

**Case C-684/23****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:**

15 November 2023

**Referring court:**

Administratīvā rajona tiesa (Latvia)

**Date of the decision to refer:**

15 November 2023

**Applicant:**

SIA Latvijas Sabiedriskais Autobuss

**Defendants:**

Iepirkumu uzraudzības birojs

VSIA Autotransporta direkcija

**Subject matter of the main proceedings**

Administrative proceedings were brought before the Administratīvā rajona tiesa (District Administrative Court, Latvia) by SIA Latvijas Sabiedriskais Autobuss, seeking a declaration that the part of the decision of the Iepirkumu uzraudzības birojs (Office of Public Procurement Oversight, Latvia) referring to the lot relating to the city of Ventspils, in the tendering procedure ‘for the award of the right to provide public transport services by bus on the network of routes of regional significance’, is unlawful in so far as the company PSIA Ventspils reiss (which was awarded the contract in that tendering procedure) was given, in its capacity as internal operator, the right to participate in that tendering procedure.

**Subject matter and legal basis of the request for a preliminary ruling**

In accordance with Article 267 of the Treaty on the Functioning of the European Union, the District Administrative Court requests a preliminary ruling from the Court of Justice of the European Union on the interpretation of Article 5(2)(c) of

Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 ('Regulation No 1370/2007'), read in conjunction with Article 5(3) thereof.

### **Questions referred for a preliminary ruling**

(1) Is Article 5 of Regulation No 1370/2007 to be interpreted as meaning that, in the course of the public tendering procedure referred to in paragraph 3 of that article, the requirements laid down in paragraph 2(c) of that article for the participation of an internal operator in the tendering procedure must be verified?

(2) If the answer to Question 1 is in the affirmative, is Article 5(2)(c) of Regulation No 1370/2007 to be interpreted as meaning that the contracting authority, when it decides on the award of the contract, is required to verify whether all the requirements set out in that provision are met at the time of submission of the tender, while also taking into account circumstances arising after submission of the tender which may influence fair competition between the tenderers?

(3) If the answer to Question 1 is in the affirmative, is Article 5(2)(c) of Regulation No 1370/2007 to be interpreted as meaning that the extension of the period for performance of a service contract that was concluded previously amounts to another directly awarded public service contract within the meaning of that provision?

### **Provisions of European Union law relied on**

Recital 18 and Article 5(2), (3) and (5) of Regulation No 1370/2007.

### **Case-law of the Court of Justice**

Judgments of the Court of Justice:

Judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799.

Judgment of 21 March 2019, *Mobit and Autolinee Toscane*, C-350/17 and C-351/17, EU:C:2019:237.

Judgment of 22 December 2010, *Mercredi*, C-497/10 PPU, EU:C:2010:829.

**Provisions of national law relied on**

Article 8 of the Sabiedriskā transporta pakalpojumu likums (Law on public transport services), which lays down provisions governing the organisation of tendering procedures for public transport services.

Article 2 of the Publisko iepirkumu likums (Law on public contracts), which defines the objectives of public procurement.

**Succinct presentation of the facts and procedure in the main proceedings**

- 1 On 19 May 2021, the contracting authority, VSIA Autotransporta direkcija, with responsibility for organising public transport services in Latvia, launched an open public tendering procedure ‘for the award of the right to provide public transport services by bus on the network of routes of regional significance’ (also ‘the public tendering procedure’), in which tenders were required to be submitted by 30 August 2021.
- 2 The applicant, SIA Latvijas Sabiedriskais Autobuss, submitted a tender but, by decision of the contracting authority of 7 December 2022, its tender was rejected and the contract was awarded to PSIA Ventspils reiss.
- 3 PSIA Ventspils reiss is a municipal capital company, wholly owned by the city council of the State city (valstspilsēta) of Ventspils. Consequently, PSIA Ventspils reiss must be regarded as an internal operator within the meaning of Regulation No 1370/2007.
- 4 On 13 January 2012, Ventspils City Council concluded a contract with PSIA Ventspils reiss for the provision of public transport services by bus in the city of Ventspils until 31 December 2023.
- 5 In relation to the public tendering procedure launched by the contracting authority, the city council decided, on 27 September 2019, to shorten the duration of the service contract previously entered into with PSIA Ventspils reiss so that it ended on 30 September 2021 and to hold a tendering procedure to award the right to provide public transport services in the city. The contract also provides that the contract term may be extended if, for reasons beyond the contracting authority’s control, the tendering procedure launched does not conclude satisfactorily and it is not possible to conclude the contract in a timely manner, and in the event of a disruption of services or the immediate risk of that occurring, in accordance with Article 5(5) of Regulation No 1370/2007.
- 6 On 31 March 2021, Ventspils City Council launched a call for tenders for the ‘provision of public transport services by bus in the city of Ventspils’, which was suspended on 10 September 2021 as a result of a decision of the supervisory authority and in the light of the need to amend the specifications.

