Case C-452/23

Request for a preliminary ruling

Date lodged:

19 July 2023

Referring court:

Oberlandesgericht Düsseldorf (Germany)

Date of the decision to refer:

16 June 2023

Applicants and appellants:

Fastned Deutschland GmbH & Co KG

Tesla Germany GmbH

Defendant and respondent:

Die Autobahn GmbH des Bundes

[…]

OBERLANDESGERICHT DÜSSELDORF

ORDER

in the public procurement review proceedings

1. **Fastned Deutschland GmbH & Co. KG,** […]

[…] Cologne,

2. **Tesla Germany GmbH,** […]

[…] Berlin,

applicants and appellants,

[…],

v

Die Autobahn GmbH des Bundes […],

[…] Berlin,

defendant and respondent,

[…],

further parties to the proceedings:

1. Autobahn Tank & Rast GmbH, […] Bonn,

2. Ostdeutsche Autobahntankstellen GmbH, […] Berlin,

joined parties,

[…],

the Vergabesenat (Procurement Chamber) of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) at the hearing of 27 April 2023 […]

has made the following order:

[…].

The following question on the interpretation of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement is referred to the Court of Justice of the European Union for a preliminary ruling:

Is Article 72(1)(c) of Directive 2014/24/EU to be interpreted as meaning that its scope also includes public contracts which were previously awarded to in-house entities outside the scope of Directive 2014/24/EU but to which the conditions of in-house procurement no longer apply at the time of the contract modification?

G r o u n d s:

I

1 The defendant is an infrastructure company under private law which is the inalienable property of the Federal Republic of Germany. The Bundesministerium für Verkehr und digitale Infrastruktur (Federal Ministry of Transport and Digital Infrastructure) entrusted it with the planning, construction, operation, maintenance, financing and asset management of the federal motorways with

effect from 1 January 2021. The financial resources necessary for the performance of its tasks are made available to it by the Federal Republic of Germany.

2 Part of the motorway network are more than 400 managed service areas where ancillary businesses in the form of refuelling stations and service facilities are maintained. The operator of the ancillary businesses was originally the Gesellschaft für Nebenbetriebe der Bundesautobahnen mbH (GfN), founded by the Federal Republic of Germany in 1951. It was renamed Tank & Rast AG in 1994 in anticipation of a planned privatisation. That initially did not change the ownership structure; the only shareholder was the Federal Republic of Germany. In the same year, Tank & Rast AG acquired Ostdeutsche Autobahntankstellengesellschaft mbH.

3 Between 1996 and 1998, the Federal Republic of Germany, without prior invitations to tender, concluded approximately 280 concession contracts, which are still in force today, with the then still federally owned Tank & Rast AG for the operation of ancillary businesses along federal motorways, on the basis of a new model concession contract. That model contract gives the concessionaire the right to construct and operate an ancillary business on defined business premises which serves the needs of the users of the federal motorway. In return, the concessionaire has to pay a turnover-based concession fee. Part of the concession contracts is a concept of operations that assumes a set number of fuel pumps and servicing spaces as well as a service facility and public toilets. The ancillary business is to be kept open 24 hours a day. The concession contracts have a term of up to 40 years. The model concession contract was published in the official section of the Verkehrsblatt, the gazette of the Federal Ministry of Transport and Digital Infrastructure, of 1997, under No 226, p. 825 et seq.

4 Starting in 1998, Tank & Rast AG was privatised through the bank […] within the framework of an investor selection procedure […]. The investor selection procedure, in which approximately 50 interested parties from Germany and elsewhere took part, ultimately led to an agreement with a consortium comprising LSG Lufthansa Service Holding AG, Allianz Capital Partners GmbH and three investment fund companies. The companies belonging to the consortium gave notice of the planned acquisition to the Commission of the European Communities, which decided on 7 December 1998, under Article 6(1)(b) of Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, that there were no objections to it (Case No IV/M.1361). Through a renaming process, the joined parties in the present case emerged from Tank & Rast AG as the new concession holders.

