



PRESS RELEASE No 53/25

Luxembourg, 29 April 2025

Judgment of the Court in Case C-452/23 | Fastned Deutschland

The Court of Justice provides clarity on the circumstances in which a concession may be modified without a new award procedure

The possibility of modifying a concession contract without a new award procedure in certain circumstances is also available in the context of a concession originally awarded to an in-house entity where the concessionaire has subsequently been privatised

In the context of a dispute concerning the extension of existing concessions for the operation of service areas on German motorways to include the construction and operation of charging stations for electric vehicles, the Court of Justice was asked whether, in certain circumstances, such an extension might be carried out without a new award procedure. The Court finds that the fact that the concession was originally awarded to an in-house entity and the concessionaire has subsequently been privatised does not preclude this. It is not necessary to check whether the original award of the concession was lawful where any period for challenging the lawfulness of the award has expired. The condition that the 'need for' modification must have been 'brought about' by unforeseeable circumstances means that those circumstances require the original concession to be adapted in order to ensure that the proper performance of the concession may continue.

Approximately 90% of the service areas on German federal motorways are operated by Autobahn Tank & Rast and Ostdeutsche Autobahntankstellen on the basis of some 360 concession contracts concluded with the German State. ¹ That State subsequently extended the existing concessions, without an award procedure, to include the construction and operation of charging stations for electric vehicles in those areas. Fastned, ² which operates such stations in Germany, is challenging that extension before a German court.

280 of those 360 concessions had originally been awarded without a tendering procedure to the predecessor ³ of the two operators in question between 1996 and 1998, for a maximum period of 40 years. At that time, all of the shares in that predecessor were owned by the German State, but it went on to be fully privatised.

Fastned argues that the extension of the concessions to include charging stations is ineffective, as it should have been preceded by an award procedure at EU level.

The German court has asked the Court of Justice about the EU rules on the award of concessions which, by reason of their value, must, in principle, be open to competition. ⁴

One of those rules permits, in certain circumstances, ⁵ the modification of an existing concession without a new award procedure where the 'need for' that modification is 'brought about' by unforeseeable circumstances. According to Fastned, that rule does not apply to concessions which were not originally awarded in the context of a call for tenders.

The Court replies that the rule in question also applies where the concession was originally awarded, without a competitive tendering procedure, to an in-house entity ⁶ and the modification of the subject matter of that concession is carried out on a date on which the concessionaire no longer has the status of an in-house entity. That

rule does not require the national courts to review the lawfulness of the original award of a concession in the context of an action for annulment of a modification of that concession, where any period for challenging that original award has expired.

The Court further states that the 'need for' modification of a concession has been 'brought about', within the meaning of that rule, if unforeseeable circumstances make it necessary to adapt the original concession in order to ensure that the proper performance of the concession may continue.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of EU law or the validity of an EU act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Unofficial document for media use, not binding on the Court of Justice.

The [full text and, as the case may be, an abstract](#) of the judgment is published on the CURIA website on the day of delivery.

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¹ Via Autobahn des Bundes, a private company that is the inalienable property of the Federal Republic of Germany.

² Initially, Tesla Germany was challenging the modification of the concessions alongside Fastned, but it subsequently withdrew from the proceedings.

³ Tank & Rast AG.

⁴ [Directive 2014/23/EU](#) of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

⁵ According to the provision at issue, the possibility of modifying a concession without a new award procedure is subject to three conditions. The first of those conditions contains two elements, the first of which relates to the materialisation of circumstances which a diligent contracting authority could not foresee and the second of which relates to the fact that those circumstances brought about a need to modify the concession concerned. The second condition stipulates that the modification concerned must not alter the overall nature of the concession contract at issue. The third of those conditions dictates that, in principle, the increase in the value of that contract must not be higher than 50% of the value of the initial concession contract.

⁶ According to the rules applicable at the time when 280 of the 360 concessions at issue were awarded, an in-house entity was an entity (i) over which the contracting authority exercised control comparable to that which the authority exercises over its own departments and (ii) which carries out the essential part of its activities with that contracting authority.