

Case C-578/23**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:**

19 September 2023

Referring court:

Nejvyšší správní soud (Supreme Administrative Court) (Czech Republic)

Date of the decision to refer:

12 September 2023

Applicant:

Česká republika – Generální finanční ředitelství (Czech Republic – General Tax Directorate)

Defendant:

Úřad pro ochranu hospodářské soutěže (Office for the protection of competition)

Subject matter of the main proceedings

The subject matter of the dispute is whether the conditions for the award of a public contract by negotiated procedure without prior publication were fulfilled and, *inter alia*, whether the legal predecessor of the applicant,¹ at the time of the conclusion of the contract for system integration into the ADIS information system ('the original contract'), was aware of the future need for basic servicing of the ADIS information system ('the ADIS IS') and whether it should have reasonably expected such a need, or whether it anticipated the need to award follow-up contracts.

¹ Czech Republic – Ministry of Finance. The applicant was established in 2013 as an independent organisational unit of the State and, as regards matters of tax administration, succeeded the Ministry of Finance, to which, however, it remains subordinate.

Subject matter of the request

The referring court is uncertain whether, when assessing the substantive condition for a negotiated procedure without prior publication, it is necessary to take account of the factual circumstances and the legal situation at the time the original contract was concluded.

Question referred for a preliminary ruling

‘Are the factual circumstances and legal situation in which the contract for the original performance, on which the follow-on public contracts are based, was concluded to be taken into account in assessing whether the substantive condition for the use of the negotiated procedure without prior publication has been fulfilled, that is to say, whether or not the contracting authority has created a state of exclusivity by its action, for the purposes of Article 31(1)(b) [of Directive 2004/18]?’²

Provisions of European Union law relied on

Article 28 of Directive 2004/18 (Public procurement procedures).

Article 31(1)(b) of Directive 2004/18 (Negotiated procedures without prior publication).

Provisions of national law relied on

Under Paragraph 21(2) of Zákon č. 137/2006 Sb., o veřejných zakázkách (Law No 137/2006 on public contracts) (‘Law on public contracts’), the contracting authority may award a public contract in an open or restricted procedure and, under certain conditions, in a negotiated procedure with prior publication or a negotiated procedure without prior publication.

Under Paragraph 23(4)(a) of the Law on public contracts, the contracting authority may award a public contract by negotiated procedure without prior publication also when the public contract may only be performed by a particular supplier for technical or artistic reasons, for the reason of protection of exclusive rights, or for reasons arising from specific legislation.

² Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (‘Directive 2004/18’).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant's predecessor in law concluded the original contract with IBM World Trade Europe/Middle East/Africa Corporation on 29 June 1992. On the basis of that contract, the ADIS IS was created, which remains the key information system for tax administration in the Czech Republic.
- 2 On 1 March 2016, the applicant initiated a negotiated procedure without prior publication pursuant to Paragraph 23(4)(a) of the Law on public contracts and awarded the public contract 'Basic post-warranty servicing of the ADIS application in 2016' on 20 May 2016. It did so on the basis of an expert report and legal opinion, for technical reasons³ and to protect the copyright of IBM Česká republika, spol. s r.o. ('the supplier')⁴ in the ADIS IS source code. The subject matter of the performance was basic post-warranty maintenance of the ADIS IS. On 20 May 2016, the applicant concluded a contract with the supplier for public contract work. The price for the public contract amounted to CZK 33 294 389, excluding VAT.
- 3 On 9 October 2017, the defendant decided that the applicant had committed an offence as the conditions for the possibility of using the negotiated procedure without prior publication pursuant to Paragraph 23(4)(a) of the Law on public contracts had not been fulfilled. The applicant had failed to demonstrate that the public contract could, for technical reasons, only have been performed by the supplier approached. At the same time, in the view of the applicant, the need to protect [the supplier's] exclusive rights was caused by the previous action of the applicant's predecessor in law.
- 4 The applicant lodged an appeal against that decision, which was dismissed by the chairman of the defendant. He concurred with the defendant's conclusions and added that it was not a technical impossibility for another supplier to perform the subject matter of the contract, but a factual consequence of the exclusivity⁵ of the supplier's copyrights which did not allow the use of a negotiated procedure without prior publication.
- 5 The applicant brought an action against the decision of the defendant's chairman before the Krajský Soud v Brně (Regional Court, Brno) ('the Krajský soud'), which dismissed the action. In the view of the Krajský soud, it is possible, by way of exception, to award a public contract in a negotiated procedure without prior

³ Without a link to the core and other modules, the independent functioning of the modules and the management and development thereof is not possible; the modules cannot be separated; the subject matter of the public contract affects current modules; the ADIS IS has been developed by the supplier who is the owner of the licence rights and familiar with the ADIS IS; technical continuity and development of the ADIS IS are required.

⁴ Its sole shareholder in 1992 was IBM World Trade Europe/Middle East/Africa Corporation.