5 After privatisation, approximately 80 more concession contracts were awarded to the joined parties in the years 1999 to 2019, 19 of which, according to the joined parties' own submissions, were awarded to them in the context of an invitation to tender. The joined parties are consequently the existing concessionaires of approximately 90 per cent of all ancillary businesses.

6 The federal Schnellladegesetz (Law on fast charging) of 25 June 2021, which applies in respect of all-battery electric vehicles covered by Article 4 of Regulation (EU) 2018/858, in the first sentence of Paragraph 5(3) obliges the defendant to offer the holder of any concession to operate an ancillary business with a refuelling station the option of installing, maintaining and operating the fast-charging points planned for that location on a commercial basis, if that is required and does not conflict with Part 4 of the Gesetz gegen Wettbewerbsbeschränkungen (Law on competition) (Bundesgesetzblatt (Federal Law Gazette) I, 2021, p. 2141 et seq.). Part 4 of the Law on competition sets out the provisions of German procurement law. In implementation of that statutory duty, the defendant agreed with the joined parties on 28 April 2022 to add the installation, maintenance and operation of functional fast-charging infrastructure on a commercial basis to the approximately 360 existing concession contracts, including an obligation to make available a certain number, set for each location, of charging points.

7 The defendant announced the completed modification in the Official Journal of the European Union under 6 May 2022, justifying the lack of an invitation to tender by reference to Paragraph 132 of the Law on competition. It explained that the provision of fast-charging infrastructure had become necessary as an additional service within the framework of the concession contracts which had not yet been foreseeable when they were concluded (Supplement to the Official Journal of the European Union, notice publication number 2022/S 089-245969).

8 The applicants both operate charging infrastructure for electric vehicles. By lawyer's letter of 20 May 2022, they requested the initiation of review proceedings. In support of their request, they submitted that, under Paragraph 135(1)(2) of the Law on competition, the supplementary agreement concluded with the joined parties was ineffective since the contract had been awarded without prior publication of a contract notice at EU level. The modification, they claimed, could not be based on Paragraph 132 of the Law on competition. They submitted that Paragraph 132 was not even applicable, because the existing concessions had not been awarded within the framework of an invitation to tender.

9 The Zweite Vergabekammer des Bundes (Second Federal Public Procurement Board) rejected the applicants' request for review by decision of 15 June 2022 (VK 2-54/22). The provisions of Paragraph 132 of the Law on competition, it argued, were not applicable to existing concessions under Paragraph 154(3) of the Law on competition. It found that the modification effected by the supplementary agreement of 28 April 2022 was not even significant within the meaning of Paragraph 132(1) of the Law on competition. The ancillary businesses, it held, served the refuelling needs of road users, which, at least from a functional perspective, also included refuelling with electricity. It found that the modification was in any event permissible under Paragraph 132(2)(3) of the Law on competition, as the need for fast-charging infrastructure could not have been foreseen in 1998.

10 The applicants immediately lodged an appeal against the decision of the Public Procurement Board before the Higher Regional Court, Düsseldorf. They argue that a modification under Paragraph 132(1) and (2) of the Law on competition is already precluded by the fact that the provision is not in any way applicable to the modification of a public contract which was originally awarded not in a competitive procedure but to an in-house entity without invitation to tender, as is evident from the judgment of the Court of Justice of the European Union of 12 May 2022, Case C-719/20, *Comune di Lerici*. That argument, they submit, applies a fortiori where the original concession was itself awarded in contravention of public procurement law at the time; it is not permissible to award contracts in house, they argue, in the knowledge that privatisation will follow.

11 The defendant and the joined parties defend the decision of the Public Procurement Board. Insignificant modifications to public contracts are always permissible, they argue. They submit that Article 72 of Directive 2014/24/EU and Paragraph 132 of the Law on competition only cover significant modifications in any event. They argue that those provisions apply to such modifications irrespective of the circumstances in which the contracts were originally awarded. The judgment of the Court of Justice cited, they aver, is relevant only to the question whether a new invitation to tender had to be issued when conditions for in-house procurement ceased to apply, because this was a substantial change not covered by any exception.

