Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

9 January 2025 *

(Reference for a preliminary ruling – Public contracts – Directive 2004/18/EC – Article 31(1)(b) – Negotiated procedure without prior publication of a contract notice – Conditions – Technical reasons – Reasons connected with the protection of exclusive rights – Attributable to the contracting authority – Factual and legal circumstances to be taken into consideration)

In Case C-578/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic), made by decision of 12 September 2023, received at the Court on 19 September 2023, in the proceedings

Česká republika – Generální finanční ředitelství

v

Úřad pro ochranu hospodářské soutěže,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Second Chamber, acting as President of the Third Chamber, K. Lenaerts, President of the Court, acting as Judge of the Third Chamber, N. Jääskinen, M. Gavalec (Rapporteur) and N. Piçarra, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Czech Government, by L. Halajová, M. Smolek and J. Vláčil, acting as Agents,

– the Slovak Government, by E. Larišová and S. Ondrášiková, acting as Agents,

– the European Commission, by M. Monfort and G. Wils, acting as Agents,

* Language of the case: Czech.

after hearing the Opinion of the Advocate General at the sitting on 26 September 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 31(1)(b) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) which was repealed and replaced by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC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 for a preliminary ruling has been made in proceedings between the Česká republika – Generální finanční ředitelství (General Finance Directorate, Czech Republic) ('the GFD') and the Úřad pro ochranu hospodářské soutěže (Office for the Protection of Competition, Czech Republic) ('the competition authority') concerning the competition authority's finding of an infringement committed by the GFD, which, without the necessary conditions being fulfilled, used a negotiated procedure without prior publication of a contract notice.

Legal context

European Union law

3 Article 28 of Directive 2004/18, entitled 'Use of open, restricted and negotiated procedures and of competitive dialogue', provides:

'In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive.

They shall award these public contracts by applying the open or restricted procedure. In the specific circumstances expressly provided for in Article 29, contracting authorities may award their public contracts by means of the competitive dialogue. In the specific cases and circumstances referred to expressly in Articles 30 and 31, they may apply a negotiated procedure, with or without publication of the contract notice.'

4 Article 31 of that directive, entitled 'Cases justifying use of the negotiated procedure without publication of a contract notice', provides in paragraph 1 thereof:

'Contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice in the following cases:

(1) for public works contracts, public supply contracts and public service contracts:

…

(b) when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;

(c) in so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication of a contract notice as referred to in Article 30 cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority.'

Czech law

5 Zákon č. 137/2006 Sb. o veřejných zakázkách (Law No 137/2006 on public contracts, 'the Law on public contracts') transposed Directive 2004/18 into Czech law.

6 Paragraph 21(2) of that law provides:

'The contracting authority may award a public contract in an open procedure or a restricted procedure and, under the conditions laid down in Paragraphs 22 and 23, also in a negotiated procedure with publication or a negotiated procedure without publication; the open procedure may not be used for public contracts in the field of defence or security.'

7 Paragraph 23(4)(a) of that law provides:

'The contracting authority may also award a public contract by negotiated procedure without publication where the public contract can only be performed by a particular supplier for technical or artistic reasons, reasons connected with the protection of exclusive rights or reasons arising from specific legislation.'

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

8 On 29 June 1992, the Ministerstvo financí (Ministry of Finance, Czech Republic) concluded a contract with the company IBM World Trade Europe/Middle East/Africa Corporation ('the original contract'), which gave rise to the creation of an information system for the Czech tax authorities.

9 The GFD, which was established in 2013 and is responsible for the administration of taxes in the Czech Republic, replaced that ministry in that field.

10 After initiating a negotiated procedure without prior publication of a contract notice on 1 March 2016, pursuant to Paragraph 23(4)(a) of the Law on public contracts, the GFD awarded on 20 May 2016, in the context of that procedure, a public contract for the maintenance of that information system, with a value of 33 294 389 Czech koruny (CZK) (approximately EUR 1 300 000), excluding value added tax (VAT), to the company IBM Česká republika, spol. s r. o., whose sole shareholder in 1992 was the company IBM World Trade Europe/Middle East/Africa Corporation.

11 The use of that procedure was based on reasons connected with technical continuity between the information system in question and its post-guarantee maintenance as well as on reasons connected with the protection of IBM Česká republika's exclusive copyright ('the situation of exclusivity') on the source code of that system. In accordance with the stipulations of the original contract, that company is the holder of the licence rights for that system.