⁵ The state of exclusivity is defined in the order for references as 'the necessity for a contract to be performed only by a particular supplier'.

publication where there are grounds for doing so under Paragraph 23(4)(a) of the Law on public contracts (formal condition), but which the contracting authority could not have foreseen and which are not attributable to it (substantive condition).

- 6 The Krajský soud considered it relevant that the applicant's predecessor in law, by its action in concluding the original contract, had created a state of exclusivity as regards the supplier's proprietary copyright. At the same time, it noted that the ADIS IS is not an information system which is expected to have a short lifetime. In addition, the field of taxation is concerned, which is objectively subject to constant change. The need for follow-up technical support must therefore have been obvious.
- 7 In the view of the Krajský soud, the applicant failed to demonstrate that there was only one possible supplier at the time of the conclusion of the original contract and further stated that the conditions for the subsequent award had to be assessed in the light of the applicable legislation at the time of that award.
- 8 The applicant lodged an appeal on a point of law against the judgment of the Krajský soud before the referring court.

The essential arguments of the parties in the main proceedings

- 9 The applicant claims that the supplier was the only possible supplier at the time of the conclusion of the original contract who was able to provide the required performance (supplying servers with its operating system and providing servicing and remote monitoring). The applicant's predecessor could not reasonably have foreseen at the time of the conclusion of the original contract that there would be a need in the future to provide additional activities necessary for the continued operation of the ADIS IS. The applicant did not itself create a state of exclusivity. Nor, in the view of the applicant, did its predecessor in law.
- 10 The applicant sought to end its dependence on the supplier since it did not have access to all the source code of the ADIS IS. However, in 2015 the supplier told the applicant that it was not considering transferring the copyright in the ADIS IS. At the time of the conclusion of the original contract, it was not even possible to obtain a full assignment of the copyright in ADIS as some of the components were used commercially worldwide by the supplier and its partners.
- 11 At the time the original contract was concluded, there was no legislation governing copyright and public procurement. The legal situation at the time the original contract was concluded is central to the assessment of the applicant's subsequent action.
- 12 If the applicant were now to carry out a procurement procedure for the supply of a new information system, it would devalue the funds invested in the ADIS IS and

would thus run the risk of that action being designated uneconomic and ineffectual.

- 13 The defendant contends that, on the basis of the exclusivity of the original 1992 contract, the applicant developed the ADIS IS exclusively by way of a negotiated procedure without prior publication until at least the end of 2019 and that the expert report does not demonstrate that the successful tenderer was the only possible supplier of the system for technical reasons.
- 14 It was not established in the administrative proceedings whether a state of exclusivity actually exists in connection with the reason of protecting exclusive rights. It was sufficient to consider whether a potential state of exclusivity had been caused.
- 15 It is clear from the wording of the original contract that the subject matter of the performance is implementation of a tax administration system in three phases. Under the original contract, only the first phase was to be implemented. The ADIS IS was therefore expected to operate long term.

Analysis of the question referred

- 16 The referring court first examines the substantive requirement of the abovementioned negotiated procedure without prior publication. According to the referring court, it is clear from the national case-law of the Nejvyšší správní soud that *‘the negotiated procedure without prior publication may be used if the reasons for its use are objective, and thus outside the control of contracting authority’s control,’*⁶ and that *‘it may be inferred unequivocally from the conditions laid down in Article 31 of Directive [2004/18] and also Paragraph 23(4) of the Law [on public contracts] that a “state of exclusivity” (that is to say the necessity for the contract to be performed only by a particular supplier) cannot be created by the contracting authority itself.’*⁷
- 17 It also pointed out that recital 50 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 states that *‘... Exclusivity can also arise from other reasons, but only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure.’* Article 32(2)(b) of that directive provides that the negotiated procedure without prior publication may be used for public contracts, inter alia, in the case of the protection of exclusive rights, when *‘no reasonable*

⁶ Judgment of the Nejvyšší správní soud of 11 January 2013, Ref. No. 5 Afs 43/2012-54, No 2790/2013 Sb. NSS, *Ministerstvo zemědělství*.

⁷ Judgment of the Nejvyšší správní soud of 12 May 2016, Ref. No. 1 As 256/2015-95, No 3436/2016 Sb. NSS, *Dopravní podnik hl. m. Prahy*.

alternative or substitute exists’ and when *‘the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement’*. Although the period for implementing that directive had not yet expired when the tendering procedure was initiated, the referring court assumes that this was merely an explicit expression of an existing rule.⁸