II

12 In the view of the present Chamber, the success of the appeal depends on the answer to the question referred for a preliminary ruling. Before a decision can be taken, therefore, the proceedings must be stayed and a preliminary ruling obtained from the Court of Justice of the European Union pursuant to point (b) of the first paragraph and the second paragraph of Article 267 TFEU. The following legal considerations play a role in the decision to refer:

13 […]. The only decisive point is whether the supplementary agreement concluded with the joined parties is ineffective under Paragraph 135(1)(2) of the Law on competition and the request for review is therefore well founded.

14 The relevant principles are enshrined in Paragraphs 135(1), 132(1) and (2), and 154(3) and (4) of the Law on competition of 26 June 2013 (Federal Law Gazette I, 2013, p. 1750 et seq.) as amended on 18 April 2016 (Federal Law Gazette I, 2016, p. 203 et seq.), excerpts of which read as follows:

15 Paragraph 135 of the Law on competition: Ineffectiveness

(1) A public contract shall be deemed ineffective from the outset if the public contracting authority

1. […]

2. has awarded the contract without prior publication or announcement in the Official Journal of the European Union without this being expressly permissible in accordance with the law

and this violation has been ascertained in review proceedings.

(2) Ineffectiveness pursuant to subparagraph (1) can be established only if this is claimed in review proceedings within 30 calendar days after the public contracting authority informs the affected candidates and tenderers concerning the conclusion of the contract, but at the latest 6 months after conclusion of the contract. If the contracting authority has published the award of the contract in the Official Journal of the European Union, the time limit for claiming ineffectiveness shall end 30 calendar days after publication of the notice of the award in the Official Journal of the European Union.

16 Paragraph 132 of the Law on competition: Modification of contracts during their term

(1) Significant modifications to a public contract during its term require a new procurement procedure. Modifications are significant if they result in the public contract differing substantially from the public contract originally awarded. […]

(2) Notwithstanding subparagraph (1), it is permissible to modify a public contract without conducting a new procurement procedure where

[…]

3. the need for modification has been brought about by circumstances that a diligent public contracting authority could not have foreseen, and the overall nature of the contract is not altered by the modification […].

In the cases referred to in points 2 and 3 of the first sentence, the price may not be increased by more than 50 per cent of the value of the original contract.

17 Paragraph 154 of the Law on competition: Other applicable provisions

As for other matters, the following provisions shall apply to the award of concessions, […]:

[…]

3. Paragraph 131(2) and (3) and Paragraph 132 […],

4. Paragraphs 133 to 135, […].

18 The Chamber considers that the conditions for applying Paragraph 132(2)(3) of the Law on competition are satisfied by the supplements to almost all the concession contracts because the public contracting authority could not have foreseen, in any event when the contracts were concluded between 1996 and 1998, that a need would develop for fast-charging infrastructure at federal motorway service areas and that a legal obligation to construct them would be created, and because the overall nature of the concessions for ancillary businesses are not altered by the supplements. Nor is the value of the original contract increased by more than 50 per cent.

19 What is not clear to the Chamber is whether the scope of Paragraph 132 (2)(3) of the Law on competition, which transposed Article 72(1)(c) of Directive 2014/24/EU on public procurement into national law and is therefore to be interpreted in accordance with the directive, also covers contracts which were concluded, outside the scope of the procurement law enshrined in Part 4 of the Law on competition, with an in-house entity of the public contracting authority if the criteria for in-house procurement are no longer fulfilled at the time of the contract modification because 100 per cent of the concessionaire's capital is now held by private investors.

20 That, however, is crucial to the decision, because the Chamber considers the supplementary agreement to be a significant modification within the meaning of the first sentence of Paragraph 132(1) of the Law on competition. The decisive point is whether the defendant and the joined parties were permitted, under Paragraph 132(2)(3) of the Law on competition, read in conjunction with Paragraph 154(3) thereof, to add the installation, maintenance and operation of functional fast-charging infrastructure on a commercial basis to the existing concession agreements between them, which were awarded without invitation to tender, without conducting a new procurement procedure, because that would mean the award of the contract without prior publication or announcement in the Official Journal of the European Union, as set out in Article 135(1)(2) of the Law on competition, was expressly permissible in accordance with the law.

