



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

14 May 2020 *

(Reference for a preliminary ruling – Public procurement – Award of public contracts – Directive 2014/24/EU – Article 1(2) and Article 72 – Directive 2014/25/EU – Article 1(2) and Article 89 – Procedures for review of the award of public supply and public works contracts – Directive 89/665/EEC – Article 2e(2) – Procurement procedures of entities operating in the water, energy, transport and telecommunications sectors – Directive 92/13/EEC – Article 2e(2) – Modifications to a contract concluded following a public procurement procedure – No new public procurement procedure – Fines imposed on the contracting authority and on the successful tenderer – Principle of proportionality)

In Case C-263/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), by judgment of 7 March 2019, received at the Court on 28 March 2019, in the proceedings

T-Systems Magyarország Zrt.,

BKK Budapesti Közlekedési Központ Zrt.

v

Közbeszerzési Hatóság Közbeszerzési Döntőbizottság,

Intervening party:

Közbeszerzési Hatóság Elnöke,

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, S. Rodin, D. Šváby, K. Jürimäe and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 5 February 2020,

after considering the observations submitted on behalf of:

– T-Systems Magyarország Zrt., by P. Szilas, Zs. Okányi and V. Kovács, ügyvédek,

* Language of the case: Hungarian.

- the Közbeszerzési Hatóság Közbeszerzési Döntőbizottság, by I. Hunya, acting as Agent,
- the Közbeszerzési Hatóság Elnöke, by T.A. Cseh, acting as Agent,
- the Hungarian Government, by M.Z. Fehér, G. Koós and M.M. Tátrai, acting as Agents,
- the European Commission, by L. Haasbeek, P. Ondrůšek and A. Tokár, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns, in essence, the interpretation of Article 1(2) and Article 72 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), Article 2e(2) of 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 (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665'), Article 2e(2) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), as amended by Directive 2007/66 ('Directive 92/13'), and Articles 41 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in proceedings between T-Systems Magyarország Zrt. ('T-Systems') and BKK Budapesti Közlekedési Központ Zrt. ('BKK'), on the one hand, and the Közbeszerzési Hatóság Közbeszerzési Döntőbizottság (Arbitration Panel of the Public Procurement Authority, Hungary, 'the Arbitration Panel') concerning fines imposed on the former on account of the modification, during its performance, of the contract between them without use being made of new public procurement procedures.

Legal context

EU law

Directive 89/665

- 3 Article 2e of Directive 89/665, which is entitled 'Infringement of this Directive and alternative penalties', provides:

'1. In the case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) which is not covered by Article 2d(1)(b), Member States shall provide for ineffectiveness in accordance with Article 2d(1) to (3), or for alternative penalties. Member States may provide that the review body independent of the contracting authority shall decide, after having assessed all relevant aspects, whether the contract should be considered ineffective or whether alternative penalties should be imposed.'

2. Alternative penalties must be effective, proportionate and dissuasive. Alternative penalties shall be:

- the imposition of fines on the contracting authority; or
- the shortening of the duration of the contract.

Member States may confer on the review body broad discretion to take into account all the relevant factors, including the seriousness of the infringement, the behaviour of the contracting authority and, in the cases referred to in Article 2d(2), the extent to which the contract remains in force.

The award of damages does not constitute an appropriate penalty for the purposes of this paragraph.'

Directive 92/13

- 4 The provisions of Article 2e of Directive 92/13, which is entitled 'Infringements of this Directive and alternative penalties', are worded identically to the provisions of Article 2e of Directive 89/665.

Directive 2007/66

- 5 Recitals 19 to 21 of Directive 2007/66 state:

- '(19) In the case of other infringements of formal requirements, Member States might consider the principle of ineffectiveness to be inappropriate. In those cases Member States should have the flexibility to provide for alternative penalties. Alternative penalties should be limited to the imposition of fines to be paid to a body independent of the contracting authority or entity or to a shortening of the duration of the contract. It is for Member States to determine the details of alternative penalties and the rules of their application.
- (20) This Directive should not exclude the application of stricter sanctions in accordance with national law.
- (21) The objective to be achieved where Member States lay down the rules which ensure that a contract shall be considered ineffective is that the rights and obligations of the parties under the contract should cease to be enforced and performed. The consequences resulting from a contract being considered ineffective should be determined by national law. National law may therefore, for example, provide for the retroactive cancellation of all contractual obligations (*ex tunc*) or conversely limit the scope of the cancellation to those obligations which would still have to be performed (*ex nunc*). This should not lead to the absence of forceful penalties if the obligations deriving from a contract have already been fulfilled either entirely or almost entirely. In such cases Member States should provide for alternative penalties as well, taking into account the extent to which a contract remains in force in accordance with national law. Similarly, the consequences concerning the possible recovery of any sums which may have been paid, as well as all other forms of possible restitution, including restitution in value where restitution in kind is not possible, are to be determined by national law.'

