

**Case C-28/23**

**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:**

24 January 2023

**Referring court:**

Okresný súd Bratislava III (Slovakia)

**Date of the decision to refer:**

16 January 2023

**Applicant:**

NFŠ a. s.

**Defendants:**

Slovenská republika (Slovak Republic), acting through the Ministerstvo školstva, vedy, výskumu a športu Slovenskej republiky  
Ministerstvo školstva, vedy, výskumu a športu Slovenskej republiky

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## **Subject matter of the main proceedings**

Request for a preliminary ruling – Construction of a football stadium – Public works contract – Agreement to enter into a future agreement– Grant agreement – Classification of an agreement as a public contract– Absolute and relative invalidity of an agreement – Directives 2014/24/EU, 2004/18/EC and 89/665/EEC

## **Subject matter and legal basis of the request**

Interpretation of EU law, Article 267 TFEU

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

1 Do a grant agreement and an agreement to enter into a future sales agreement, concluded between a ministry (the State) and a person governed by private law selected outside competition procedures, constitute ‘public works contracts’ within the meaning of Article 1(2)(b) of Directive 2004/18 or Article 2(6)(c) of Directive 2014/24 where the grant agreement constitutes State aid approved by the European Commission for the purposes of Article 107(3)(c) TFEU, the grant agreement contains an obligation on the State to grant a subsidy as well as an obligation on the person governed by private law to construct the building in accordance with conditions specified by the ministry and to allow a sports organisation to use a part of that building, and the agreement to enter into a future agreement contains a unilateral option conferred on the person governed by private law in the form of an obligation on the State to purchase the constructed building, while those agreements constitute a framework of mutual obligations between the ministry and the person governed by private law which are linked in terms of time and subject matter?

2 Does Article 1(2)(b) of Directive 2004/18 or Article 2(6)(c) of Directive 2014/24 preclude national legislation of a Member State under which any legal act which by its content or purpose contravenes or circumvents the law or is contrary to accepted principles of morality is absolutely invalid (that is to say, from the outset/*ex tunc*) where that infringement of the law consists of a serious infringement of the rules on public procurement?

3 Do Article 2d(1)(a) and Article 2d(2) of Directive 89/665 preclude national legislation of a Member State under which any legal act which by its content or purpose contravenes or circumvents the law or is contrary to accepted principles of morality is absolutely invalid (that is to say, from the outset/*ex tunc*) where that infringement of the law consists of a serious infringement (circumvention) of the rules on public procurement, as in the main proceedings?

4 Must Article 1(2)(b) of Directive 2004/18 or Article 2(6)(c) of Directive 2014/24 be interpreted as precluding *ex tunc* the assumption that an agreement to enter into a future sales agreement, such as that at issue in the main proceedings, has produced legal effects?

### **Provisions of European Union law [and case-law] relied on**

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; Article 1(2)(b)

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 2(6)(c) and Article 18(1)

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts; Article 2d(1)(a) and Article 2d(2)

Judgment of the Court of Justice of 29 October 2009, *Commission v Germany*, C-536/07, EU:C:2009:664, paragraph 57

Judgment of the Court of Justice of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraphs 41, 43 and 44

Judgment of the Court of Justice of 22 April 2021, *Commission v Austria (Lease of a building not yet constructed)*, C-537/19, EU:C:2021:319, paragraphs 49 and 50

### **Provisions of national law relied on**

Zákon z 26. februára 1964 č. 40/1964 Zb. Občiansky zákonník (Law No 40/1964 of 26 February 1964 establishing the Civil Code), as subsequently amended ('the Civil Code'):

- Paragraph 39: 'Any legal act which by its content or purpose contravenes or circumvents the law or is contrary to accepted principles of morality shall be invalid' (absolute invalidity of a legal act)
- Paragraph 40a: 'If the ground for invalidity of a legal act arises from Paragraph 49a, [Paragraph] 140, Paragraph 145(1), Paragraph 479, Paragraph 589 or Paragraph 701(1), the legal act shall be deemed to be valid, unless the person affected by the legal act claims that it is invalid. Invalidity cannot be claimed by the person who caused it. The same applies if the legal act was not performed in the form stipulated by the parties (Paragraph 40). If a legal act is contrary to the generally applicable rules on prices, it shall be

invalid only in so far as it is contrary to those rules where the person affected by the act claims that it is invalid’ (relative invalidity of a legal act)

Zákon zo 14. decembra 2005 č. 25/2006 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov (Law No 25/2006 of 14 December 2005 on public procurement and amending and supplementing certain laws), as subsequently amended; Paragraph 1(2)(m), Paragraph 1(7), Paragraph 3(3) and Paragraph 147a

