Önkormányzat (General Assembly of Budapest, Hungary). That company carries out public service tasks in the field of public transport in Budapest. By an invitation to participate of 31 January 2013, it launched a negotiated tendering procedure for the manufacture, transport, installation and full operation of ticket vending machines ('TVM'). On 4 September 2013, at the end of that tendering procedure, it concluded a contract ('the main project contract') with T-Systems Magyarország Zrt. ('the successful tenderer')

2 An annex to the main project contract included a works contract, an operating contract, technical specifications and the bid from the successful tenderer. The

total value of the contract was HUF 5 561 690 409. The parties have, on several occasions, modified the main project contract, inter alia:

– On 13 July 2017 (‘the third modification’), the contracting entity ordered the successful tenderer to supplement the central control system of the vending machines with a software module that enabled online sales to be carried out.

– In the context of the modification to the contract made on 15 September 2017 (‘the fourth modification’), the actions which cause or may cause the machinery to cease operations were identified and the contractual concepts of ‘obstruction’, ‘withdrawal of bank notes’ and ‘customer error’ were set out, as well as the period for necessary repairs and detailed rules in that respect. It was established that the value of the additional consideration in the context of the modification of the contract cannot exceed HUF 2 530 195 870, that is to say, 50% of the initial contract value.

3 Previously, on 22 December 2016, an agreement had been concluded (‘the costs compensation agreement’), the purpose of which was to regulate the compensation of the costs incurred by the successful tenderer in relation to the additional services required by the contracting entity in respect of the operation of TVM.

4 On 29 September 2017, the Director of the Public Procurement Office initiated an administrative procedure against the contracting parties on the grounds that, through the modifications and agreement referred to above, provisions of both the former Public Procurement Law and the (current) Public Procurement Law — amongst others — had been infringed.

5 The Board of appeal of the Public Procurement Office (‘the Board of appeal’) found in its decision that the contracting entity and the successful tenderer were in breach of Article 141(8) of the Public Procurement Law for the following reasons:

– The third and fourth contract modifications do not comply with the requirements of the Public Procurement Law as regards modifications of contracts and should therefore have been subject to a new tendering procedure.

– The costs compensation agreement regulated the services which are the subject of the main project contract in a different manner than the latter and should therefore also be considered as a modification of the contract, in respect of which the criteria laid down in the Public Procurement Law are not met.

6 On the basis of the above, the arbitration panel imposed a fine of HUF 80 000 000 on the contracting entity and a fine of HUF 70 000 000 on the successful tenderer. In support of that fine, it stated that both contracting parties are required to

comply with the rules on public procurement in relation to the modification of the contract and took the view that the contribution and liability of the contracting entity and of the successful tenderer for the legal acts considered to be unlawful were identical.

7 The successful tenderer and the contracting entity brought proceedings, as first and second applicants, before the referring court. The Board of appeal is party to those proceedings as the first defendant and the Director of the Public Procurement Office acts as an intervener in support of its claims. In addition, the Board of appeal, as the third applicant, asks the referring court to declare invalid the third and fourth modifications and the costs compensation agreement which it considered unlawful and to restore the situation prior to that established by those acts. In relation to these claims, the contracting entity is party to the proceedings as the second defendant and the successful tenderer as the third defendant.

Principal submissions of the parties to the main proceedings

8 In the part of its application concerning the preliminary ruling procedure, the *successful tenderer* submits that the decision of the Board of appeal does not take into account the fact that the contracting entity is in a position to decide, in the light of its procurement needs, whether to launch a tendering procedure or to consider, where appropriate, that it is not necessary. Accordingly, only the contracting entity may be the addressee of Article 141 of the Public Procurement Law, concerning modifications to the contract. The Board of appeal therefore makes the successful tenderer liable for decisions over which it does not exercise, nor is able to exercise, any influence, which, in addition to being contrary to the previous practice of the Board of appeal, constitutes a serious violation of the principles of legal certainty and the rule of law.

9 In addition, the Board of appeal does not explain how the successful tenderer committed the infringement. The requirements of foreseeability and due diligence are circumstances that must be examined with respect to the contracting entity, and therefore the failure to meet those requirements is at most imputable to the contracting entity and not to the successful tenderer.

10 Furthermore, the successful tenderer claims that the application of the penalty is unlawful, and criticises in that respect the fact that the Board of appeal considered that its contribution and liability in relation to the contract modifications were identical to those of the contracting entity, without taking into account that it was the contracting entity which deemed it necessary to modify the contract and which took the initiative in that respect. There was no intent, bad faith or collusion on the part of the successful tenderer. Compliance with the procedural rules applicable to public procurement is an obligation of the contracting entity and, accordingly, failure to comply with those rules is not imputable to the successful tenderer.