- 7 In relation to the extended tendering procedure, the city council decided, on 2 September 2021, to extend the duration of the service contract previously concluded with PSIA Ventspils reiss until the conclusion of the new contract or until 30 September 2022, whichever occurred first. As justification for the contract extension, the city council cited Article 5(5) of Regulation No 1370/2007.
- 8 On 19 September 2021, the city council launched a new tendering procedure for the ‘provision of public transport services by bus in the city of Ventspils’, which was suspended on 1 June 2023 as a result of a decision of the supervisory authority and in the light of the need to remove inconsistencies from the specifications.
- 9 Therefore, on 22 September 2022, the city council decided, on the basis of Article 5(5) of Regulation No 1370/2007, to further extend the duration of the service contract previously concluded with PSIA Ventspils reiss until the conclusion of the new contract or until 30 September 2023, whichever occurred first.
- 10 The applicant contested the decision of the contracting authority before the Office of Public Procurement Oversight (‘the Office’), in its capacity as a hierarchically superior public authority which supervises public tendering procedures.
- 11 The applicant calls into question, inter alia, the successful tenderer’s participation in the tendering procedure in its capacity as an internal operator.
- 12 The contracting authority’s decision was confirmed by decision of the Office of 6 February 2023.
- 13 The applicant appealed to the District Administrative Court against the decision of the Office, maintaining, inter alia, its position to the effect that PSIA Ventspils reiss should have been excluded from participation in the public tendering procedure.

#### **Essential arguments of the parties in the main proceedings**

- 14 The applicant submits that the contracting authority was obliged to exclude the successful tenderer, PSIA Ventspils reiss, from participation in the public tendering procedure since, in its view, the period laid down in Article 5(2)(c) of Regulation No 1370/2007, with effect from which an internal operator is entitled to participate in other calls for tender, was not complied with.
- 15 The applicant argued that the public authorities misinterpreted the provisions of Regulation No 1370/2007, since they did not take account of the fact that the duration of the contract concluded by PSIA Ventspils reiss with the city council was extended, which is essentially equivalent to the conclusion of a new directly awarded contract.

- 16 The applicant further submits that, in order to ensure that PSIA Ventspils reiss was entitled to participate in the public tendering procedure held by the contracting authority, the city council initially decided to shorten the duration of the contract, although it later extended it a number of times. In the applicant's submission, such conduct itself conflicts with the objective of the provisions of Regulation No 1370/2007 of reducing the distortions of competition which would occur if those service providers were allowed to participate in calls for tender and to organise public transport services outside the territory of the municipality concerned.
- 17 The applicant also asks whether, as a general rule, the city council has the power to decide to extend the duration of the contract, taking into account the fact that a tendering procedure which is extended (or delayed) cannot generally be considered to be an emergency situation for the purposes of Article 5(5) of Regulation No 1370/2007.
- 18 At the hearing, the applicant reaffirmed its application based on the arguments set out therein. The applicant does not dispute that, at the time of submission of the tender, the two-year period laid down in Article 5(2)(c) of Regulation No 1370/2007 was complied with. However, the applicant claims that that fact should have been verified again at the time when the decision to award the contract was taken in order to prevent any abuse of that right. In the present case, at the time of adoption of the decision, the contract had been extended until 30 September 2023, which, as regards the time of submission of the tender, exceeds by one month the two-year period laid down in Article 5(2)(c) of that regulation.
- 19 Conversely, the Office and the contracting authority submit that the principle of fair competition has not been infringed in this case. In particular, they assert that performance of the contract awarded as a result of the public tendering procedure will not commence until 1 July 2024, from which it follows that PSIA Ventspils reiss will not be remunerated simultaneously for performance of the directly awarded contract and for performance of the contract concluded in the course of the public tendering procedure.
- 20 The Office submits that, on the deadline for the submission of tenders set out in the public call for tenders – 30 August 2021 – all the preconditions laid down in Article 5(2)(c) of Regulation No 1370/2007 for the participation of an internal operator in other tendering procedures were satisfied. Even though the city council decided, on 2 September 2021 and 22 September 2022, to extend until 30 September 2023 the total duration of the service contract concluded with PSIA Ventspils reiss, this was done with the aim of ensuring continuity of provision of the public transport service in the administrative territory of the municipality pursuant to Article 5(5) of Regulation No 1370/2007. Furthermore, the question of the unlawfulness of State or municipal aid should be assessed in the context of the decisions adopted by the city council and the contracts concluded by it and not in