21 The Chamber considers the wording of Article 72 of Directive 2014/24/EU insufficiently clear. The first sentence of Article 72(1) and Article 72(2) and (5) do refer to 'a new procurement procedure'. Article 72(1)(b) and (4)(a) include the phrase 'the initial procurement procedure'. Recital 109 of Directive 2014/24/EU, which relates to Article 72(1)(c), explains that a certain degree of flexibility is needed to adapt the contract to unforeseeable circumstances without a 'new procurement procedure'. It is common parlance to refer to a 'new' procedure if there has been a preceding 'old' or 'initial' procedure. The term 'procurement procedure' in connection with Directive 2014/24/EU can also be taken to indicate that a formal procedure in accordance with the provisions of Directive 2014/24/EU is meant. That need not be the case, however. The commissioning of an in-house entity can also be understood as procurement (in-house procurement), and the sequence of events leading up to the awarding of the contract might be referred as a procedure.

22 In the view of the Chamber, the case-law of the Court of Justice of the European Union to date also does not supply an unambiguous answer. In two judgments, the Court of Justice applied its principles for subsequent contract modifications to contracts which were concluded at a time when Community law was not yet applicable. In its seminal judgment of 19 June 2008, C-454/06, *pressetext*, it not only developed the principles governing when amendments to the provisions of a public contract during the term of the contract should be deemed a new award of a contract, but also considered those principles applicable to a contract which had been concluded prior to the Republic of Austria's accession to the European Union and to which the provisions of Community law therefore did not apply at the time (EU:C:2008:351, [2008] ECR 1-4401, paragraphs 28 and 34 to 37). In the context of proceedings against the Italian Republic concerning a failure to fulfil obligations, the Court noted, with reference to the extension of a works concession concluded in 1969 and so prior to the adoption of EU rules on the matter, that the applicable EU legislation was that in force at the date of the amendment and the fact that the original concession contract was concluded prior to the adoption of EU rules on the matter was therefore without consequence (CJEU, judgment of 18 September 2019, C-526/17, EU:C:2019:756, paragraph 60).

23 That could be understood to mean that, for the applicability of the principles governing the subsequent modification of a contract without conducting a (new) procurement procedure, which are now laid down in Article 72 of Directive 2014/24/EU, it does not matter how the initial contract came into being, in particular whether the principles of non-discrimination, equality and effective competition were observed. That view might also be supported by the fact that the Court generally sees no cause to intervene in existing legal relationships established for an indefinite period or for several years if those legal relationships came into being before the relevant EU rules were in force (CJEU, judgment of 24 September 1998, C-76/97, EU:C:1998:432, [1998] ECR I-5357, paragraph 54, *Tögel*; CJEU, judgment of 5 October 2000, C-337/98, EU:C:2000:543, [2000] ECR I-8377, paragraph 38, *Matra-Transport*).

24 In contrast, the judgment of the Court of 12 May 2022, C-719/20, *Comune di Lerici* (EU:C:2022:372), goes in a different direction. The Italian municipality of Lerici had, by a decision expressly described as the 'in-house award' of the contract, entrusted its municipal waste management to a company whose shareholders were exclusively local authorities, including itself. Subsequently, the company experienced financial difficulties and was taken over by the listed company IREN SpA, which continued the provision of the outsourced services. The Court saw that as an unlawful modification of the contract. In the Court's view, it followed from the wording of Article 72(1) of Directive 2014/24/EU that its scope was limited to scenarios where the legal successor of the original contractor assured the continued performance, in accordance with the requirements of the directive, of the public contract which was the subject of the initial procurement procedure, these including observance of the principles of non-discrimination, equality and effective competition between economic operators. That interpretation, the Court held, was also supported by Article 72(4)

of the directive, under which a contract modification was considered to be significant if it introduced conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure, and by the objective pursued by the directives in this area of attaining the widest possible opening up of public contracts to competition to the benefit not only of economic operators but also of contracting authorities. Accordingly, it found, a change of contractor such as that at issue in the main proceedings could not be covered by Article 72 of Directive 2014/24, as the public contract concerned in the main proceedings had originally been awarded to an in-house entity without invitation to tender (EU:C:2022:372, paragraphs 41 to 43).