11 The *Board of appeal*, as the first defendant, contends that the only infringement found against the successful tenderer was that of a legal rule of which it was an

addressee, since the provisions on the modification of contracts in Article 141 of the Public Procurement Law are addressed to the parties that conclude the contract. Except for the aspects regulated otherwise by the Public Procurement Law, contracts concluded in accordance with the tendering procedure are governed by the provisions of civil law, that is to say, in the present case, by Polgári Törvénykönyvről szóló 1959. évi törvény (Law IV of 1959 on the Civil Code; 'the former Civil Code'). In accordance with Article 240(1) of the former Civil Code, unless otherwise provided for by law, the parties may by common agreement modify the content of the contract or the legal nature of the commitments which they have entered into. Since such joint action by the parties is necessary for the occurrence of the impugned actions, it was justified to examine the infringements relating to the modification of the contract in respect of both parties. The issue of the contracting party in respect of which the examination of the foreseeability requirement may be carried out is not related to the issue of the contracting party to which the legal consequences of an unlawful modification of a contract made with the agreement of the parties should be imputed.

12 The *Director of the Public Procurement Office*, as an intervener in support of the form of order sought by the defendant, argues that the contracting entity is the principal entity required to act in accordance with the law governing the tendering procedure, but not the only one. He stresses that, with regard to the modification of a contract concluded under a tendering procedure, the responsibility for complying with the provisions of the public procurement legislation is more nuanced and it is not unusual for the successful tenderer to take the initiative for the modification. In such cases, the successful tenderer will necessarily have more information on the implementation under the Public Procurement Law of the public contract concluded by means of a tendering procedure and on whether the requirements laid down in that law as regards the modification of the contract are met. The Public Procurement Law restricts the contractual freedom of the parties in relation to modifications of the contract. However, that does not alter the civil law principle that the modification of the contract presupposes a manifestation of the concordant intention of the parties to the contract. This, together with the obligation to cooperate, also involves the transmission of information between the parties. Therefore, the argument that the successful tenderer has no possibility of assessing whether the modification of the contract is in line with the requirements of the Public Procurement Law is flawed. In his opinion, the finding that the successful tenderer committed an infringement and the imposition of a fine on it were lawful.

Brief summary of the reasons for the referral

13 The European Union regulates public procurement with a view to ensuring the functioning of the single internal market. The main instruments of EU law in the field of public procurement are the TFEU and the provisions of the Directives on public procurement that prohibit discrimination, the provisions of the Directives

which ensure the transparency of tendering procedures and the provisions of the Directives on public procurement aimed at removing certain market access barriers.

14 Entities subject to public procurement are obliged to make their purchases of certain products at certain prices determined in accordance with the public procurement rules in order to make rational and efficient use of public funds, enable their public oversight and ensure competition. The public procurement requirement and the obligation to carry out a tendering procedure apply to the contracting entity. In the light of its procurement requirements, the contracting entity decides whether to convene a tendering procedure or may consider that this is not necessary. Contracting entities should carry out public procurement in a documented and monitored framework.

15 The responsibility of the economic operator bidding for a public tender is essentially laid down in the legislation on public procurement which guarantees respect for competition, and the penalties for infringements are specified in the relevant legislation.

16 The tendering procedure concludes with the award of the contract. From the time the obligation to conclude a contract arises until it is concluded and implemented, the performance of the parties to the contract, which is governed by the public procurement legislation, necessarily has reciprocal effects. Where the contract is not concluded for a reason which arises after the decision terminating the procedure, where the rules relating to the period during which the contract is suspended are infringed, or where the contract is concluded in breach of the public procurement legislation, the consequences affect both the contracting entity and the successful tenderer. On the basis of the same principles and with the aim of ensuring as much competition as possible, Article 137(1)(a) to (c) of the Public Procurement Law, as regards the conclusion of the contract, and Article 141 of that law, as regards the modification of the contract, lay down severe penalties for unlawful actions arising from the legal relationship between the parties which goes beyond the scope governed by civil law when concluding the contract.

17 Article 141 of the Public Procurement Law contains, as does Article 72 of Directive 2014/24, the rules allowing the contract to be modified in the event that changes occur during the period of validity of the contract. Moreover, failure to meet the requirements laid down in that legislation gives rise to the obligation to carry out a new tendering procedure. It follows, regardless of whether the modification of the contract can only take place with the concordant intention of both parties, that the addressee of the provision infringed in the field of public procurement can only be a contracting entity falling within the scope *ratione personae* of the law.