Directive 2014/24

- 6 Recitals 10, 29, 107, 109 and 111 of Directive 2014/24 read as follows:

- '(10) The notion of 'contracting authorities' and in particular that of 'bodies governed by public law' have been examined repeatedly in the case-law of the Court of Justice of the European Union. To clarify that the scope of this Directive *ratione personae* should remain unaltered, it is

appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case-law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concepts as elaborated by the case-law. ...

...

- (29) It is appropriate to recall that this Directive applies only to contracting authorities of Member States. ...

...

- (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]. 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.

Modifications to the contract resulting in a minor change of the contract value up to a certain value should always be possible without the need to carry out a new procurement procedure. To this effect and in order to ensure legal certainty, this Directive should provide for *de minimis* thresholds, below which a new procurement procedure is not necessary. Modifications to the contract above those thresholds should be possible without the need to carry out a new procurement procedure to the extent they comply with the relevant conditions laid down in this Directive.

...

- (109) Contracting authorities can be faced with external circumstances that they could not foresee when they awarded the contract, in particular when the performance of the contract covers a long period. In this case, a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement procedure. ...

...

- (111) Contracting authorities should, in the individual contracts themselves, have the possibility to provide for modifications to a contract by way of review or option clauses, but such clauses should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial contract. ...'

7 Article 1(2) of Directive 2014/24 provides:

'Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.'

- 8 Title II of Directive 2014/24, which is entitled ‘Rules on public contracts’, includes, inter alia, Chapter IV on ‘contract performance’, which contains Articles 70 to 73 of that directive. Article 72, which is itself entitled ‘Modification of contracts during their term’, provides:

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

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;
- (b) for additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor:
 - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and
 - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority.

However, any increase in price shall not exceed 50% of the value of the original contract. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;

- (c) where all of the following conditions are fulfilled:
 - (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
 - (ii) the modification does not alter the overall nature of the contract;
 - (iii) any increase in price is not higher than 50% of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;

...

- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

Contracting authorities having modified a contract in the cases set out under points (b) and (c) of this paragraph shall publish a notice to that effect in the *Official Journal of the European Union*. Such notice shall contain the information set out in Annex V part G and shall be published in accordance with Article 51.

2. Furthermore, and without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met, contracts may equally be modified without a new procurement procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values:

- (i) the thresholds set out in Article 4; and
- (ii) 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts.

However, the modification may not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

...

5. A new procurement procedure in accordance with this Directive shall be required for other modifications of the provisions of a public contract or a framework agreement during its term than those provided for under paragraphs 1 and 2.'

Directive 2014/25/EU

- 9 Under recitals 12, 113, 115 and 117 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243):

'(12) The notion of 'contracting authorities' and in particular that of 'bodies governed by public law' have been examined repeatedly in the case-law of the [Court]. To clarify that the scope of this Directive *ratione personae* should remain unaltered, it is appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case-law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concept as elaborated by the case-law.

...

(113) 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]. 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.

Modifications to the contract resulting in a minor change of the contract value up to a certain value should always be possible without the need to carry out a new procurement procedure. To this effect and in order to ensure legal certainty, this Directive should provide for *de minimis* thresholds, below which a new procurement procedure is not necessary. Modifications to the contract above those thresholds should be possible without the need to carry out a new procurement procedure to the extent they comply with the relevant conditions laid down in this Directive.

...

(115) Contracting entities can be faced with external circumstances that they could not foresee when they awarded the contract, in particular when the performance of the contract covers a long period. In this case, a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement procedure. ...

...

(117) Contracting entities should, in the individual contracts themselves, have the possibility to provide for modifications by way of review or option clauses, but such clauses should not give them unlimited discretion. This Directive should therefore set out to what extent modifications may be provided for in the initial contract. ...'

10 Article 1(2) of that directive reads as follows:

'Procurement within the meaning of this Directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 8 to 14.'