25 That interpretation could militate in favour of generally excluding contracts initially awarded to in-house entities from the scope of Article 72 of Directive 2014/24/EU, and consequently from the scope of the provision relevant to the present case, Article 72(1)(c) thereof, if the conditions for in-house procurement are no longer satisfied at the time of the modification of the contract.

26 The principal objective of the Community rules is, via the public procurement system, to guarantee free competition on services and the opening up of markets to undistorted competition in all the Member States. In order to pursue that two-fold objective, Community law applies inter alia the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom (CJEU, judgment of 19 June 2008, C-454/06, EU:C:2008:351, [2008] ECR I-4401, paragraphs 31 to 32, *pressetext*; CJEU, judgment of 12 May 2022, C-719/20, EU:C:2022:372, paragraph 42, *Comune di Lerici*). However, the objective of opening up the field of public procurement to competition as widely as possible would not be achieved if it were possible for a contract which had been awarded in-house to be modified during its term without a new procurement procedure although the criteria for in-house procurement were no longer satisfied. At no point would other tenderers and candidates have the opportunity to obtain the contract – neither the initial contract, because it was not within the scope of the Public Contracts Directive, nor any significant contract modification, because it would be covered by Article 72 of Directive 2014/24/EU, specifically in the present case by Article 72(1)(c) thereof.

27 In the view of the Chamber, however, it is not beyond doubt whether the Court actually intended to limit the scope of Article 72(1) to that effect. Its statements can also be understood as meaning that, although Article 72(1) is in principle applicable in respect of a contract initially awarded in-house, the change of contractor under review nonetheless does not satisfy the conditions set out in Article 72(1)(d)(ii) of Directive 2014/24/EU, under which it must not entail other substantial modifications to the contract.

28 The Court not only sees its interpretation confirmed by the rules in Article 72(4) but also states that the continued performance assured by IREN SpA of the public contract at issue in the main proceedings stems from the modification of a fundamental condition of the contract, which requires an invitation to tender (CJEU, judgment of 2 May 2022, C-719/20, EU:C:2022:372, paragraphs 42 and 50, *Comune di Lerici*). However, the modification of a fundamental condition of a contract amounts to a substantial modification, which, under Article 72(1)(d)(ii), a change of contractor must not entail.

29 The applicability of Article 72(1)(c) to contracts initially awarded in-house without invitation to tender might also be supported by the fact that it should make no difference, with regard to the objectives of Community law (see paragraph 26), whether the contract was awarded outside the scope of Directive 2014/24/EU because it was a case of in-house procurement or because Community law was not yet in force at all when the initial contract was concluded.

30 In contrast, it is irrelevant in the view of the referring Chamber whether the initial award of the concession to the joined parties in the run-up to the intended privatisation was compliant with public procurement law or whether the privatisation of the joined parties beginning in 1998 constituted a substantial modification of the concession contracts, since in that respect the 6-month time limit established by Paragraph 135(2) of the Law on competition in transposition of Article 2(1)(b) of Directive 89/665/EEC is long past.

31 The intention behind that cut-off point, to ensure legal certainty after the expiry of suitable minimum limitation periods, would be undermined if the compliance with public procurement law of the initial award or of previous modifications could be called into question with every subsequent modification even after those periods have expired. The general principle of legal certainty precludes reviewing the award or amendment of a public contract after the limitation period provided for has expired (CJEU, judgment of 26 March 2020, C-496/18, EU:C:2020:240, paragraph 102, *Hungeod Közlekedésfejlesztési*).

32 The present Chamber takes the view that the questions to be referred for a preliminary ruling are material to the decision. It does not believe that, without the questions being answered, it would be possible to give a ruling on the dispute in the light of other legal considerations.

[…]