Case C-443/22

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:

5 July 2022

Referring court:

Varhoven administrativen sad (Bulgaria)

Date of the decision to refer:

21 June 2022

Appellant in the appeal in cassation:

Zamestnik ministar na regionalnoto razvitie i blagoustroystvoto i rakovoditel na Natsionalnia organ po programa 'INTERREG V-A Romania-Bulgaria 2014-2020'

Respondent in the appeal in cassation:

Obshtina Balchik

Subject matter of the main proceedings

Appeal against the decision of the Zamestnik-ministar na regionalnoto razvitie i blagoustroystvoto i rakovoditel na Natsionalnia organ po programa 'INTERREG V-A Romania-Bulgaria 2014-2020' (Deputy Minister for Regional Development and Public Works and Head of the National Authority for the Programme 'INTERREG V-A Romania-Bulgaria 2014-2020'), by which a financial correction was imposed on the Obshtina Balchik (Municipality of Balchik) in the amount of 25% of the eligible costs from the European Structural and Investment Funds (ESIF) under the contract concluded between the municipality and Infra Expert AD, Sofia, for the award of a public contract having as its object the 'Extension of the promenade of the town of Balchik, between the Darzhaven kulturen institut – kulturen tsentar "Dvoretsa" (State Institute of Culture – Cultural Centre, "The Palace") and the Kulturno-turisticheski informatsionen tsentar "Melnitsata" (Cultural and Tourist Information Centre, "The Mill")' ('Extension of the promenade') and having a contract value of 1 245 532.25 leva (BGN).

Subject matter and legal basis of the request

Request under Article 267 TFEU for an interpretation of Article 72(1)(e), in conjunction with Article 72(4)(a) and (b), 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, and recital 109 of that directive

Questions referred for a preliminary ruling

1. Does Article 72(1)(e) of Directive 2014/24, in conjunction with Article 72(4)(a) and (b) thereof, permit a national rule, or practice of interpreting and applying that rule, according to which a breach of the rules on substantial modifications of public contracts can be invoked only where the parties have signed a written agreement/annex amending the contract?

2. If the first question is answered in the negative, does Article 72(1)(e) of Directive 2014/24, in conjunction with Article 72(4)(a) and (b) thereof, permit a national rule, or practice of interpreting and applying that rule, according to which an unlawful modification of public contracts may take place not only by means of a written agreement signed by the parties but also by joint acts of the parties which are contrary to the rules on the modification of contracts, and are expressed in communications and the associated paper trail (such as that in the main proceedings), from which a common intention to effect the modification can be inferred?

3. Does the concept of 'diligent preparation of the … award' within the meaning of recital [109] of Directive 2014/24, in the part relating to the period for performance of the works, cover an assessment of the risks arising from ordinary weather conditions which could have an adverse effect on the performance of the contract within the time frame, as well as an assessment of statutory prohibitions on the performance of works during a certain period which falls within the period of performance of the contract?

4. Does the concept of 'unforeseeable circumstances' within the meaning of Directive 2014/24 cover only circumstances which arose after the award of the contract (as provided for in the national provision of Paragraph 2(27) of the Dopalnitelni razporedbi na Zakona za obshtestvenite porachki [Additional Provisions for the Law on public procurement]) and which could not have been foreseen even with reasonably diligent preparation and are not attributable to acts or omissions of the parties, but render performance under the agreed conditions impossible? Or does that directive not require that such circumstances arise after the award of the contract?

5. Do ordinary weather conditions, which do not constitute 'unforeseeable circumstances' within the meaning of recital [109] of Directive 2014/24, and a statutory prohibition – announced prior to the award of the contract – of construction works during a certain period constitute objective justification

for failure to perform the contract within the time frame? In that context, is a participant obliged (for the purposes of exercising due diligence and acting in good faith) to take ordinary risks relevant to the performance of the contract within the time frame into account in his or her calculation of the time frame proposed in the tender?

