



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

3 February 2022*

(Reference for a preliminary ruling – Directive 2014/24/EU – Article 72 – Modification of contracts during their term – Transfer of a framework agreement – New contractor assuming on the insolvency of the initial contractor the rights and obligations attributed to the latter under a framework agreement – Whether need for a new procurement procedure)

In Case C-461/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), made by decision of 15 September 2020, received at the Court on 24 September 2020, in the proceedings

Advania Sverige AB,

Kammarkollegiet

v

Dustin Sverige AB,

THE COURT (Fourth Chamber),

composed of K. Jürimäe, President of the Third Chamber, acting as President of the Fourth Chamber, S. Rodin (Rapporteur) and N. Piçarra, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Advania Sverige AB, by T. Wanselius,
- the Kammarkollegiet, by A. Ekberg and A. Thomsen, acting as Agents,
- Dustin Sverige AB, by C. Bokwall and L. Håkansson Kjellén, advokater,

* Language of the case: Swedish.

- the Austrian Government, by J. Schmoll, acting as Agent,
- the European Commission, by P. Ondrůšek and K. Simonsson and by G. Tolstoy, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2021,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 72(1)(d)(ii) 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 (OJ 2014 L 94, p. 65).
- 2 The request has been made in proceedings between Advania Sverige AB ('Advania') and the Kammarkollegiet (Swedish Legal, Financial and Administrative Services Agency) ('the National Legal Services Agency') and Dustin Sverige AB ('Dustin') concerning the decision of that agency to approve the transfer of four framework agreements without a new procurement procedure in accordance with Directive 2014/24.

Legal context

European Union law

- 3 Recitals 107 and 110 of Directive 2014/24 state:
 - '(107) It is necessary to clarify the conditions under which modifications to a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the Court of Justice of the European Union. A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.
 - ...
 - (110) In line with the principles of equal treatment and transparency, the successful tenderer should not, for instance where a contract is terminated because of deficiencies in the performance, be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract should be able, in particular where the contract has been awarded to more than one undertaking, to undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, takeovers, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all public contracts performed by that tenderer.'

4 Article 72 of Directive 2014/24, entitled ‘Modification of contracts during their term’, provides as follows:

‘1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:

...

- (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either:
 - (i) an unequivocal review clause or option in conformity with point (a);
 - (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or
 - (iii) in the event that the contracting authority itself assumes the main contractor’s obligations towards its subcontractors where this possibility is provided for under national legislation pursuant to Article 71;
- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

...

4. A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

- (a) the modification introduces 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;
- (b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- (c) the modification extends the scope of the contract or framework agreement considerably;
- (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1.

...’

Swedish law

- 5 The first subparagraph of Paragraph 13 of Chapter 17 of Lagen (2016:1145) om offentlig upphandling (Law No 1145 of 2016 on public procurement; ‘the Law on public procurement’), provides that a contract or a framework agreement might be modified with one contractor being replaced by another, without a new procurement, if:
- ‘(1) the new contractor fully or partially replaces the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, and
- (2) the circumstance that a new contractor fully or partially replaces the initial contractor did not entail other substantial modifications to the contract or framework agreement.’
- 6 According to the referring court, it is apparent from the second subparagraph of Paragraph 13 of Chapter 17 of that law that such a replacement of the contractor presupposes that the new service provider is not excluded under a ground for exclusion laid down by that law and that it meets the qualification conditions established in the original contract.

The dispute in the main proceedings and the question referred for a preliminary ruling