11 Title II of Directive 2014/25, which is entitled 'Rules applicable to contracts', includes, inter alia, Chapter IV on 'contract enforcement', which contains Articles 87 to 90 of that directive. Article 89, which is itself entitled 'Modification of contracts during their term', provides:

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

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or framework agreement;
- (b) for additional works, services or supplies by the original contractor, irrespective of their value, that have become necessary and were not included in the initial procurement where a change of contractor:
 - (i) cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, software, services or installations procured under the initial procurement; and
 - (ii) would cause significant inconvenience or substantial duplication of costs for the contracting entity;
- (c) where all of the following conditions are fulfilled:
 - (i) the need for modification has been brought about by circumstances which a diligent contracting entity could not foresee;
 - (ii) the modification does not alter the overall nature of the contract;

...

- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

Contracting entities having modified a contract in the cases set out under points (b) and (c) of this paragraph shall publish a notice to that effect in the *Official Journal of the European Union*. Such notice shall contain the information set out in Annex XVI and shall be published in accordance with Article 71.

2. Furthermore, and without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4 are met, contracts may equally be modified without a new procurement procedure in accordance with this Directive being necessary where the value of the modification is below both of the following values:

- (i) the thresholds set out in Article 15; and
- (ii) 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts.

However, the modification may not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.

3. For the purpose of the calculation of the price referred to in paragraph 2, the updated price shall be the reference value when the contract includes an indexation clause.

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 entity had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1.

5. A new procurement procedure in accordance with this Directive shall be required for other modifications of the provisions of a works, supply or service contract or a framework agreement during its term than those provided for under paragraphs 1 and 2.'

Hungarian law

- ¹² Article 2(1) of the közbeszerzésekről szóló 2015. évi CXLI. törvény (Law No CXLI on public procurement, 'the Public Procurement Law') provides:

'The contracting authority must ensure the fairness and the transparency of competition in procurement procedures and the public nature of those procedures, with which economic operators must comply.'

- 13 Article 141 of that law, which determines the different cases in which the parties to a public contract may modify that contract, provides in paragraph 8 thereof:

‘Save in the cases covered by the provisions of this article, a contract may be modified only further to the organisation of a new procurement procedure. If a contract is modified such that a public procurement procedure is unlawfully precluded, the modification shall be void pursuant to Article 137(1)(a).’

- 14 Article 153(1) of the Law states:

‘The Közbeszerzési Hatóság Elnöke [(Director of the Public Procurement Authority, Hungary)] shall take the initiative to initiate the procedure *ex officio* before the [Arbitration Panel]

...

(c) where it is plausible, in the light of the outcome of the checks conducted by the Public Procurement Authority pursuant to Article 187(2)(j), or even without initiating administrative checks, that the contract has been modified or performed in breach of this Law, in particular where an infringement as referred to in Article 142(2) has been committed;

...’

- 15 Under Article 165 of the same law:

‘...

(2) In its ruling, the [Arbitration Panel]

...

(d) shall find that an infringement has been committed and apply the legal consequences provided for in paragraph 3;

(e) in the cases referred to in paragraph 6, shall find that an infringement exists and impose a fine;

...

(3) If, in its ruling, it finds that an infringement exists, the [Arbitration Panel]

...

(d) may impose a fine on the entity or person in breach as well as on a person or an entity which has a legal relationship with the entity or person responsible for the infringement and which is also responsible for the infringement.

...

(6) The [Arbitration Panel] shall find an infringement exists and impose a fine where

(a) the procurement procedure is unlawfully precluded by virtue of the infringement;

...

(e) the Director of the Public Procurement Authority initiated the procedure [under Article 153] *ex officio* and the Arbitration Panel has found that an infringement had been committed.

...'

16 Article 176 of the Public Procurement Law provides:

'(1) If, in its ruling on the merits of the case, the [Arbitration Panel] finds that an infringement exists as referred to in Article 137(1), it shall initiate judicial proceedings for a declaration that the contract is invalid and that the legal consequences of that illegality apply.

...

(4) If, following the proceedings referred to in paragraph 1, the court finds that a contract is invalid for the reasons defined in Article 137(1), it shall give due effect to the legal consequences of that illegality in accordance with the provisions of the Civil Code and of this Law.