6. Does Article 72(1)(e) of Directive 2014/24, in conjunction with Article 72(4)(a) and (b) thereof, permit a national rule, or practice of interpreting and applying that rule, according to which unlawful modification of a public contract may take place in a case such as that in the main proceedings, where the time frame for performance of the contract within certain limits constitutes a condition of participation in the award procedure (and the participant is excluded if those limits are not complied with); the contract was not performed within the time frame on account of ordinary weather conditions and a statutory prohibition of activities, which was announced prior to the award of the contract, whereby those circumstances are covered by the subject matter and time frame of the contract and do not constitute unforeseeable circumstances; performance of the contract was accepted without any objections regarding the time frame, and no contractual penalty for delay was asserted, with the result that a material condition in the contract documents which determined the competitive environment was modified and the economic balance of the contract was shifted in favour of the contractor?

Provisions of European Union law and case-law relied on

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, Article 72(1)(e), in conjunction with Article 72(4)(a) and (b), and recital 109

Provisions of national law relied on

Zakon za obshtestvenite porachki (Law on public procurement; ‘the ZOP’), Article 2(1), points 1 and 2, Article 2(2), Article 107, Article 116(1), points 2, 3 and 7, in conjunction with Article 116(5), points 1 and 2

Zakon za upravlenie na sredstvata ot Evropeyskite strukturni i investitsionni fondove (Law on the management of resources from the European Structural and Investment Funds; ‘the ZUSESIF’), Article 70(1), point 9, Article 70(2), Article 73(1), Paragraph 2, point 27, of the Dopalnitelni razporedbi (Additional Provisions)

Zakon za zadalzheniata i dogovorite (Law on obligations and contracts; ‘the ZZD’), Article 20a

Naredba za posochvane na nerednosti, predstavlyavashti osnovania za izvarshvane na finansovi korektsii, i protsentnite pokazateli za opredelyane razmera na finansovite korektsii po reda na Zakona za upravlenie na sredstvata ot Evropeyskite strukturni i investitsionni fondove (Regulation on the identification of irregularities constituting grounds for making financial corrections and on the percentage indicators for determining the amount of financial corrections in accordance with the procedure under the Law on the management of resources from the European Structural and Investment Funds; 'Regulation on the identification of irregularities), point 23 of Annex 1

Zakon za ustroystvoto na Chernomorskoto kraybrezhie (Law on Spatial Planning on the Black Sea Coast), Article 15(1)

Succinct presentation of the facts and procedure in the main proceedings

1 The Municipality of Balchik is a beneficiary of the INTERREG V-A – Romania-Bulgaria cross-border cooperation programme under a contract for subsidisation from the European Regional Development Fund (ERDF). The object of the contract is the allocation of resources from that fund for the purpose of implementing ROBG-422 'Synergy of nature and culture – potential for the development of the cross-border region'.

2 In order to implement the measures financed by the European Structural and Investment Funds (ESIF), the Municipality of Balchik, as contracting authority, conducted a procurement procedure having as its object the 'Extension of the promenade'.

3 The estimated contract value of the construction works is BGN 1 245 532.25 excluding VAT. Two tenders were submitted.

4 The contract documents state, in the section 'Time frame for performance of the contract', that the contract is to be performed within a time frame of between 45 and 90 calendar days, starting from the date of the drawing up of the protocol on the opening of the construction site and the determination of the construction line and level, and ending with the signing of the legal act according to Form 15. It also states that a participant who offers a time frame for the execution of the construction and installation works ('CIW') which is shorter than the minimum time frame or longer than the maximum time frame set by the contracting authority is to be excluded from participation in the procedure as its tender would not comply with the previously announced conditions of the contract (Article 107, point 1, of the ZOP).