the context of the open and transparent tendering procedure held by the contracting authority.

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

- 21 In the present case, when it examines the public tendering procedure in question, the referring court must apply Article 5(2)(c) of Regulation No 1370/2007, read in conjunction with Article 5(3) thereof, provisions which have not yet been the subject of a combined interpretation by the Court of Justice of the European Union.
- 22 Although the judgment of the Court of Justice in Joined Cases C-350/17 and C-351/17, *Mobit and Autolinee Toscane*, held that Article 5 of Regulation No 1370/2007 was not applicable at all, the Opinion of the Advocate General in that case did however state that failure to comply with the geographical requirement laid down in Article 5(2)(b) of Regulation No 1370/2007 cannot have any impact on a competitive tendering procedure within the meaning of Article 5(3) of that regulation. That Opinion was based, first, on the fact that the limitation requirement is laid down in Article 5(2) of Regulation No 1370/2007, which governs direct awards, and not Article 5(3) of that regulation, which governs competitive tendering procedures. Secondly, that interpretation follows from the wording of Article 5(2)(b) of Regulation No 1370/2007, and in particular from the words ‘the condition for applying this paragraph is that’, from which it is apparent that the requirement to limit the activities of the internal operator is a condition for the validity of internal award procedures. Thirdly, it is also apparent from the wording of the second sentence of Article 5(3) of Regulation No 1370/2007 that it is not permitted to exclude operators who have benefited from a direct award, since it expressly requires that that procedure be ‘open to all operators’. The Advocate General pointed out, in that regard, that Article 5(3) of that regulation, which concerns competitive tendering procedures, contains a reference neither to the limitation requirement laid down in Article 5(2)(b) of that regulation nor to any similar requirement. Fourthly, such an interpretation is consistent with one of the objectives pursued by Regulation No 1370/2007, namely to increase the use of competitive tendering procedures for the award of public service transport contracts. In the light of the foregoing considerations, the Advocate General concluded that non-compliance with the requirements laid down in Article 5(2)(b) of Regulation No 1370/2007 could call into question the validity of the direct award of a contract to that undertaking, or to the undertaking which controls it.
- 23 It is also possible to apply that Advocate General’s Opinion to the application of Article 5(2)(c) of Regulation No 1370/2007, leading to the conclusion that failure to comply with the requirements laid down in that provision cannot have any impact on the public tendering procedure within the meaning of Article 5(3) of that regulation.