(5) If the court declares, pursuant to Article 137(3), that the contract concluded further to the procurement procedure is valid, it shall be required to impose a fine the amount of which, taking into account all the circumstances of the case in question, shall be a maximum of 15% of the contract value. If, where it gives due effect to the legal consequences of the illegality, the court orders the reimbursement of the equivalent value of the service received without consideration, it shall be required to impose a fine the amount of which, taking into account all the circumstances of the case in question, shall be a maximum of 10% of the contract value.

(6) The proceedings referred to in paragraph 1 shall fall within the exclusive jurisdiction of the administrative and labour court which, in the case of one and the same infringement of the rules on procurement, shall apply the procedure for administrative proceedings provided for in Article 170. ...'

17 Article 240(1) of the Polgári Törvénykönyvről szóló 1959. évi IV. törvény (Law No IV of 1959 on the Civil Code) reads as follows:

'Unless otherwise provided for by law, the parties may by common agreement modify the content of the contract or the legal nature of the commitments which they have entered into.'

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

18 BKK, a company established by the municipal authorities of Budapest Capital (Hungary), carries out public service tasks in the field of public transport in that city.

19 Following a restricted tendering procedure for the manufacture, transport, installation and operation of ticket vending machines, on 4 September 2013 BKK, as the contracting authority, concluded with T-Systems a contract with a total value of 5 561 690 409 Hungarian forints (HUF) (approximately EUR 18 500 000).

20 The parties modified that contract on several occasions. In particular, by a modification of 13 July 2017, BKK ordered T-Systems to supplement the central control system of the ticket vending machines with a software module enabling tickets to be purchased online.

21 It was subsequently stipulated that the amount of the additional consideration corresponding to the various contractual modifications could not exceed the amount of HUF 2 530 195 870 (approximately EUR 8 200 000).

- 22 On 29 September 2017, the Director of the Public Procurement Authority initiated, pursuant to Article 153(1)(c) of the Public Procurement Law, a procedure *ex officio* against the contracting parties for breach, inter alia, of Article 141(2) and (4)(b) and (c) of that law and referred the matter to the Arbitration Panel.
- 23 The Arbitration Panel found that each of the modifications to the contract should have been subject to a new public procurement procedure. It observed that the two contracting parties must comply with the requirements laid down in public procurement law as regards modifications of contracts, which means that, if they have applied those provisions unlawfully, they must each be regarded as having committed an infringement.
- 24 The Arbitration Panel therefore found that, by virtue of the contractual modifications, the contracting parties had infringed inter alia the provisions of Article 141(8) of the Public Procurement Law. Taking into account in particular the provisions of Article 165(3)(d) of that law, it imposed a fine of HUF 80 000 000 (approximately EUR 258 941) on BKK and a fine of HUF 70 000 000 (approximately EUR 226 573) on T-Systems.
- 25 The latter brought proceedings before the Fővárosi Törvényszék (Budapest High Court, Hungary) for a finding that there was no infringement on its part and, accordingly, for the reversal of the decision which imposed a fine on it.
- 26 T-Systems takes the view that the requirement to organise a public procurement procedure is incumbent on the contracting authority and that a successful tenderer cannot be held responsible for a decision taken by that authority as regards its needs in terms of public procurement. Thus, in the present case, by making it bear the consequences of the decisions adopted by BKK, the Arbitration Panel infringed the principles of legal certainty and the rule of law.
- 27 In T-Systems' opinion, the contracting authority is the sole addressee of the rule of law contained in Article 141(8) of the Public Procurement Law and, on that basis, the contracting authority alone is capable of committing the infringement punishable by that provision.
- 28 T-Systems is of the view that the requirements of foreseeability and due diligence are incumbent on the contracting authority and that the breach of those requirements is attributable to the contracting authority alone where it takes the initiative to alter a contract.
- 29 BKK has also contested the decision imposing a fine on it before the referring court, seeking, primarily, a review of that decision, a finding that an infringement does not stem from the modifications to the contract at issue in the main proceedings and the cancellation of that fine.
- 30 The Arbitration Panel asks the referring court to find that the modifications made to the contract at issue in the main proceedings were invalid, to order, if it deems it necessary, the restoration of the situation existing prior to that contract and to reject the forms of order sought by BKK and T-Systems. It states that, with regard to the latter company, it found there to be an infringement solely because of a breach of the rules of law of which it was the addressee, namely the provisions of Article 141 of the Law on Public Procurement. It observes that the provisions of the Civil Code state that the two parties must act jointly in order for a contract to be modified, which justifies examining the breach of the rules on contract modifications in respect of the two parties.
- 31 For his part, the Director of the Public Procurement Authority considers that the lawful performance of the public procurement procedure is a matter primarily but not exclusively for the contracting authority. He points out that it is not unusual for the successful tenderer for a public contract to take the initiative to modify a contract. He also refers to the fundamental principle of civil law that the modification of the contract presupposes the common agreement of the parties concerned.