- 7 Four framework agreements with a reopening of competition, for the purchase of various computer equipment, were awarded by the National Legal Services Agency under a restricted procedure pursuant to Lagen (2007:1091) om offentlig upphandling (Law No 1091 of 2007 on public procurement), which was repealed in the meantime. In that procedure, 17 candidates qualified for the selection, including Advania, Dustin and Misco AB. While Dustin and Misco were among the nine candidates who were invited to tender, Advania was not invited to tender. At the end of that procedure, Misco was awarded framework agreements in the four areas at issue and Dustin was awarded framework agreements in two areas.
- 8 By letter of 4 December 2017, Misco requested the National Legal Services Agency to authorise the transfer to Advania of the four framework agreements which it held. On 12 December 2017, Misco was declared insolvent and, on 18 January 2018, its insolvency administrator signed a contract with Advania providing for the transfer of those framework agreements. The National Legal Services Agency authorised that transfer in February 2018.
- 9 Dustin then brought an appeal before the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm, Sweden) seeking that the framework agreements between Advania and the National Legal Services Agency be declared invalid.
- 10 The Förvaltningsrätten i Stockholm (Administrative Court, Stockholm) dismissed the appeal. It considered that the National Legal Services Agency had correctly found that the succession at issue resulted from the restructuring of Misco and that Advania had obtained the framework agreements at issue and had acquired the branches of business enabling them to be performed, under the conditions laid down in Paragraph 13 of Chapter 17 of the Law on public procurement, which transposes Article 72(1)(d)(ii) of Directive 2014/24 into Swedish law.
- 11 Dustin brought an appeal against the judgment of the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm) before the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm, Sweden), which upheld that appeal and declared the invalidity of the four

framework agreements between Advania and the National Legal Services Agency. That court was of the opinion that Advania could not be regarded as having replaced Misco universally or partially, within the meaning of Paragraph 13 of Chapter 17 of the Law on public procurement, since, with the exception of the framework agreements at issue, Misco had transferred virtually no business to Advania. In support of that conclusion, the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) noted that only one employee of Misco subsequently joined Advania, that the list of Misco's customers was not fully updated or relevant, that customers of Misco had already changed supplier and that there was no evidence to prove that Advania had taken on some of Misco's subcontractors or that other public framework agreements had been transferred to Advania, even though Misco was party to at least one other public framework agreement.

- 12 Advania and the National Legal Services Agency each brought an appeal against the judgment of the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) before the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden). In their appeals, they do not dispute the appeal court's assessment of the nature and extent of the elements covered by the transfer at issue. However, they contend that such a transfer satisfies the condition in Paragraph 13 of Chapter 17 of the Law on public procurement.
- 13 Before the referring court, Advania submits that Directive 2014/24 does not require that, in addition to the framework agreements, a business of a certain nature or scope be transferred to the new contractor which replaces that to which the contracting authority initially awarded the contract.
- 14 The National Legal Services Agency submits in its action before the referring court that the concept of 'universal or partial succession', which is one of the methods of transfer provided for by the relevant provisions of the Law on public procurement and Directive 2014/24, must be interpreted as meaning that the transferee contractor is required only to take the place of the original contractor in the rights and obligations arising from the contract or framework agreement at issue. By requiring, in addition to such substitution, the transfer of business or the transfer of assets, the applicability of those provisions would be severely limited. The fundamental point is that the new contractor may perform the contract or framework agreement at issue in accordance with the conditions and requirements originally laid down.
- 15 Dustin contends, for its part, before that court that the condition relating to the universal or partial succession of the original contractor following corporate restructuring operations provided for in Article 72(1)(d)(ii) of Directive 2014/24 covers situations in which the branches of business concerned by the contract or framework agreement at issue are transferred to the new contractor. The transfer of the contract or framework agreement in question is merely incidental to the transfer of business. The transfer of contracts or framework agreements which were the subject of calls for tenders without the simultaneous transfer of the branches of business concerned would lead not only to the trade in such contracts or framework agreements but would also enable the transfer of partial rights and obligations arising from those contracts or framework agreements.

- 16 In those circumstances, the Högsta förvaltningsdomstolen (Supreme Administrative Court) stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

‘Does the circumstance that a new contractor has taken over the initial contractor’s rights and obligations under a framework agreement, after the initial contractor has been declared insolvent and the insolvency estate has transferred the agreement, mean that the new contractor will be deemed to have succeeded into the position of the initial contractor under conditions such as those referred to in Article 72(1)(d)(ii) of [Directive 2014/24]?’