Zákon z 18. novembra 2015 č. 343/2015 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov (Law No 343/2015 of 18 November 2015 on public procurement and amending and supplementing certain laws), as subsequently amended; Paragraph 1(2)(c), Paragraph 3(3), Paragraph 10(3), Paragraph 181(1) and Paragraph 181(11)

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

- 1 The Government of the Slovak Republic (‘the Government’) adopted a number of resolutions between 2006 and 2013 with the intention of constructing a Národný futbalový štadión (national football stadium; ‘the stadium’) in Slovakia which would meet UEFA standards. The investor/contractor for the project was to be selected through an open procedure.
- 2 On 10 July 2013, the Government adopted, without conducting any tender or competition procedure, Resolution No 400/2013, under which the Ministerstvo školstva, vedy, výskumu a športu Slovenskej republiky (Ministry of Education, Science, Research and Sport of the Slovak Republic; ‘the Ministry of Education’) was to conclude with a specific company, namely Národný futbalový štadión, a. s. (the legal predecessor of the applicant, NFŠ, a. s.), a memorandum which was to set out the conditions for the grant of a subsidy and the construction of the stadium. The final text of that memorandum already formed part of the Government Resolution in question. The memorandum o spolupráci pri realizácii výstavby a prevádzke športovej infraštruktúry „Národný futbalový štadión“ (memorandum on cooperation in constructing and operating the sports infrastructure ‘Národný futbalový štadión’ (national football stadium)); ‘the memorandum’) was signed on 11 July 2013.
- 3 On 15 August 2013, the Ministry of Education concluded with Národný futbalový štadión, a. s., the Zmluva o podmienkach poskytnutia dotácie na výstavbu Národného futbalového štadióna (Agreement on the conditions for granting a subsidy for the construction of a national football stadium). Pursuant to that agreement, Call for Applications for the grant of subsidies in the field of sport No 2013-11- ‘Národný futbalový štadión’ (‘the call for applications’) was published within 60 days of the agreement’s entry into force, that is to say, on 20 September 2013. Under the call for applications, the only person stated as eligible to submit an application was Národný futbalový štadión, a. s..

- 4 On 21 November 2013, the Ministry of Education concluded with Národný futbalový štadión, a. s., on the basis of the call for applications, the Zmluva o poskytnutí dotácie zo štátneho rozpočtu (Agreement on the grant of a subsidy from the State budget). The subsidy was granted without making a selection from a wider range of interested parties (outside competition procedures), since, in accordance with the wording of the call for applications, the only eligible person was Národný futbalový štadión, a. s., as set out in Government Resolution No 400/2013.
- 5 The Ministry of Education undertook to grant a subsidy in the amount of EUR 27 200 000 for the stadium construction project.
- 6 Národný futbalový štadión, a. s., undertook to co-finance the stadium in an amount corresponding to at least 60% of the expenditure incurred in its construction.
- 7 On 10 May 2016, the Ministry of Education, acting on behalf of the Slovak Republic, as the future purchaser, concluded with NFS, a. s., as the future seller, Zmluva o budúcej (kúpnej) zmluve č. 0385/2016 (Agreement to enter into a future (sales) agreement No 0385/2016) [(‘the agreement to enter into a future agreement’)], which set out the conditions for the conclusion of the promised sales agreement for the stadium on the basis of the call to NFS, a. s., whereby the risks attached to owning and operating the stadium would be transferred to the Slovak Republic upon sale. [The agreement to enter into a future agreement] included annexes containing detailed specifications of the technical and material parameters of the constructed building, namely the stadium. The characteristics of the building were thus determined by the Slovak Republic, as represented by the Ministry of Education.
- 8 On the same date, namely 10 May 2016, the Ministry of Education concluded with the applicant Annex No. 1 to the grant agreement, which excluded the possibility of free use of certain areas of the stadium by the Slovenský futbalový zväz (Slovak Football Association, Slovakia).
- 9 For [the agreement to enter into a future agreement] to produce legal effects, three conditions had to be satisfied, namely (1) the publication of the agreement in the State Central Register of Contracts, (2) the issuing by the European Commission of a decision assessing the transactions provided for in [the agreement to enter into a future agreement] and the grant agreement from the perspective of the permissibility of State aid, and (3) the adoption of a position by the Úrad pre verejné obstarávanie Slovenskej republiky (Office for Public Procurement of the Slovak Republic, Slovakia) [(‘the Office’)], as the national public procurement supervisory authority, on the compatibility of the transactions provided for in [the agreement to enter into a future agreement] with the rules on public procurement.
- 10 By Decision SA.46530 of 24 May 2017, the European Commission declared the State aid in the form of the above subsidy and sales option compatible with the

internal market for the purposes of Article 107(3)(c) TFEU, which meant that the second of the abovementioned conditions for [the agreement to enter into a future agreement] to produce legal effects was satisfied.