12 By decision of 9 October 2017, the competition authority found that, by awarding the public contract in question to IBM Česká republika, the GFD had committed an infringement. It had awarded that contract without the conditions for being able to use the negotiated procedure without prior publication of a contract notice being satisfied. First, the GFD had not shown that, for technical reasons, the public contract in question in the main proceedings could only be performed by IBM Česká republika. Second, the need to protect IBM Česká republika's exclusive rights in respect of that source code was the consequence of the previous conduct of the GFD's predecessor in law.

13 After an administrative appeal brought by the GFD against that decision was dismissed by decision of the President of the competition authority, the GFD brought an action against that latter decision before the Krajský soud v Brně (Regional Court, Brno, Czech Republic).

14 That court dismissed the action inter alia on the ground that the award of the contract to IBM Česká republika, because of the need to respect its exclusive copyright, was due to the conduct of the GFD's predecessor in law.

15 The GFD therefore brought an appeal on a point of law before the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic), which is the referring court.

16 Before that court, the GFD claims that neither it nor its predecessor in law created IBM Česká republika's situation of exclusivity. On the date on which the original contract was concluded, 29 June 1992, the sole shareholder of that company was the only economic operator able to provide the services required. It also submits that the clauses of the original contract relating to copyright on the source code of the information system in question in the main proceedings complied with the national legislation in force on that date. The GFD states that it attempted to free itself from its 'dependence' on IBM Česká republika, but that IBM Česká republika informed GFD of its intention not to transfer the economic copyright in that source code. In the absence of a negotiated procedure without prior publication of a contract notice, that information system would have been unusable and the tax authority would have been unable to carry out its tasks. In addition, launching a procedure for the award of a public contract for the supply of a new information system for the Czech tax authority would not be financially reasonable.

17 For its part, the competition authority claims that it was clear, at the time when the original contract was signed, that maintenance and assistance were necessary for the proper working of the information system in question in the main proceedings. According to that authority, instead of complying with changes in the relevant legislation, the GFD's predecessor in law and the GFD relied on an interpretation of the original contract and of the Law on public contracts which made it possible to ensure the administration of that information system without a call for competition, exclusively by means of a negotiated procedure without prior publication of a contract notice.

18 The referring court observes that a request for a preliminary ruling on the interpretation of Article 31(1)(b) of Directive 2004/18 has not yet been submitted to the Court of Justice. It considers that a public contract cannot be awarded to a particular economic operator under a negotiated procedure without prior publication of a contract notice where the reason for the award of that contract, related to the protection of exclusive rights, is attributable to the contracting authority. That court nevertheless notes that an interpretation of that provision is necessary to determine the factual and legal circumstances that are relevant for assessing whether such a reason may be attributable. The referring court also states that its own case-law is not fully clear in that regard.

19 In those circumstances, the Nejvyšší správní soud (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are the factual circumstances and legal situation in which the contract for the original performance, on which the follow-on public contracts are based, was concluded to be taken into account in assessing whether the substantive condition for the use of the negotiated procedure without prior publication has been fulfilled, that is to say, whether or not the contracting authority has created a state of exclusivity by its action, for the purposes of Article 31(1)(b) of Directive [2004/18]?'

Consideration of the question referred

20 By its question, the referring court asks, in essence, whether Article 31(1)(b) of Directive 2004/18 must be interpreted as meaning that, in order to assess whether the conduct of a contracting authority has created a situation of exclusivity, for the purposes of that provision, account must be taken of the factual and legal circumstances surrounding the conclusion of a contract for an initial service, which gave rise to subsequent public contracts.

21 Directive 2004/18 was repealed and replaced by Directive 2014/24 with effect from 18 April 2016.

22 In accordance with settled case-law, the directive applicable *ratione temporis* to the award of a public contract is, in principle, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether or not there is an obligation to proceed to a prior call for competition for the award of that public contract (see, to that effect, judgment of 17 October 2024, *NFŠ*, C-28/23, EU:C:2024:893, paragraph 34 and the case-law cited).

23 In the present case, it is apparent from the request for a preliminary ruling that the GFD initiated a negotiated procedure without prior publication of a contract notice on 1 March 2016. It is therefore in fact Directive 2004/18 which applies to the dispute in the main proceedings, irrespective of the fact that the public contract was awarded to IBM Česká republika on 20 May 2016, that is to say, after the date on which that directive was repealed.

