The EU Rules on Contract Modifications in the Context of the Insolvency of Economic Operators: *Advania Sverige and Kammarkollegiet* (C-461/20)

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1. Introduction

The number of judgments of the Court of Justice of the European Union (CJEU or Court) concerning contract modifications is relatively low.[1] Moreover, cases regarding the interpretation of relevant provisions of public procurement directives adopted in 2014 can be counted on the fingers of one hand.[2] Consequently, any new case before the Court on contract modification deserves special consideration, particularly when—as noted by Advocate General H. Saugmandsgaard Øe—the stakes are high.[3]

In this case, upon a reference from the Swedish Supreme Administrative Court, the CJEU was invited to define the margin of manoeuvre available to a contracting authority to replace the initial successful tenderer where the latter became insolvent.

2. Facts

The request has been made in proceedings between Advania Sverige AB (Advania), on one hand, and the Swedish Legal, Financial and Administrative Services Agency (Agency) and Dustin Sverige AB (Dustin), on the other, concerning the decision of the Agency to approve the transfer of four framework agreements for the purchase of various computer equipment without a new procurement procedure in accordance with Directive 2014/24.[4]

The Agency has initially qualified for the selection 17 candidates, including Advania, Dustin and Misco AB (Misco). Ultimately, framework agreements were concluded with six suppliers in various fields. Misco was awarded four framework agreements covering all the fields concerned. Dustin was awarded framework agreements in two of those fields. Advania was not awarded any framework agreement.

In December 2017, a few days before it was declared insolvent, Misco requested the Agency to authorise the transfer to Advania of four of the framework agreements which it held. In January 2018 its insolvency administrator signed a contract with Advania providing for the transfer of those framework agreements. The Agency authorised that transfer in February 2018. This was challenged by Dustin which brought an appeal before the Administrative Court in Stockholm seeking that the framework agreements between Advania and the Agency be declared invalid.

[1] See, e.g. judgment of the Court of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06) ECLI:EU:C:2008:35 which by all means is the most important and most often quoted judgment of the CJEU concerning contract modification in EU public procurement law.

[2] See judgments of the Court: of 26 March 2020, *HUNGEOD* (C-496/18 and C-497/18) ECLI:EU:C:2020:240; of 14 May 2020, *T-Systems Magyarország* (C-263/19) ECLI: EU: C: 2020:373 and of 2 September 2021, *Sisal* (C-721/19 and C-722/19) ECLI:EU:C:2021:672.

[3] See opinion of Advocate General H. Saugmandsgaard Øe of 9 September 2021, *Advania Sverige and Kammarkollegiet* (C-461/20) ECLI:EU:C:2021:729 at [34]. Opinion and the judgment in question are generally aligned.

[4] 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 ([2014] OJ L 94/65) (Directive 2014/24).

The appeal was dismissed. However, Dustin brought an appeal against the judgment before the Administrative Court of Appeal which upheld the appeal and declared the invalidity of the four framework agreements between Advania and the Agency. Advania and the Agency both then brought an appeal against the judgment before the Supreme Administrative Court. In those circumstances, the Supreme Administrative Court stayed the proceedings and referred the following question to the Court 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]?"

3. Judgment of the Court

The CJEU ruled that art.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 leading 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.

As a preliminary point, the Court recalled that in accordance with the case law of the Court,[5] then codified in art.72(4)(d) of Directive 2014/24, the substitution of a new contractor for one to which the contracting authority had initially awarded the contract must be regarded, in general, 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. By way of exception, art.72(1)(d)(ii) of Directive 2014/24 provides that a new contractor may replace the contractor 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.

As noted by the Court, it is apparent from the wording of art.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. At the same time, 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.

In the view of the Court, that literal interpretation of art.72(1)(d)(ii) of Directive 2014/24 is also consistent with the principal objective pursued by art.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 considering the relevant case-law of the Court and the principles of transparency and equal treatment. In this context, the Court noted that this case-law does not preclude that interpretation.[6]

Finally, the Court held that the presented interpretation of art.72(1)(d)(ii) of Directive 2014/24 is also supported by the specific objective of the exception provided for in that provision, which is, as the Advocate General observed in its opinion,[7] to introduce a degree of flexibility in the application of the rules in order

[5] The CJEU cited its judgment of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06) ECLI:EU:C:2008:35 at [40] and [47].
[6] Once again, the CJEU referred to *pressetext Nachrichtenagentur* (C-454/06).
[7] See [82] and [83].

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.