- 11 With regard to the third of the abovementioned conditions for [the agreement to enter into a future agreement] to produce legal effects, [the Office] did not, despite a request by the Ministry of Education, adopt a binding position; nor did it carry out any checks in relation to the transaction provided for in [the agreement to enter into a future agreement]. It therefore did not approve the transaction provided for in that agreement. The Chair of [the Office] merely sent a non-binding response in the form of a letter dated 8 July 2016.
- 12 The following legal disputes are currently underway: (1) the Ministry of Education and the Slovak Republic are suing NFŠ, a. s., for repayment of the entire amount of the subsidy in the amount of EUR 27 200 000, plus interest and costs, on the ground that the grant agreement is absolutely invalid in that it is incompatible with the law, (2) NFŠ, a. s., is suing the Ministry of Education and the Slovak Republic to determine the content of the unenforceable provision of [the agreement to enter into a future agreement] which lays down the procedure for calculating the sales price of the stadium, (3) NFŠ, a. s., is suing the Slovak Republic and the Ministry of Education for payment of a contractual penalty in the amount of EUR 48 000 000 for failure to conclude the promised sales agreement for the stadium under the terms of [the agreement to enter into a future agreement], and (4) NFŠ, a. s., is suing the Slovak Republic and the Ministry of Education for damages in the amount of EUR 47 349 262.73 in connection with the stadium project, plus interest and costs.

### **The essential arguments of the parties in the main proceedings**

- 13 The applicant claims that without State support in the form of a subsidy and sales option, construction of the stadium would have been unfeasible for a private investor (the applicant). State support for that project consisted of two instruments, namely (i) the subsidy provided for in the grant agreement and (ii) the option provided for in [the agreement to enter into a future agreement]. In the view of the applicant, the [Agreement on the conditions for granting a subsidy for the construction of a national football stadium] and the memorandum jointly created a legal framework which was intended to guarantee that, if the applicant were successful in the call for applications for the grant of a subsidy for the construction of a stadium, it would be assured of State support.
- 14 The applicant further claims that that no obligation to construct the stadium and subsequently sell it to the Ministry of Education arises from [the agreement to enter into a future agreement]. In the view of the applicant, that agreement does not meet the definition of a public contract, since, according to the case-law of the Court of Justice, in order for an agreement to be regarded as a public contract, there must be an obligation to perform certain works, the performance of which is

judicially enforceable. However, [the agreement to enter into a future agreement] contains no such obligation. The applicant disputes the assertion that [the agreement to enter into a future agreement] is for consideration, arguing that that agreement merely concerns an option granted to the applicant and not an obligation on its part to implement the agreement.

- 15 The Ministry of Education contends that the rules on public procurement were infringed in the construction of the stadium. It expresses the view that the Agreement on the grant of a subsidy from the State budget was concluded in breach of the law, since the subsidy was granted and the agreement was concluded on the basis of a call [for applications] which did not provide a competition between the persons applying for funds. Thus, in the view of the Ministry of Education, the grant agreement is invalid within the meaning of Paragraph 39 of the Civil Code (absolute invalidity).
- 16 The Ministry of Education further argues that the failure to apply public procurement procedures and the essentially direct award of the contract to NFŠ, a. s., infringed not only public procurement legislation, but also other legislation of the Slovak Republic which provided for the application of a competition or established an obligation to manage public funds sparingly and effectively.
- 17 The Ministry of Education considers that the Agreement on the grant of a subsidy from the State budget and [the agreement to enter into a future agreement] constitute a set of mutual rights and obligations of the Ministry of Education and NFŠ, a. s., which are linked in terms of time and subject matter, by which there has been an intentional circumvention of Zákon č. 25/2006 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov (Law No 25/2006 [of 14 December 2005] on public procurement and amending and supplementing certain laws), as subsequently amended, or Zákon č. 343/2015 Z. z. o verejnom obstarávaní [a o zmene a doplnení niektorých zákonov] (Law No 343/2015 [of 18 November 2015] on public procurement [and amending and supplementing certain laws]), and is therefore absolutely invalid from the outset as it is contrary to or circumvents the law on public procurement.
- 18 The Ministry of Education is of the view that the selection of the contractor or investor should have taken place through a transparent competition and preference should not have been given to a particular person governed by private law.
- 19 The Ministry of Education contends that the grant agreement laid down the conditions which the stadium had to satisfy (it had to be a Category 4 Stadium within the meaning of UEFA's regulations [and] meet certain requirements regarding capacity, equipment, dimensions, technical parameters, training of sports representatives, and so on). The Ministry of Education was a member of the committee managing and monitoring the construction of the stadium, which gave it an opportunity to comment on the progress of the construction and use thereof, as well as on other issues concerning construction, financing, and the analyses and opinions of external advisors. The tasks and control of the monitoring committee

were also laid down directly in [the agreement to enter into a future agreement] (point 4.1.1 of that agreement).