24 In the light of those preliminary observations, it should be borne in mind that the negotiated procedure without prior publication of a contract notice may only be used in the circumstances precisely delimited in Article 31 of Directive 2004/18 and that, as compared with open and restricted procedures, referred to in Article 28 of that directive, that procedure is exceptional (see, to that effect, judgments of 23 April 2009, *Commission* v *Belgium*, C-292/07, EU:C:2009:246, paragraph 106, and of 11 September 2014, *Fastweb*, C-19/13, EU:C:2014:2194, paragraph 49).

25 In particular, Article 31(1)(b) of Directive 2004/18 provides that, in the case of public works contracts, public supply contracts and public service contracts, contracting authorities may award public contracts by a negotiated procedure without prior publication of a contract notice when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator.

26 That provision allows the use of that procedure if two cumulative conditions are satisfied, namely, first, the existence of technical or artistic reasons or reasons connected with the protection of exclusive rights linked to the subject matter of the contract and, second, the fact that those

reasons make it absolutely necessary to award the contract to a particular economic operator (see, by analogy, judgments of 18 May 1995, *Commission* v *Italy*, C-57/94, EU:C:1995:150, paragraph 24, and of 2 June 2005, *Commission* v *Greece*, C-394/02, EU:C:2005:336, paragraph 34).

27 As a derogation from the rules intended to ensure the effectiveness of the rights conferred by EU law in the field of public contracts, that provision must be interpreted strictly and it is for the person seeking to rely on it to prove that those cumulative conditions are satisfied (see, by analogy, judgments of 10 March 1987, *Commission* v *Italy*, 199/85, EU:C:1987:115, paragraph 14, and of 15 October 2009, *Commission* v *Germany*, C-275/08, EU:C:2009:632, paragraphs 55 and 56).

28 In those circumstances, it is necessary, in the first place, to ascertain whether, as the referring court states, the contracting authority must also establish that the situation of exclusivity is not attributable to it. The wording of Article 31(1)(b) of Directive 2004/18 does not lay down that requirement. On the other hand, Article 31(1)(c) of that directive expressly requires that the circumstances invoked to justify extreme urgency, permitting the use of a negotiated procedure without prior publication of a contract notice, must not in any event be attributable to the contracting authority.

29 However, to take account exclusively of the difference in the wording of Article 31(1)(b) and Article 31(1)(c) of Directive 2004/18 could lead to a failure to comply with, first, the need to interpret Article 31 of that directive strictly and, second, the main objective of the rules of EU law in the field of public contracts, namely the free movement of goods and services and the opening up of public contracts to competition in all the Member States (see, to that effect, judgments of 8 December 2016, *Undis Servizi*, C-553/15, EU:C:2016:935, paragraph 28, and of 4 June 2020, *Asmel*, C-3/19, EU:C:2020:423, paragraph 58).

30 In addition, the Court has previously held that the use of the negotiated procedure without prior publication of a contract notice cannot be justified by invoking the technical specificity of software used in the national administration, which is the subject matter of the supply contract, in the absence of evidence establishing that thorough research was carried out with a view to identifying operators, different from the supplier to whom the contract was awarded, who are able to present suitable software (judgment of 15 October 2009, *Commission* v *Germany*, C-275/08, EU:C:2009:632, paragraphs 57 to 64).

31 Therefore, a contracting authority is required to do everything that can reasonably be expected of it in order to avoid the application of Article 31(1)(b) of Directive 2004/18 and to use a procedure that is more open to competition. It would be incompatible with that requirement to allow such a contracting authority to apply that provision when the creation or maintenance of the situation of exclusivity which it invokes for that purpose is attributable to it, on account, inter alia, of the fact that, in order to achieve the result sought by the contract concerned, that contracting authority did not need to create such a situation of exclusivity, or that it had real and reasonable means from an economic point of view to put an end to such a situation.

32 It follows that, for the purpose of applying Article 31(1)(b) of Directive 2004/18, a contracting authority must establish, first, that the two cumulative conditions referred to in paragraph 26 above are satisfied and, second, that the existence of technical or artistic reasons or reasons connected with the protection of exclusive rights linked to the subject matter of the contract is not attributable to it.