4. Comment

The position of the Court seems to be correct. Notably, even before the entry into force of Directive 2014/24, the possibility of modifying a contract in the case of insolvency was advocated in the legal literature.[8] Paradoxically, after this legislation went into effect, it appeared that this may not have been possible because of the concept of succession mentioned in art.72(1)(d)(ii) of Directive 2014/24. Therefore, the judgment is noteworthy because the Court applied a functional approach when interpreting this provision, which allowed it to effectively disregard the reference to the concept of succession in art.72(1)(d)(ii).[9]

Pursuant to art.72(1)(d)(ii), 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". The event giving rise to the succession must be a corporate restructuring, which can take various forms. The provision lists four of these by way of an example. As aptly noted by the Court, the first three examples given, namely takeover, merger and acquisition, have something in common. In all three cases, the continuation of at least part of the original contractor's business takes place. This is a simple consequence of universal or partial succession, that is an acquisition of the contractor's rights and acceding to a legal situation that, in addition to rights, also includes obligations. This is succession under a general title, based on a single legal event (such as a takeover, merger or acquisition). This succession under the general title distinguishes universal or partial succession from a *singular* succession, i.e. a succession under a special title, involving the acquisition of an individually designated right or rights.

Interestingly, the Swedish-language version of art.72(1)(d)(ii) does not use the expression "universal or partial succession", as for instance the English and French language versions of the provision do. It states that another economic operator "replaces [the initial economic operator] in full or in part". The Advocate General believed that these expressions are broadly equivalent.[10] This is, however, problematic.

It is unclear whether under Swedish law insolvency leads to "universal or partial succession". If it were not to do so (as it does not, for instance, under Polish law, in which insolvency is classified as a case of singular succession[11]), one could call into question the possibility of the replacement of the contractor to whom the contracting authority initially awarded the contract following its insolvency. Simply, art.72(1)(d)(ii) does not refer to "singular succession". Taking this stance could certainly limit the application of art.72(1)(d)(ii) in practice. In fact, the application of this provision could depend in such case on the notion of "universal or partial succession" in Member States.[12] As it seems, the CJEU has recognised this issue.

Leaving aside the concept of succession, the Court focused on the concepts of "insolvency" and "restructuring" and held that both of these concepts encompass "structural changes to the original contractor, in particular insolvency which includes insolvency resulting in liquidation".[13] The interpretation of these

[8] See, with reservations, S. Treumer, "Transfer of contracts covered by the EU public procurement rules after insolvency" (2014) 23 P.P.L.R. 21–31. See also M. Comba, "Retendering or sale of contract in case of bankruptcy of the contractor" in G. Piga and S. Treumer (eds), *The Applied Law and Economics of Public Procurement* (Routledge, 2016), pp.201–209.

[9] Even if the Court referred to it in [23]–[25] and said in the sentence about the contractor "having succeeded into the position of the initial contractor". On the necessity of taking the functional approach see P. Bogdanowicz, "Transposition of the Public Procurement Directives in Poland: evolution instead of revolution" in M. Comba and S. Treumer (eds), *Modernising Public Procurement. The Approach of EU Member States* (Edward Elgar, 2016), pp.164–165.

[10] See [41] of his opinion.

[11] Probably this is why the Polish public procurement law does not use the term of "universal or partial succession" but refers to just "succession".

[12] Notably, neither "universal succession" nor "partial succession" is defined in Directive 2014/24.

[13] See [26] and [31] of the judgment in question.

concepts, and not of "succession", led the Court to build further on this and to refer to the case-law of the Court and the objective of art.72(1)(d)(ii) in order to confirm its position.

However, it is questionable whether the CJEU's reference to its case-law was indeed necessary in this case. As noticed by the Court itself, it follows from the *pressetext Nachrichtenagentur* case 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" (emphasis added). Following the entry into force of Directive 2014/24, EU public procurement law permits contract modification regardless of whether a change is substantial or not. The changes referred to in art.72(1)(a)-(d) are compatible with EU law not because, or at least not necessarily because, they are not substantial. They are permissible because Directive 2014/24 so provides.[14]

Similarly, it is questionable for the CJEU to still treat permitted modifications as exceptions to a general prohibition on the modification of a contract. Under the Court's case-law, the prohibition on making substantial modifications to a contract could be regarded as being a rule. However, pursuant to Directive 2014/24, such modifications can be triggered by a range of behaviours, needs or events. Therefore, modifications can be a result of careful forward planning carried out by the contracting authority (modifications provided for in the review clauses). They may also be triggered following circumstances that could not have been foreseen by the contracting authority despite exercising due care, or following events on the economic operator's side, such as restructuring. Consequently, it seems that the division into a rule (modification of a contract is impermissible) and an exception (modification of a contract is permissible) loses a lot of its merit in practice.

[14] See further P. Bogdanowicz, *Contract Modifications in EU Procurement Law* (Edward Elgar, 2021), pp.77–83.