5 The procurement was carried out by means of a 'public competition'. The participant Infra Expert AD proposed a time frame of 45 calendar days for the execution of the CIW. In its technical proposal, the contractor stated that it had taken possible critical points, weather conditions, the specificities of the nature of the works and the deadlines for their execution into account in its planning of the

phases of work. A linear schedule setting out the technical sequence of the performance of the contract and listing the works was submitted.

6 By decision of 11 March 2019 concerning the appointment of a contractor, the Mayor of the Municipality of Balchik approved the protocols of the commission's work submitted to him and declared the participant Infra Expert AD as the tenderer awarded first place, it having proposed a price of BGN 1 245 532.35 excluding VAT, or BGN 1 494 638.70 including VAT, and a time frame for the execution of the CIW of 45 calendar days starting from the date of the determination of the construction line and level.

7 The time frame for performance of the public contract was 45 calendar days, but the performance of the subject matter of the contract it in fact took 250 days. The municipality submits that there were objective reasons for the extension of that time frame. It submitted a report from the Natsionalen institut po meteorologia i hidrologia (National Institute for Meteorology and Hydrology), Varna office, on the meteorological situation in the period from 18 November 2019 to 30 January 2020. According to the municipality, the works had been suspended because the weather conditions were unfavourable and Article 15(1) of the Law on Spatial Planning on the Black Sea Coast introduced a prohibition on the performance of construction and assembly works in the national seaside resorts along the Black Sea coast in the period from 15 May to 1 October.

8 On 28 February 2020, a declaratory notice of acceptance of the works (Form 15) was issued, certifying that the contractor had fulfilled all its obligations, without addressing the fact that the works had been carried out over a period longer than that specified in the contract notice (maximum period of 90 days) and the technical proposal submitted (45 calendar days) and, respectively, in the contract relating to the public contract. The contracting authority did not seek to enforce a penalty for late performance.

9 A final audit report of the Ministerstvo na regionalnoto razvitie i blagoustroystvoto (Ministry of Regional Development and Public Works) raised a suspicion of an infringement, categorised as an irregularity under point 23(a) of Annex No 1 to Article 2(1) of the Regulation on the identification of irregularities, allegedly consisting in an unlawful modification of the public contract in the part relating to the time frame for performance.

10 In the course of the audit, the Head of the National Authority notified the beneficiary of the suspicion of an irregularity and of the opening of a procedure for determining a financial correction, giving it the opportunity, as required by Article 73(2) of the ZUSESIF, to submit written observations concerning the merits and amount of the financial correction and, if necessary, to provide evidence.

11 Following an examination of the facts, the procedure ended with the issuance of a decision on 26 October 2020, by which the Head of the National Authority

imposed a financial correction on the Municipality of Balchik in the amount of 25% of the eligible costs from the European Structural and Investment Funds (ESIF) under the contract concluded between the municipality and Infra Expert AD, Sofia, for the award of public contract No 229 of 19 April 2019, having as its object the 'Extension of the promenade'.

The essential arguments of the parties in the main proceedings

12 In order to establish an infringement of point 3 of Article 116(1) of the ZOP, in conjunction with points 1 and 2 of Article 116(5) thereof, the head of the National Authority considered the following:

13 The contract documents stipulate the time frame for performance with a minimum and maximum duration (45 to 90 days) and provide that a participant proposing a time frame outside that tolerance range is to be excluded. That time frame determines the competitive environment for participation. In calculating the time required to perform the subject matter of the contract, both the contracting authority and the participant should have taken into account all foreseeable circumstances which were relevant in that regard. In the present case, despite the contractual obligation to perform the works within 45 calendar days, performance actually took 250 days, with notices suspending the works having been issued.

14 One of the reasons for the suspension of the works was the unfavourable weather conditions. The authority categorised them as circumstances which were normal for the time of year concerned and which any experienced contractor could have taken into account when calculating the time frame for performance proposed in its tender. The other reason was the beginning of the tourist season and the prohibition, under Article 15(1) of the Law on Spatial Planning on the Black Sea Coast, on the carrying out of construction and assembly works in the national seaside resorts along the Black Sea Coast in the period from 15 May to 1 October. That circumstance had been announced by the legislature before the date of the public contract and does not constitute an unforeseeable circumstance. It should therefore have been taken into account in the calculation of the time frame for performance.