Consideration of the question referred

- 17 By its question, the referring court asks, in essence, whether Article 72(1)(d)(ii) of Directive 2014/24 must be interpreted as meaning that an economic operator which, following the insolvency of the initial contractor which led to its liquidation, has taken over only the rights and obligations of the initial contractor arising from a framework agreement concluded with a contracting authority must be regarded as having succeeded that initial contractor under the conditions referred to in that provision.
- 18 As a preliminary point, it should be recalled that, in general, the substitution of a new contractor for one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question and, consequently, as a substantial modification to the contract, which must give rise to a new award procedure relating to the contract thus amended, in accordance with the principles of transparency and equal treatment which underlie the obligation of competition between the candidates potentially interested in the various Member States (see, to that effect, judgment of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraphs 40 and 47). That premiss is codified in Article 72(4)(d) of Directive 2014/24.
- 19 It follows from the Court’s case-law that the principle of equal treatment and the obligation of transparency resulting therefrom preclude, following the award of a public contract, the contracting authority and the successful tenderer from amending the provisions of that contract in such a way that those provisions differ materially in character from those of the original contract (see, to that effect, judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraph 28).
- 20 By way of exception, Article 72(1)(d)(ii) of that directive provides that a new contractor may, without a new procurement procedure in accordance with that directive, replace that to which the contracting authority initially awarded the contract following a universal or partial succession into the position of the original contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of that directive.
- 21 It is thus apparent from the wording of that article that it makes the application of the exception at issue subject, inter alia, to the condition that the replacement of the former contractor is due to a universal or partial succession which occurs following company restructuring, in particular insolvency.

- 22 In the present case, the referring court questions whether the condition of universal or partial succession of the original contractor following insolvency is satisfied where the new contractor takes over only the rights and obligations arising from the framework agreement concluded with the contracting authority and does not take over all or part of the business of the original contractor falling within the scope of that framework agreement.
- 23 In that regard, it should be noted, as regards the wording of Article 72(1)(d)(ii) of Directive 2014/24, first, that the replacement of the contractor to whom the contracting authority initially awarded the contract is authorised only ‘as a result of a universal or partial succession of the original contractor’. It follows that that succession may involve the taking over, by the new contractor, of all or only part of the assets of the initial contractor and may therefore involve, as the Advocate General noted in point 43 of his Opinion, the transfer only of a public contract or of a framework agreement making up the assets of the initial contractor.
- 24 Furthermore, it should be noted, as did the Advocate General in point 95 of his Opinion, that requiring a transfer of assets in order to prevent a party from circumventing the award rules is not necessary where the transfer of the public contract or the framework agreement is, in any event, subject to the condition, laid down in Article 72(1)(d)(ii) of Directive 2014/24, not to constitute a means of excluding application of that directive.
- 25 Furthermore, while it is true that such an interpretation of the concept of ‘partial succession’ in Article 72(1)(d)(ii) of Directive 2014/24 is not sufficient in itself to ensure that the new contractor performs the contract or framework agreement in question with an equivalent capability to that of the original contractor, as Dustin contends, the fact remains that that provision provides that such succession is subject to the condition that the new contractor fulfils the qualitative selection criteria initially established.
- 26 Therefore, it is apparent from the wording of Article 72(1)(d)(ii) of Directive 2014/24 that the concept of ‘insolvency’, falling within the concept of ‘restructuring operations’, encompasses structural changes to the original contractor, in particular insolvency which includes insolvency resulting in liquidation.
- 27 Secondly, as for the scope of the concept of ‘insolvency’, which is covered by the concept of ‘restructuring operations’, it is necessary to examine whether that presupposes that the new contractor takes over all or part of the business falling within the scope of the framework agreement at issue.
- 28 Although the first three situations listed as examples of ‘restructuring operations’ in Article 72(1)(d)(ii) of Directive 2014/24, namely takeover, merger and acquisition, may involve the continuation of at least part of the original contractor’s business, the fact remains that that provision also lists insolvency as an example of restructuring, which may lead, as the Advocate General noted in point 47 of his Opinion, to the dissolution of the insolvent company. There is no indication in the wording of that provision that the concept of ‘insolvency’ must be understood not in its usual meaning, but as being limited to situations in which the business of the original contractor which enables the performance of the public contract is pursued, at least in part.
- 29 Nor is there any such indication in recital 110 of that directive, which mentions insolvency together with purely internal restructurings, takeovers, mergers and acquisitions, as situations involving ‘certain structural changes’ of the successful tenderer.