- 20 Furthermore, the Ministry of Education considers that point 2.2 of [the agreement to enter into a future agreement] expressly provides for a pecuniary consideration by calculating the sales price (also stating the upper limit thereof). The agreement itself therefore sets out the procedure for determining the price at which the State is to buy the stadium under the promised sales agreement. The entire transaction provided for in [the agreement to enter into a future agreement] can therefore be actually valued in monetary terms and it is completely irrelevant whether the final sum is entered into the promised sales agreement, since it is already absolutely clear from [the agreement to enter into a future agreement] that there is a transaction for consideration between the parties thereto. Acceptance of the concept of ‘consideration/not for consideration’ put forward by NFS, a. s., would make it possible in practice, by this deliberate and unlawful method, to transform any agreement for consideration into an agreement not for consideration, and this would be done by transforming an agreement for consideration into a commitment to a future agreement, with the right of a ‘unilateral option’ to conclude an agreement for consideration being granted to only one of the contracting parties (the tenderer).

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

- 21 It is necessary to clarify whether (i) an agreement on the grant of a subsidy for the construction of a building which, in addition to commercial purposes, will also serve publicly to promote sport and (ii) an agreement to enter into a future agreement, concluded between the Ministry of Education (the State) and a person governed by private law selected outside competitive procedures, constitute ‘public works contracts’ within the meaning of Article 1(2)(b) of Directive 2004/18 or Article 2(6)(c) of Directive 2014/24 where:
- the grant agreement constitutes State aid approved by the European Commission for the purposes of Article 107(3)(c) TFEU,
  - the grant agreement contains an obligation on the State to grant a subsidy as well as an obligation on the person governed by private law to construct the building in accordance with conditions specified by the Ministry of Education and to allow a sports organisation to use a part of that building, and
  - the agreement to enter into a future agreement contains a unilateral option conferred on the person governed by private law in the form of an obligation on the State to purchase the constructed building,

- while those agreements constitute a framework of mutual obligations between the Ministry of Education and the person governed by private law which are linked in terms of time and subject matter.
- 22 The parties to the main proceedings argue that it is not settled in the relevant academic legal writings and case-law whether an infringement of the law on public procurement gives rise to absolute invalidity of an agreement (invalidity from the outset – *ex tunc*) or whether it involves relative invalidity of that agreement (*ex nunc*).
- 23 In this regard, the applicant points, in its application for determination of the content of [the agreement to enter into a future agreement] in so far as it fixes the sales price, to the fact that ‘neither in the relevant academic legal writings nor in the case-law has it been fully settled whether an infringement of the law on public procurement gives rise to absolute or relative invalidity of an agreement’. In this context, the applicant argues that the invalidity of a legal act (agreement) cannot be claimed by the person who caused that invalidity (Paragraph 40a of the Civil Code).
- 24 The Ministry of Education is seeking a declaration of absolute invalidity of the legal act (agreement), since the contested set of agreements leads to a blatant circumvention of the rules on public procurement laid down in the law on public procurement and in EU law.
- 25 Case-law at the national level on this issue is not uniform. The applicant refers to judgments of the Krajský súd v Bratislave (Regional Court, Bratislava, Slovakia) which has applied the concept of relative invalidity of an agreement in relation to an infringement of the rules on public procurement. The Ministry of Education, on the other hand, refers to a decision of the Ústavný súd (Constitutional Court of the Slovak Republic, Slovakia), which links an infringement of the rules on public procurement to absolute invalidity *ex tunc*, and a decision of the Krajský súd v Bratislave (Regional Court, Bratislava), in which that court held that the award of a contract which should have been awarded in accordance with the procedure laid down by [public procurement] law, but was not so awarded, also renders such an agreement absolutely invalid.
- 26 In the light of the foregoing, it is necessary to determine whether Article 2d(1)(d) and Article 2d(2) of Directive 89/665 preclude national legislation of a Member State under which any legal act which by its content or purpose contravenes or circumvents the law or is contrary to accepted principles of morality is absolutely invalid (that is to say, from the outset/*ex tunc*) where that infringement of the law consists of a serious infringement (circumvention) of the rules on public procurement.