- 24 However, in the referring court's opinion, it is important to verify, in the context of a public tendering procedure, that the limitations laid down in Article 5(2)(b) and (c) of Regulation No 1370/2007 have been complied with.
- 25 In particular, it is apparent from recital 18 of Regulation No 1370/2007 that the direct award of public transport services needs to be strictly controlled to ensure a level playing field. The direct award of services must be regarded as an economic advantage to which no economic operator can aspire under normal market conditions and that is the case because that advantage and the payments made as a result have a clear impact on competition. For that reason, Article 5(2)(b) of Regulation No 1370/2007 prohibits internal operators from participating in other public tendering procedures outside the territory of the competent public authority. In addition, in order to promote the opening of the market for public transport services, Article 5(2)(c) of Regulation No 1370/2007 lays down a derogation from that prohibition if a number of requirements are met which are intended to put at a distance the provision of the service by the direct award of the contract. Decisions relating to the future organisation of the internal operator's economic activities affect the price offered by a tenderer, so that, in order to ensure the same conditions of competition, the referring court takes the view that it is essential that the requirements set out in Article 5(2)(c) of Regulation No 1370/2007 are verified in the context of the public tendering procedure.
- 26 In the light of the foregoing considerations, the referring court asks the Court of Justice of the European Union to clarify whether, in the course of public tendering procedures governed by Article 5(3) of Regulation No 1370/2007, it is necessary to verify the requirements for the participation of an internal operator in the tendering procedure, laid down in paragraph 2(c) of that article.
- 27 If the answer to the first question is in the affirmative, the referring court must apply the requirements laid down in Article 5(2)(c) of Regulation No 1370/2007.
- 28 It is apparent from that provision that an internal operator may participate in an open tendering procedure if the following requirements are met simultaneously: (1) no more than two years remain until the end of the directly awarded service contract; (2) a final decision has been taken to submit the public passenger transport services covered by the internal operator contract to fair competitive tender; (3) the internal operator has not concluded any other directly awarded public service contract.
- 29 In this case, it is important to clarify the point in time when all the requirements for the participation of an internal operator in a public tendering procedure, laid down in Article 5(2)(c) of Regulation No 1370/2007, must be met.
- 30 Taking into account the fact that the tender submitted by a tenderer ratifies participation in the public tendering procedure and that decisions relating to the future organisation of the internal operator's economic activities may affect the price offered by a tenderer, it is, in the referring court's view, logical to conclude

that the requirements in question must be met at the time of submission of the tender.

- 31 However, the facts of the case show that, after submission of the tender, the situation may change. In the present case, the directly awarded contract was extended a number of times, pursuant to Article 5(5) of Regulation No 1370/2007, exceeding in total the two-year period laid down if that period is counted from the date of submission of the tender. It is essential to clarify whether the contracting authority should have verified, at the time when the contract was awarded, that the requirements laid down in Article 5(2)(c) of Regulation No 1370/2007 continued to be met when the tender was submitted and, if it identified a breach of the two-year time period, it should have excluded the internal operator from the tendering procedure. However, the public authorities argue that decisive importance should be attached to the fact that the contract was extended for the reasons set out in Article 5(5) of Regulation No 1370/2007 and that it does not affect, as such, fair competition between tenderers.
- 32 The referring court also considers that, as regards the public tendering procedure, the changes in the factual circumstances following the submission of the tender should also be considered, since it is not possible to rule out that the requirements laid down in Article 5(2)(c) of Regulation No 1370/2007 were formally met only at the time of submission of the tender, regard being had, inter alia, to the interconnection between the city council and the most direct operator and to the fact that changes in circumstances following the submission of the tender must be examined from the point of view of whether they affect fair competition between tenderers.
- 33 In the light of the foregoing considerations, the referring court takes the view that it is essential to clarify whether Article 5(2)(c) of Regulation No 1370/2007 must be interpreted as meaning that, when the contracting authority decides on the award of a contract, it is required to verify whether all the requirements set out in that provision are met at the time of submission of the tender, while also taking into account circumstances arising after submission of the tender which may influence fair competition between the tenderers.
- 34 The applicant submits, inter alia, that the extension of a directly awarded service contract amounts to the conclusion of another directly awarded public service contract within the meaning of Article 5(2)(c) of Regulation No 1370/2007.
- 35 In view of the fact that the period of performance of the contract was extended in the context of a contract that had already been concluded, without any changes to the other terms of the contract, the referring court harbours doubts as to whether the requirement to the effect that ‘the internal operator has not concluded any other directly awarded public service contract’, laid down in Article 5(2)(c) of Regulation No 1370/2007, should be interpreted so broadly.

- 36 The referring court also considers it necessary to clarify the interpretation of the requirement laid down in Article 5(2)(c) of Regulation No 1370/2007.

WORKING DOCUMENT