18 However, in accordance with Article 165(3)(d) of the Public Procurement Law, when the Board of appeal identifies an infringement, it may in its decision impose a fine on the infringing entity or person and on the person or entity which has a

legal relationship with the person or entity responsible for the infringement and which is also responsible for the infringement. The rules on review procedures do not specify on that point which participants in the public procurement procedure can be penalised. The logical conclusion is that those who infringe specific substantive rules and those who commit prohibited acts can be penalised in the same way. However, within a framework governed by public procurement law, the question of which person or legal entity is to be considered as infringing may be determined by the circumstance of which party is to be considered the addressee of the rule infringed. Nevertheless, in view of the purpose of the fine, which is intended to compel persons falling within the scope *ratione personae* of public procurement to act in accordance with the law, such an alternative penalty may be interpreted against the party obliged to hold a tendering procedure, that is to say, only against the contracting entity. The fine is not specific to the contractual legal relationship, but results exclusively from the special provisions on public procurement, and a third party which is not party to the contract — the entity of a Member State selected to carry out an objective legal protection task — imposes the fine because there is a legal obligation to intervene from outside the contractual relationship between the parties, in the interests of the objectives protected by public procurement law, regardless of whether there is a dispute between the parties to the contract. The fine is of a punitive nature, and must therefore actually be imposed on the infringer.

19 In the event that the infringement entails the invalidity of the contract, the infringer may, under the relevant legislation, be fined for the infringement, and a fine may be imposed as an alternative penalty where, since it is not possible to restore the initial situation, the court declares the validity of the contract concluded on the basis of the public procurement procedure.

20 Some typical cases show the practice of the Hungarian courts as regards the fine applicable for infringements that entail the invalidity of the contract: in one of its judgments, the Fővárosi Ítélőtábla (Budapest Regional Court of Appeal) — in addition to confirming the invalidity of a contract which was concluded unlawfully, without a public tendering procedure being held, and declaring it valid with retroactive effect from the date of its conclusion — exempted the contracting entity from the payment of the fine, invoking the judgments in *von Colson* (14/83, ECLI:EU:C:1984:153) and the judgment in *RWE Vertrieb* (C-92/11, ECLI:EU:C:2013:180), paragraph 58, in accordance with the application of the Directive on review procedures. Given the specific characteristics of the conclusion of the contract, it did not consider it justified to apply an alternative penalty since the Board of appeal had already imposed a fine for the same circumstances (*ne bis in idem*). In another of its judgments, the Fővárosi Ítélőtábla altered a judgment delivered at first instance — which declared a contract invalid for unlawful failure to carry out a tendering procedure, declared the works contracts to be applicable until a decision was taken and imposed a fine on the parties jointly and severally — and revoked the fine imposed on the economic operator party to the contract. It argued that the obligation to hold a tendering procedure lies with the contracting entity and that, on that basis, the invalidity of

the public contract results from the omission of the contracting entity. The court of first instance did not have any information that would have led it to conclude that the economic operator had acted in bad faith, that is to say, that it knew, or ought to have known, that the contracts infringed the Public Procurement Law. The Fővárosi Törvényszék relied on similar arguments to those on which the Fővárosi Ítélőtábla based the latter judgment in finding that there was no legal basis for imposing a fine on the economic operator or holding the parties to the contract jointly and severally liable.

21 In order to modify the contract, Article 240(1) of the former Civil Code requires — as does the legislation in force — an expression of the joint intention of the contracting parties, and the successful tenderer is necessarily an addressee of the provisions of the Public Procurement Law concerning the modification of the contract. However, this does not mean, or does not necessarily mean, that, under civil law rules, the legal liability of the successful tenderer for the modification of a contract should be regarded as identical to the liability of the contracting entity. In the procedure in which the Board of appeal has the power to review the legality of a contractual modification, contractual legal aspects (for example, incorrect performance) cannot be assessed; rather, the examination must address legal aspects of public procurement governed in the same manner by EU law and national law (for example, foreseeability, due diligence and emergence of new needs). Where legal responsibility in relation to public procurement is imputed to both contracting parties, it must be ensured that they have the possibility of clarifying their involvement in the origin of the infringement. Under contract law (expression of common intention), a legal presumption in the field of public procurement which would deprive the contracting parties of that possibility cannot be established (judgments in *Micraniki*, C-213/07, ECLI:EU:C:2008:731, and *Fabricom*, C-21/03 and C-34/03, ECLI:EU:C:2005:127).

22 For the referring court, it is not clear what limits may be set on the Member State's powers as regards review procedures on the basis of the scope *ratione personae* laid down by the relevant EU law, without giving rise to a situation where the right to an effective, proportionate and dissuasive review procedure is no longer guaranteed. In the absence of a clear guidance from the Courts of the Union to the national court on the issues raised in these proceedings, the Fővárosi Törvényszék has decided to refer questions to the Court of Justice of the European Union on this matter.