- 32 The referring court notes that it is for the contracting authority to organise a public procurement procedure.
- 33 It takes the view that, in order to maintain competition that is as broad as possible, even after the contract has been signed, strict penalties are attached to offending conduct resulting from the legal relationships between the parties. It clarifies that those relationships fall within the field of civil law as a result of the conclusion of the contract.
- 34 The referring court is of the view that it follows from the provisions of Article 141 of the Public Procurement Law that, although a contract may be modified only by common agreement of the parties, the contracting authority is the only party that can be caught by an infringement of the rules on public procurement because it falls within the scope *ratione personae* of the legislation.
- 35 It states that the provisions of the national legislation on review procedures do not specify which persons involved in a procurement procedure may be penalised. In addition, in order to determine which individual should be regarded as having infringed a rule, it would be necessary to determine which person is the addressee of the provision that has been infringed. In its view, the penalty laid down, which is punitive in nature and must be imposed on the perpetrator of the offence alone, concerns the person required to conduct a procurement procedure, namely the contracting authority.
- 36 The referring court refers to several judgments of Hungarian courts from which it is clear that the contracting authority or the economic operator was exempted from payment of the fine imposed, inter alia because the latter was not responsible for the organisation of the procurement procedure.
- 37 The referring court states that the fact that the successful tenderer for a contract is an addressee of the provisions of the Public Procurement Law on modifications to contracts cannot mean that that tenderer may be held to bear the same responsibility to that borne by the contracting authority from the perspective of public procurement law.
- 38 It takes the view that, although the responsibility of the contracting parties may be called into question from the point of view of that law, they must be afforded the opportunity to furnish probative evidence capable of clarifying their involvement in the modification of the contract at issue and in the commission of any offence.
- 39 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) stayed the proceedings and referred the following questions to the Court for a preliminary ruling:
- ‘(1) Do Articles 41(1) and 47 of the [Charter], as well as recitals 10, 29, 107, 109 and 111 and Articles 1(2) and 72 of Directive [2014/24] preclude a national rule or a practice in relation to the interpretation and application of that rule which, taking into account the contractual legal relationship between the contracting parties, stipulates that an infringement for an unlawful failure to hold a public tender, allegedly violating the rules concerning the modification of contracts, and a failure to comply with the provisions governing the modification of contracts, is committed not only by the contracting entity, but also by the successful tenderer which concluded the contract with it, on the basis that the unlawful modification of the contracts requires joint action by the parties?
- (2) In the event that the first question is answered in the negative, taking into account the provisions of Articles 41(1) and 47 of the [Charter] and recitals 10, 29, 107, 109 and 111 and Articles 1(2) and 72 of Directive [2014/24], do recitals 19, 20 and 21 of Directive [2007/66] and Article 2e(2) of [Directive 89/665] and Article 2e(2) of [Directive 92/13], which articles are identical in terms of content, preclude a national rule or a practice in relation to the interpretation and application of that rule which allows a penalty (fine) – other than a reduction of the duration of the contract –

for unlawful failure to hold a public tendering procedure and for failure to comply with the rules on the modification of contracts to be imposed also on the successful tenderer which concluded the contract with the contracting entity?

- (3) If the first two questions are answered in the negative, the referring court asks the [Court] to also provide it with guidance as to whether, in order to determine the amount of the penalty (fine), it is sufficient that there is a contractual legal relationship between the parties, without it being necessary to examine the action and the contribution of the parties which led to the modification of the contract?’