15 The technical proposal for the performance of the contract of Infra Expert AD specified a time frame for performance of 45 days, with a linear schedule setting out the technical sequence of the works. In the exercise of due care and with careful preparation, the participant should have taken into account the statutory prohibition and the possibility of unfavourable weather conditions which are normal for the seasons in question, and should have factored them into its calculation of the time frame for performance.

16 The National Authority concluded that an unlawful substantial modification of the public contract had in fact taken place, taking into account the fact that the time frame for performance had been set in the documents in such a manner, and with limits of such a nature, that non-compliance therewith would lead to the exclusion

of the participant (point 1 of Article 107 of the ZOP); that that period determined the competitive environment; that the successful participant had proposed the shortest possible time frame for performance of 45 days; and that the construction works had been suspended several times due to normal adverse weather conditions and statutory prohibitions which did not go beyond the limits of the exercise of due diligence and the preparation of its assessment (outside the cases under point 3 of Article 116(1) of the ZOP).

17 The actual construction period of 250 days exceeded the agreed time frame by 205 days. In its technical proposal, the contractor had stated that the planning of the work phases had taken into account possible critical points, weather conditions and the specificities of the nature of the works, from which it follows that it had been aware of the risk of adverse weather conditions during the period of performance of the contract. The statutory prohibitions are known to everyone. The adverse weather conditions are not to be regarded as unforeseeable circumstances within the meaning of point 27 of Paragraph 2 of the Additional Provisions for the ZOP.

18 It was stated in conclusion that the contract had been substantially modified pursuant to points 1 and 2 of Article 116(5) of the ZOP, since the time frame resulting from the documents had determined the competitive environment, and a longer time frame for performance would have had an impact on the selection results. If a participant had proposed a time frame for performance corresponding to the actual performance period, it would have been excluded from participation (point 1 of Article 107 of the ZOP).

19 The National Authority's decision to impose a financial correction was challenged before the Administrativen sad – Dobrich (Administrative Court, Dobrich, court of first instance), which annulled the contested administrative act on the grounds of substantive illegality.

20 The court of first instance proceeded on the assumption that the text of Article 120 of the ZOP stipulates that the provisions of the Targovski zakon (Commercial Code; 'the TZ') and the ZZD are applicable to all unregulated matters relating to the award, performance and termination of public contracts. According to Article 288 of the TZ, in the case of commercial transactions, matters not regulated in the TZ are subject to the provisions of civil law. According to Article 20a of the ZZD, contracts can be modified only by agreement of the parties or in the cases provided for by law, whereby, with regard to Article 112(1) of the ZOP, modifications of contracts can be validly effected only by means of written agreements. The administrative authority therefore adopted its decision in breach of substantive law in so far as it assumed that the contract at issue had been modified by implied action.

21 From a formal point of view, the contractor did not fulfil its obligations properly, namely not within the time frame. However, this does not constitute a modification of the contract, but a legally relevant circumstance which triggers the

beneficiaries' right to enforce the agreed contractual penalty, which had been included in the content of the contract expressly and in advance. Accordingly, the present case does not concern a modification of the contract, but, rather, the improper performance thereof. However, there are significant differences between a modification of the contract and improper performance combined with the stipulated penalty for improper performance.

22 The administrative authority wrongly assumed that all possible reasons for the suspension and delay of the construction works, including adverse winter weather conditions and statutory prohibitions, should have been included and taken into account in the stipulated time frame for performance. It is legally irrelevant for what reasons the construction works had been suspended and whether the reasons had been unforeseeable for the parties.

23 The Head of the National Authority brought an appeal in cassation before the Varhoven administrativen sad (Supreme Administrative Court) against the decision of the Administrative Court, Dobrich annulling the financial correction imposed on the Municipality of Balchik.