- 30 In that regard, indeed it must be noted that Article 72(1)(d)(ii) of Directive 2014/24, and thus the concept of ‘insolvency’, must be interpreted strictly in so far as, as is apparent from paragraphs 20 and 21 of this judgment, that article sets out an exception. As the Advocate General noted in point 62 of his Opinion, however, that interpretation cannot render that exception ineffective. It would do so if the term ‘insolvency’ were limited solely to situations in which the business of the original contractor falling within the scope of the framework agreement at issue was taken over by the new contractor, at least in part, and if that term were not understood in its usual broader sense.
- 31 Therefore, it is clear from the wording of Article 72(1)(d)(ii) of Directive 2014/24 that the concept of ‘restructuring’ encompasses structural changes to the original contractor, in particular insolvency which includes insolvency resulting in liquidation.
- 32 That literal interpretation of Article 72(1)(d)(ii) of Directive 2014/24 is also consistent with the principal objective pursued by Article 72 of that directive, as set out in recitals 107 and 110 thereof. According to those recitals, Directive 2014/24 seeks to clarify the conditions under which changes to a contract during their performance require a new contract award procedure, while taking into account the relevant case-law of the Court and the principles of transparency and equal treatment.
- 33 In that regard, it should be noted, in the first place, that that interpretation of Article 72(1)(d)(ii) of Directive 2014/24 is based on the usual meaning of the concepts in that provision, without requiring, unlike the interpretation proposed by Dustin and the Commission, additional criteria not included therein.
- 34 In the second place, that interpretation takes account of the Court’s case-law, in particular the judgment of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:351), from which it follows that internal reorganisations of the initial contractor are capable of constituting insubstantial changes in the terms of the public contract concerned which do not require the opening of a new public procurement procedure.
- 35 In recital 110 of Directive 2014/24, insolvency is listed without reservation as one of the examples of structural changes to the original contractor not being contrary to the principles of transparency and equal treatment on which that case-law is based. As the Advocate General noted in points 84 and 85 of his Opinion, the insolvency of the original contractor, including the bankruptcy which results in its winding-up proceedings, represents an extraordinary circumstance before the occurrence of which the public contract or framework agreement at issue has already been opened to competition in accordance with Directive 2014/24 and, under Article 72(1)(d)(ii) of that directive, can neither lead to any other substantial modifications, in particular those relating to the qualitative selection criteria initially established, or aimed at circumventing the application of that directive.
- 36 However, the case-law referred to in paragraph 34 of the present judgment does not apply to the insolvency of the original contractor or, generally, to situations in which a substantial modification of the original contractor does not require a reopening to competition. Therefore, that case-law does not preclude the interpretation which follows from paragraph 31 of the present judgment.

- 37 The interpretation of Article 72(1)(d)(ii) of Directive 2014/24 given in paragraph 31 of this judgment is also supported by the specific objective of the exception provided for in that provision, which is, as the Advocate General observed in points 82 and 83 of his Opinion, to introduce a degree of flexibility in the application of the rules in order to respond pragmatically to all the extraordinary instances, such as the insolvency of the successful tenderer, which prevents it from performing the public contract at issue. As the Advocate General noted in point 83 of his Opinion, the problem created by insolvency, which the EU legislature sought to address, does not arise differently depending on whether the business of the successful tenderer which has become insolvent is continued, at least in part, or is totally stopped.
- 38 In the light of all the foregoing considerations, the answer to the question referred is that Article 72(1)(d)(ii) of Directive 2014/24 must be interpreted as meaning that an economic operator which, following the insolvency of the initial contractor which led to its liquidation, has taken over only the rights and obligations of the initial contractor arising from a framework agreement concluded with a contracting authority must be regarded as having succeeded in part of that initial contractor, following corporate restructuring, within the meaning of that provision.

Costs

- 39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 72(1)(d)(ii) 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 must be interpreted as meaning that an economic operator which, following the insolvency of the initial contractor which led to its liquidation, has taken over only the rights and obligations of the initial contractor arising from a framework agreement concluded with a contracting authority must be regarded as having succeeded in part to that initial contractor, following corporate restructuring, within the meaning of that provision.

[Signatures]