The questions referred for a preliminary ruling

Preliminary observations

- 40 According to the referring court, the resolution of the dispute in the main proceedings turns on whether the Charter and Directives 89/665, 92/13, 2007/66 and 2014/24 preclude national legislation which, in the context of a review procedure initiated *ex officio* by a supervisory authority, allows an offence to be attributed to, and a fine imposed on, not only the contracting authority but also the successful tenderer for a public contract where, when that contract is modified during its performance, the public procurement rules have been unlawfully disapplied.
- 41 In the first place, it must be observed that the provisions of the Charter are not relevant for the provision of guidance to the referring court in the context of the dispute in the main proceedings.
- 42 First, it is clear from the wording of Article 41 of the Charter that that article is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (judgment of 26 March 2020, *HUNGEOD and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 63 and the case-law cited).
- 43 Second, with regard to Article 47 of the Charter, which is likewise invoked by the referring court, it must be recalled that, when defining the detailed procedural rules governing the remedies intended to protect the rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities, the Member States must not compromise the effectiveness of the rights conferred on individuals by EU law, in particular, the right to an effective remedy and to a fair hearing enshrined in Article 47 of the Charter (judgment of 26 March 2020, *HUNGEOD and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 64 and the case-law cited).
- 44 However, it is not apparent from any documents available to the Court that the procedure which resulted in the imposition of a fine, where a public contract was unlawfully modified during its performance, not only on the contracting authority but also on the successful tenderer for the contract would have the effect of compromising the effectiveness of the right to an effective remedy or to a fair hearing.
- 45 In the second place, it must be recalled that, in accordance with settled case-law, in the context of the cooperation procedure between the national courts and the Court established in Article 267 TFEU, it is for the Court to provide the national court with an answer which will be of use to it and enable it to decide the case before it. With that in mind, it is for the Court, where appropriate, to reformulate the questions submitted to it. In addition, the Court may be prompted to consider rules of EU law to which the national court has not referred in the wording of its questions (judgment of 12 December 1990, *SARPP*, C-241/89, EU:C:1990:459, paragraph 8, and of 8 June 2017, *Medisanus*, C-296/15, EU:C:2017:431, paragraph 55).

- 46 In the present case, since the contract at issue in the main proceedings related to the manufacture, transport, installation and operation of ticket vending machines, it is Directive 2014/25 that may be applicable and not Directive 2014/24; this is, however, a matter for the referring court to determine.
- 47 Accordingly, in order to provide an answer which will be of use to that court, account must be taken of recitals 12, 113, 115 and 117 as well as Articles 1(2) and 89 of Directive 2014/25, which corresponds, in that directive, to the recitals and provisions of Directive 2014/24 invoked in the request for a preliminary ruling.
- 48 In those circumstances, the view must be taken that, by its first and second questions, the referring court asks whether Article 2e(2) of Directive 89/665, Article 2e(2) of Directive 92/13, recitals 19 to 21 of Directive 2007/66, and recitals 12, 113, 115 and 117, Article 1(2) and Article 89 of Directive 2014/25 preclude national legislation which, in the context of a review procedure initiated *ex officio* by a supervisory authority, allows an offence to be attributed to, and a fine imposed on, not only the contracting authority but also the successful tenderer for a public contract where, when that contract is modified during its performance, the rules on public procurement have been unlawfully disapplied, and, by its third question, whether, if the first and second questions are answered in the negative, the amount of the fine penalising the unlawful modification of the public contract concluded between the contracting authority and the successful tenderer for the contract must be determined taking into account merely the existence of the contractual relationship between those two parties or whether consideration must be given to the specific conduct of each of those parties.

The first and second questions

- 49 By its first and second questions, the referring court asks whether Article 2e(2) of Directive 89/665, Article 2e(2) of Directive 92/13, recitals 19 to 21 of Directive 2007/66, and recitals 12, 113, 115 and 117, Article 1(2) and Article 89 of Directive 2014/25 are to be interpreted as precluding national legislation which, in the context of a review procedure initiated *ex officio* by a supervisory authority, allows an offence to be attributed to, and a fine imposed on, not only the contracting authority but also the successful tenderer for the contract where, when that contract is modified during its performance, the rules on public procurement have been unlawfully disapplied.
- 50 In the first place, it must be observed that Directives 89/665 and 92/13 do indeed provide merely that the Member States are to ensure that the review procedures are available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement (judgment of 26 March 2020, *HUNGEOD and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 71).
- 51 The provisions of those directives are intended to protect tenderers against arbitrary behaviour on the part of the contracting authority and thus designed to reinforce the existence, in all Member States, of effective remedies, so as to ensure the effective application of the EU rules on the award of public contracts, in particular where infringements can still be rectified (judgment of 26 March 2020, *HUNGEOD and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 72).
- 52 It is with that in mind that Article 2e of Directive 89/665 and Article 2e of Directive 92/13, which are worded identically, require that Member States provide, in the case of infringement of certain provisions of those directives, either for the ineffectiveness of the contract or for alternative penalties that may consist in the imposition of fines on the contracting authority.