24 Concerning the substance of the dispute, the appellant in cassation maintains the view that it took in the statement of reasons for the administrative act which it adopted, adding that 'force majeure' is a fortuitous event that does not encompass the risk factors existing in the ordinary course of the contractor's activity. The contractor, with good preparation, should have taken the natural seasonal adverse weather conditions into account as ordinary risks in its calculation of the time frame for performance. Failure to take them into account in the calculation of the time frame for performance and the subsequent failure actually to perform the contract within the time frame points to a subjective rather than objective impossibility of performance.

25 The respondent in the appeal in cassation takes the view that the adverse weather conditions are not the subject of the legal acts under Form 10. The legislature does not prescribe a requirement to state reasons for their issuance. The construction works were resumed after the adoption of a legal act under Form 11 and not because the reasons for suspension ceased to exist. Legal acts under Forms 10 and 11 are issued where business partners with reciprocal commitments have a common intention.

26 The respondent in the appeal in cassation further submits that a modification of the public contract can be considered to be effective only where the parties agree to it in writing.

Succinct presentation of the reasoning in the request for a preliminary ruling

27 The Supreme Administrative Court is seised of a dispute whose resolution concerns the interpretation and application of provisions of EU law, regard being had to the principle of the primacy of EU law over domestic law in the event of a

conflict between them. An additional argument militating in favour of the admissibility of the present request for a preliminary ruling is the fact that the European Union budget is affected in so far as the dispute relates to the lawful expenditure of ESIF funds.

28 The national case-law on the interpretation of point 7 of Article 116(1) of the ZOP, in conjunction with points 1 and 2 of Article 116(5) thereof, which transposes Article 72(1)(e) of Directive 2014/24, in conjunction with Article 72(4)(a) and (b) thereof, is inconsistent. In addition, there are doubts as to the correct transposition of that directive in the part concerning 'unforeseeable circumstances', as well as concerns in practice as to whether the foreseeable risks for the performance of the contract are to be taken into account when determining the time frame for performance. The dispute concerns the following issues.

29 One of the issues of the dispute is whether it is possible to presume an unlawful modification of a public contract even where the parties have not concluded a written agreement amending the contract, but there are other forms of communication between them, with a paper trail from which an amendment of material terms of the contract can be inferred.

30 It is true that public contracts as defined in point 5 of Article 2(1) of Directive 2014/24 are contracts concluded in writing. An effective modification of such contracts requires a written agreement of the parties to amend the clauses of the contract. However, it is also true that point 18 of Article 2(1) of Directive 2014/24 defines 'written' or 'in writing' as any expression consisting of words or figures which can be read, reproduced and subsequently communicated, including information transmitted and stored by electronic means. While – according to recital 58 of Directive 2014/24 – essential elements of a procurement procedure such as the procurement documents, requests for participation, confirmation of interest and tenders should always be made in writing, oral communication with economic operators should otherwise continue to be possible, provided that its content is documented to a sufficient degree. The established difference in interpretation given by the national court to those provisions of secondary EU law raises doubts as to their meaning.

31 According to one of the views expressed in the case-law of the Supreme Administrative Court (for example in judgment No 6755/2020), the intention of the parties to a public contract must be interpreted not only on the basis of the content of that contract, but, rather, the circumstances, statements and conduct of the parties must also be analysed. A modification of a contract in a manner contrary to Article 116(1) of the ZOP cannot be assumed only in the case of an effective written agreement between the parties. The existence of an unlawful modification of the contract must be assessed in the light of all the relevant circumstances, including the statements and conduct of the parties in the performance of the contract.