33 As regards, in the second place, the assessment by a competent national court of whether such reasons are attributable to the contracting authority, it is for that court to determine whether the conduct of that contracting authority, in particular when concluding a previous contract which gave rise to the public contract concerned, created a situation of exclusivity, which is capable of justifying, in theory, the application of Article 31(1)(b) of Directive 2004/18 for the award of the public contract concerned. That national court must also examine whether the perpetuation of such a situation of exclusivity until the decision of that contracting authority to follow the negotiated procedure without prior publication of a contract notice is due to the action or inaction of that contracting authority.

34 For the purposes of that verification, it should be observed, as the Advocate General did in points 51 and 59 of his Opinion, that a situation of exclusivity cannot be found to be attributable to the contracting authority solely on the basis of the fact that it created that situation by concluding a previous contract, when, at the time of concluding that contract, the EU legislation on public contracts was not applicable to it. On the other hand, it is not necessary for such a situation to have been intentionally created or maintained by that contracting authority with a view to limiting competition in the award of future public contracts.

35 As regards the case in the main proceedings, it should be recalled that, in accordance with the principle that the provisions of EU law apply *ab initio* and *in toto* to new Member States, the Czech Republic had to comply, from its accession to the European Union, with Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), which was repealed and replaced by Directive 2004/18 and the wording of Article 6(3)(b) of which was reproduced in Article 31(1)(b) of Directive 2004/18 (see, to that effect, judgment of 6 December 2017, *Compania Națională de Administrare a Infrastructurii Rutiere*, C-408/16, EU:C:2017:940, paragraph 37 and the case-law cited).

36 Therefore, since the accession of the Czech Republic to the European Union, a contracting authority in that Member State has been able, pursuant to Article 31(1)(b) of Directive 2004/18, to use the negotiated procedure without prior publication of a contract notice for the maintenance of an information system used in the national administration only on the condition that it is able to establish, first, that for technical reasons or reasons connected with the protection of exclusive rights in that information system, the contract may only be awarded to a particular economic operator and, second, that those reasons are not attributable to that contracting authority.

37 In the present case, first, the referring court states that, between 1 May 2004, the date on which the Czech Republic acceded to the European Union, and 1 March 2016, the date on which the procedure in question in the main proceedings was initiated, the GFD, or its predecessor in law, had the possibility of initiating a procedure for the award of a public contract for the supply of a new information system. Second, before that court, the GFD maintains that it attempted to put an end to the situation of exclusivity of IBM Česká republika but that IBM Česká republika refused to transfer the economic copyright in the source code of the information system in question, with the result that, if it had not opted for the negotiated procedure without prior publication of a contract notice, that information system would have become unusable, thus preventing the tax authority from carrying out its task.

38 It is for the referring court to determine whether, in the light of the circumstances surrounding the conclusion of the original contract and, in particular, those characterising the period between 1 May 2004 and 1 March 2016, the situation of exclusivity invoked by the GFD in order to justify

the application of Article 31(1)(b) of Directive 2004/18 is attributable to it, in particular in so far as the GFD had real and reasonable means from an economic point of view to put an end to that situation of exclusivity during that period before deciding to use the negotiated procedure without prior publication of a contract notice.

39 In the light of the foregoing, the answer to the question raised is that Article 31(1)(b) of Directive 2004/18 must be interpreted as meaning that in order to justify the use of the negotiated procedure without prior publication of a contract notice, within the meaning of that provision, the contracting authority may not invoke the protection of exclusive rights where the reason for such protection is attributable to it. The attributing of such a reason is to be assessed on the basis not only of the factual and legal circumstances surrounding the conclusion of a contract for an initial service, but also of all those which characterise the period between the date of concluding that contract and the date on which the contracting authority chooses the procedure to be followed for the award of a subsequent public contract.

Costs

40 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 (Third Chamber) hereby rules:

Article 31(1)(b) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

must be interpreted as meaning that in order to justify the use of the negotiated procedure without prior publication of a contract notice, within the meaning of that provision, the contracting authority may not invoke the protection of exclusive rights where the reason for such protection is attributable to it. The attributing of such a reason is to be assessed on the basis not only of the factual and legal circumstances surrounding the conclusion of a contract for an initial service, but also of all those which characterise the period between the date of concluding that contract and the date on which the contracting authority chooses the procedure to be followed for the award of a subsequent public contract.

[Signatures]