- 18 Although the Court of Justice has not yet considered in its case-law whether it is necessary, for the use of the negotiated procedure without prior publication, that the reason for which a public contract needs to be awarded only to a particular economic operator pursuant to Article 31(1)(b) of Directive 2004/18 is not imputable to the contracting authority, the referring court considers the interpretation of EU law in that respect to be *acte clair*.
- 19 However, the referring court has doubts as to whether, when assessing that substantive condition, it is necessary to take account of the factual circumstances and legal situation at the time when the contracting authority is claimed to have created a state of exclusivity. In the present case, the question is therefore whether the applicant’s predecessor in law, by establishing the proprietary copyrights in the original ADIS IS contract in 1992, caused a state of exclusivity in favour of the supplier which precludes use of the negotiated procedure without prior publication for the follow-on contract in 2016 (that is to say 24 years later).
- 20 As regards the factual circumstances and the legal situation at the time of the conclusion of the original contract, the Czech Republic (or the Czech and Slovak Federal Republic) was not a member of the European Union (or the European Economic Community) at that time. Furthermore, there was no relevant national legislation on public procurement, merely brief rules on the award of public contracts laid down by the government, which were in force as from 1 July 1992, that is to say a relatively long time after the negotiations for the conclusion of the original contract had begun. The first comprehensive legislation was laid down by Zákon č. 199/1994 Sb., o zadávání veřejných zakázek (Law No 199/1994 on the award of public contracts), with effect from 1 January 1995. As regards the licence conditions governing the ADIS IS, Zákon č. 35/1965 Sb., o dílech literárních, vědeckých a uměleckých (autorský zákon) (Law No 35/1965 on literary, scientific and artistic work (Law on copyright)), in the version in force until 31 December 1993, applied at the time the original contract was concluded. In that respect, the applicant’s assertion that there was no legislation governing copyright is unfounded, although it cannot be ignored that the experience of concluding contracts concerning copyright for complex systems such as the ADIS IS was very different at that time.
- 21 Thus, at the time of the conclusion of the original contract the applicant’s predecessor in law could legitimately have assumed that the subsequent performance could be awarded to the same supplier without the need to ensure

⁸ The referring court refers, for example, to recital 51 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

that other suppliers could also tender for the performance required. In the view of the applicant, at the time of the conclusion of the original contract, the supplier was the only possible supplier and therefore it did not have automatically to presume that other suppliers would also be capable of providing the subsequent performance.

- 22 In the view of the referring court, in relation to the question submitted for a preliminary ruling, there appears to be a contradiction in national case-law.
- 23 In its judgment of 30 November 2021, Ref. No. 3 As 60/2020-64, *Statutární město Brno*, the Nejvyšší správní soud concluded that it is necessary to assess the creation of exclusivity in the light of the time when such a relationship came about, the relevant legislation (including the fact that the Czech Republic was not a member of the EU at the time), and commercial practices at that time. In the present case, the contracting authority is claimed to have created the state of exclusivity in 1998 by laying down the licensing conditions in the contract for work on the information system. That view is supported by the fact that, if the fault of the contracting authority in awarding the original contract were fundamental to fulfilment of the substantive aspect, it would be difficult to apply retroactively the current legislation on public procurement by negotiated procedure without prior publication. In that context, the principle of non-retroactivity and legal certainty must also be taken into consideration. A further reason for taking account of the factual circumstances and legal situation at the time the original contract was awarded is that the contracting authority would, at the same time, have been obliged to use one of the more open forms of tendering procedure, even though, for technical reasons or to protect exclusive rights which originated when there was no relevant legislation, only one particular supplier could have provided the performance.
- 24 However, in its judgment of 12 March 2020, Ref. No. 10 As 372/2019-56, *Ministerstvo financí*, the Nejvyšší správní soud came to the opposite conclusion that ‘a reasonable view of the contracting environment would preclude’ acceptance of a state of exclusivity lasting “forever” (for several decades) merely because new, emerging contracts follow on from contracts concluded “a long time ago”. In the present case, too, the contracting authority is claimed to have created a state of exclusivity by concluding an contract for an information system in 1995. That view is supported by the fact that, according to the Court of Justice, the exceptions which allow the use of the negotiated procedure without prior publication must be interpreted restrictively. The applicant awarded the follow-on public contract under the Law on public contracts and Directive 2004/18. It was therefore subject to the requirement that it had not caused the state of exclusivity by its own action. From 1992 to 2016, the applicant (or its predecessor in law) could either have negotiated a new contractual arrangement for copyrights, and thus awarded the public contracts in one of the more open forms of tendering procedure, or it could have started to procure a new information system even at the cost of temporarily increased expenditure, but which could have led to long-term savings. Therefore, the situation at the time the original contract was

concluded cannot be relied on if the state of exclusivity continued after the relevant legislation on public procurement was adopted. In determining whether the negotiated procedure without prior publication is applicable, account must be taken of the point in time at which the decision was adopted to award the contract in that form.⁹

- 25 The referring court does not believe that any of the various interpretations can be considered clear, credible and, beyond reasonable doubt obviously more compelling than others. In addition, the referring court considers that resolving the issue of whether, when assessing the substantive condition, account must be taken the factual circumstances and the legal situation at the time when the contracting authority is claimed to have caused the state of exclusivity, which has not yet been resolved in the case-law of the Court of Justice, is essential not only in respect of the case under consideration here, but also in respect of similar cases concerning other contracting authorities.

WORKING DOCUMENT

⁹ Judgment of the Court of Justice of 5 October 2000, *Commission v France*, C-337/98, EU:C:2000:543, paragraph 37.