- 53 However, although Directives 89/665 and 92/13 require that remedies are available to undertakings having or having had an interest in obtaining a particular contract and who have been or risk being harmed by an alleged infringement, they cannot be regarded as bringing out complete harmonisation and, therefore, as providing for all possible remedies in matters of public procurement (judgment of 26 March 2020, *HUNGEOD and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 73).
- 54 It follows that Article 2e of Directive 89/665 and Article 2e of Directive 92/13 relate only to actions brought by undertakings having or having had an interest in obtaining a particular contract and who have been or risk being harmed by an alleged infringement.
- 55 In those circumstances, those articles cannot preclude an appeal procedure from being initiated *ex officio* by a supervisory authority or an infringement relating to the modification of a public contract during its performance in breach of the rules on public procurement from being attributed not only to the contracting authority but also to the successful tenderer for the contract and, therefore, a penalty in the form of a fine from being imposed on both the contracting authority and that tenderer.
- 56 Moreover, recitals 19 to 21 of Directive 2007/66, which inserted Article 2e into Directives 89/665 and 92/13, in no way invalidate such an interpretation.
- 57 In the second place, it cannot be inferred either from Article 1(2) of Directive 2014/25, which defines both the scope *ratione materiae* and the scope *ratione personae* of that directive, or from recital 12 of that directive, which, in support of that provision, clarifies inter alia the concept of a ‘contracting authority’, that the successful tenderers for public contracts are not covered by the rules of law laid down by the Directive.
- 58 First, under Article 1(2) of Directive 2014/25, procurement is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities from economic operators who, after having put themselves forward as a candidate or submitted a tender, have been chosen by those entities. It follows that the term ‘economic operators’ used in that provision necessarily includes the successful tenderers for public contracts.
- 59 Second, Article 89 of Directive 2014/25, which is entitled ‘Modification of contracts during their term’, and which is part of Chapter IV on contract performance in Title II of that directive, confirms that the Directive applies to the successful tenderers for contracts.
- 60 Paragraphs 1 and 2 of that article list the different situations in which a contract may be modified during its performance by the contracting parties, namely the contracting authority and the successful tenderer, without recourse being had to a new procurement procedure, regardless of whether or not that modification gives rise to the publication of a notice in the *Official Journal of the European Union*.
- 61 Article 89(5) of that directive requires that a new procurement procedure is organised for modifications of the provisions of a public contract other than those provided for in paragraphs 1 and 2 of that article. It follows that a new procurement procedure must be organised for modifications that are materially different in character from the original contract and are, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see, by analogy, judgments of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraph 34, and of 29 April 2010, *Commission v Germany*, C-160/08, EU:C:2010:230, paragraph 99).
- 62 However, Article 89(5) of the Directive does not specify the appropriate conclusions which the national authorities should draw from the fact that a public contract has been modified materially during its performance without recourse being had to a new procurement procedure.

- 63 In addition, it should be observed that recitals 113, 115 and 117 of Directive 2014/25, which are mentioned by the referring court, provide no clarification in that regard. Furthermore, recital 113 states that material changes to a public contract during its performance demonstrate the contracting parties' intention to renegotiate essential terms or conditions of that contract.
- 64 It follows from the foregoing that, since neither Article 1(2) nor Article 89 of Directive 2014/25 brings about complete harmonisation, neither of those two provisions can preclude, in the context of a review procedure initiated *ex officio* by a supervisory authority, an infringement consisting in the modification of a public contract during its performance in breach of the rules on public procurement from being attributed not only to the contracting authority but also to the successful tenderer for that contract and, therefore, a penalty in the form of a fine from being imposed on the latter.
- 65 The fact remains that, where provision is made for it in national legislation, a review procedure initiated *ex officio* by a supervisory authority which culminates in an infringement being attributed to the successful tender for a public contract on account of the unlawful modification of that contract during its performance and, therefore, in a fine being imposed on that tenderer must be consistent with EU law in so far as such a contract itself falls within the scope *ratione materiae* of the directives on public procurement, either *ab initio* or following its unlawful modification.
- 66 Therefore, such an *ex officio* review procedure must comply with EU law, including the general principles of that law.
- 67 Having regard to the foregoing, the first and second questions must be answered to the effect that Article 2e(2) of Directive 89/665, Article 2e(2) of Directive 92/13, recitals 19 to 21 of Directive 2007/66, and recitals 12, 113, 115 and 117, Article 1(2) and Article 89 of Directive 2014/25 are to be interpreted as not precluding national legislation which, in the context of a review procedure initiated *ex officio* by a supervisory authority, allows an infringement to be attributed to, and a fine imposed on, not only the contracting authority but also the successful tenderer for the contract where, when a public contract is modified during its performance, the rules on public procurement have been unlawfully disappplied. However, where the national legislation provides for a review procedure, that procedure must comply with EU law, including the general principles of that law, in so far as the public contract concerned itself falls within the scope *ratione materiae* of the directives on public procurement, either *ab initio* or following its unlawful modification.