32 Failure to perform the contract within the time frame objectively constitutes a materialisation of the case of a substantial modification of the contract, provided that, in the absence of objective reasons for the failure, it modifies a material condition of the documents, the bid of the successful tenderer and the contract concluded with him or her, and provided that the contracting authority does not seek to enforce a penalty for improper performance but accepts the latter without complaint. The time frame resulting from the documents determined the competitive environment; such a modification allows for conditions that would have attracted the interest of other participants also and shifts the balance of the contract in favour of the contractor.

33 That standpoint is opposed by the opposite view (taken in, for example, the judgment of the Supreme Administrative Court in Administrative Case No 7911/2020). According to that view, a modification of the contract exists only where the parties have agreed to amend a clause of the contract by written agreement. Non-assertion of a contractual penalty for delay is not to be regarded as a modification of the contract. If it is to be assumed that the reason for the delayed performance of the public contract is to be attributed to the contractor, this is not to be regarded as a modification of the contract, but as improper performance of the contract by that contractor. There is no legal provision that creates the fiction that delayed performance in the event of non-assertion of the contractual right to damages for delay constitutes a 'modification of the contract'.

34 There is also a need to clarify the notions of 'diligent preparation of the … award', 'unforeseeable circumstances' and 'circumstances which a diligent contracting authority could not foresee' within the meaning of Directive 2014/24.

35 For the reasons set out above, the interpretation of Article 72(1)(e) of Directive 2014/24, in conjunction with Article 72(4)(a) and (b) thereof, of Article 72(1)(c) in conjunction with recital [109] thereof, and of concepts such as 'unforeseeable circumstances', 'diligent preparation of the … award' and 'circumstances which a diligent contracting authority could not foresee', is necessary for the correct resolution of the dispute in the main proceedings.

36 According to recital [109] of Directive 2014/24, the notion of 'unforeseeable circumstances' refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority.

37 The national law on public procurement, the ZOP, defines the notion of 'unforeseeable circumstances' as circumstances that occurred after the award, which could not have been predicted by the exercise of due diligence, and are not attributable to acts or omissions of the parties, but render performance under the agreed conditions impossible.

38 The national legislature has provided for the possibility, in points 2 and 3 of Article 116(1) of the ZOP, of a lawful modification of the public contract, whereby point 2 concerns unforeseeable circumstances requiring additional

supplies, services or works not covered by the initial public contract and point 3 concerns circumstances which could not have been foreseen by the contracting authority despite exercising due diligence and which require a modification which does not alter the subject matter of the contract or the framework agreement.

39 It is also questionable to what extent the directive has been correctly transposed into national law with regard to the definition of 'unforeseeable circumstances'.

40 It is also relevant to the resolution of the dispute whether, in a case such as that in the main proceedings – in which the time frame for performance within certain limits was laid down as an initial requirement in the contract documents, whereby a participant is to be excluded in the event of non-compliance with those limits – the provisions of Directive 2014/24 allow a degree of flexibility with regard to modifications after the award of the contract in the form of the extension of that time frame for performance via the issuance of legal acts suspending it during the works for reasons which are not unforeseeable circumstances, but adverse weather conditions which are normal for the time of year and statutory prohibitions which the parties to the contract could have identified or foreseen by exercising due diligence at the time when the contract was concluded. Unlawful modification of the contract requires that the parties have acted jointly.

41 Do weather conditions that are normal for the time of year in question, which are relevant to the performance of the contract, and statutory prohibitions on activities covered by the subject matter of the contract, constitute risks which the parties to the contract could have foreseen if they had been reasonably diligent in their preparation and had exercised due care before concluding the contract?

42 With regard to Directive 2014/24/EU, the present Chamber proceeds on the assumption that that directive is not applicable to the proceedings before the national court, since the value of the public contract at issue is below the thresholds of that directive. On the other hand, Article 116 of the ZOP transposes Article 72 of Directive 2014/24, and an interpretation is necessary with a view to the uniform application of the law in the Member States of the European Union.

43 For the reasons set out above, the Supreme Administrative Court submits, of its own motion, the present request for a preliminary ruling with the questions set out above.