The third question

- 68 By its third question, the referring court asks whether, if the first and second questions are answered in the negative, the amount of the fine penalising the unlawful modification of a public contract concluded between the contracting authority and the successful tenderer for the contract must be determined taking into merely the existence of a contractual relationship between those parties, pursuant to which they should act jointly in order to modify the public contract between them, or whether consideration must be given to the specific conduct of each of those parties.
- 69 As is clear from paragraph 65 of this judgment, where such provision is made in national legislation, a review procedure initiated *ex officio* by a supervisory authority which culminates in an infringement being attributed to the successful tender for a public contract on account of the unlawful modification of that contract during its performance and, therefore, in a fine being imposed on that tenderer must be consistent with EU law in so far as the contract at issue itself falls within the scope *ratione materiae* of the directives on public procurement, either *ab initio* or following its unlawful modification.

- 70 In the light of the scope of the third question, it is therefore necessary to determine the requirements arising from the principle of proportionality which must be met where, in the context of an *ex officio* review procedure, the amount of the fine imposed on the successful tenderer for the public contract must be determined.
- 71 It must be recalled that, in accordance with the principle of proportionality, which constitutes a general principle of EU law, the rules laid down by the Member States or contracting authorities in the application of the directives on public procurement must not go beyond what is necessary to achieve the intended objectives of those directives (see, to that effect, judgments of 8 February 2018, *Lloyd's of London*, C-144/17, EU:C:2018:78, paragraph 32, and of 30 January 2020, *Tim*, C-395/18, EU:C:2020:58, paragraph 45).
- 72 In the present case, although it is for the referring court to assess whether the amount of the fine imposed on T-Systems is proportionate to the objectives of the Public Procurement Law, the supervisory authority or the referring court cannot determine such an amount simply taking into consideration the mere fact that, under the contractual relationship between them, the parties must act jointly in order to modify the public contract between them. That amount must be determined having regard to the conduct or the actions of the parties to the public contract concerned over the period during which they contemplated modifying that contract.
- 73 With regard more specifically to the successful tenderer, account may be taken *inter alia* of the fact that it took the initiative to propose the modification of the contract or whether it suggested, or even demanded, that the contracting authority refrain from organising a public procurement procedure to meet the needs necessitating the modification of that contract.
- 74 However, the amount of the fine imposed on the successful tenderer cannot be dependent on the fact that use was not made of a public procurement procedure to modify the contract, since the decision to adopt such a procedure falls within the prerogatives of the contracting authority alone.
- 75 Accordingly, the third question must be answered to the effect that the amount of the fine penalising the unlawful modification of a public contract concluded between a contracting authority and a successful tenderer must be determined taking into consideration the specific conduct of each of those parties.

Costs

- 76 Since these proceedings are, for the parties to the main proceedings, a step in the action brought before the national 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:

1. **Article 2e(2) of 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 contract, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, Article 2e(2) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 2007/66, recitals 19 to 21 of Directive 2007/66, and recitals 12, 113, 115 and 117, Article 1(2) and Article 89 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors**

and repealing Directive 2004/17/EC are to be interpreted as not precluding national legislation which, in the context of a review procedure initiated *ex officio* by a supervisory authority, allows an infringement to be attributed to, and a fine imposed on, not only the contracting authority but also the successful tenderer for the contract where, when a public contract is modified during its performance, the rules on public procurement have been unlawfully disapplied. However, where the national legislation provides for a review procedure, that procedure must comply with EU law, including the general principles of that law, in so far as the public contract concerned itself falls within the scope *ratione materiae* of the directives on public procurement, either *ab initio* or following its unlawful modification.

2. The amount of the fine penalising the unlawful modification of a public contract concluded between a contracting authority and a successful tenderer must be determined taking into consideration the specific conduct of each of those parties.

[Signatures]