Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 26 September 2024[1]

Case C-578/23

Česká republika – Generální finanční ředitelství
v
Úřad pro ochranu hospodářské soutěže

(Request for a preliminary ruling from the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic))

(Reference for a preliminary ruling – Public procurement – Directive 2004/18/EC – Article 31 – Negotiated procedure without prior publication of a contract notice – Conditions – Protection of exclusive rights – Situation of exclusivity caused by the contracting authority – Contract pre-dating the accession of a Member State to the European Union – Time when the factual and legal circumstances of the contract must be examined)

1. In 1992, the Ministry of Finance of the Czech Republic[2] directly awarded a contract to set up a tax administration IT system called ADIS to a particular undertaking.[3] IBM held the copyright in the program source code, meaning that the use and updating of the system was dependent on its involvement.

2. In 2016, the body responsible for tax administration in the Czech Republic decided to conclude a contract for basic post-warranty servicing of the ADIS application, which it also awarded to IBM by a negotiated procedure without prior publication of a contract notice.

3. The conclusion of that new contract resulted in a dispute between two authorities of the Czech Republic: the tax administration authority and the authority with responsibility for reviewing the lawfulness of public contracts. The latter argues that the direct award of the contract is unlawful.

4. The court seised of that dispute at last instance is uncertain whether the new contract comes within the scope of Article 31(1)(b) of Directive 2004/18/EC,[4] the interpretation of which is the subject of its question to the Court. The national court asks whether the factual and legal

[1] Original language: Spanish.

[2] The separation of the Czech Republic and the Slovak Republic took place on 1 January 1993.

[3] IBM World Trade Europe/Middle East/Africa Corporation. In 1992, that company was the sole shareholder of the company IBM Česká republika, spol. s r. o. Hereinafter, interchangeably referred to as 'IBM' or 'the supplier'.

[4] Directive 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).

circumstances existing at the time of conclusion of the original contract (1992) or of the new contract (2016) must be taken into account in assessing one of the conditions for the use of the negotiated procedure without prior publication of a contract notice.

5. The background to the dispute is the difficulty, having general implications, of the 'lock-in' of public authorities which are dependent on a supplier in order to use information technology. In 2013, the Commission published a communication [5] in which it drew attention to the difficulties faced by those authorities when changing supplier.

I. Legal framework

A. European Union law: Directive 2004/18

6. Article 28 ('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.'

7. In accordance with Article 31 ('Cases justifying use of the negotiated procedure without publication of a contract notice'):

'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;

…'

[5] Communication from the Commission of 25 June 2013 Against lock-in: building open ICT [information and communication technologies] systems by making better use of standards in public procurement (COM (2013) 455 final) ('the 2013 Communication').

B. Czech law: Zákon č. 137/2006 Sb., o veřejných zakázkách [6]

8. Pursuant to Paragraph 21(2), contracting authorities may award a public contract in an open or restricted procedure and, under certain conditions, in a negotiated procedure with publication of a contract notice or a negotiated procedure without publication of a contract notice.

9. Under Paragraph 23(4)(a), contracting authorities may award a public contract by negotiated procedure without publication of a contract notice also when the public contract may only be performed by a particular economic operator for technical or artistic reasons, for the reason of protection of exclusive rights, or for reasons arising from specific legislation.

II. Facts, dispute and question referred for a preliminary ruling

10. On 29 June 1992, the Ministry of Finance of the Czech Republic concluded with IBM a contract for integration of the ADIS information system for tax administration.

11. From 2013, the Česká republika – Generální finanční ředitelství (General Tax Directorate, Czech Republic; 'the GTD') took over the duties of the Ministry of Finance with regard to tax administration, under the latter's control.

12. On 1 March 2016, the GTD commenced a negotiated procedure, without prior publication of a contract notice, for the award of a new contract entitled 'Základní pozáruční servis aplikace ADIS v r. 2016', the aim of which was to provide basic post-warranty servicing of the ADIS application. [7]

13. In support of its use of that type of contract, the GTD relied on technical reasons and reasons relating to protection of the supplier's intellectual property rights in the ADIS source code. [8]

14. On 20 May 2016, the GTD awarded the new contract to IBM.

15. On 9 October 2017, the Úřad pro ochranu hospodářské soutěže (Office for the Protection of Competition, Czech Republic; 'the Úřad') declared that, by using the negotiated procedure without prior publication of a contract notice, the GTD had infringed Paragraph 23(4)(a) of Law 137/2006.

16. According to the Úřad, the GTD had not shown that, for technical reasons, the new public contract could only be performed by IBM. Furthermore, the need to protect that supplier's exclusive rights was a consequence of the Ministry of Finance's previous conduct.

6 Law 137/2006 on public contracts ('Law 137/2006'), in the version applicable to the facts.

7 Although this is a matter for the referring court to verify, it appears that the new contract covered maintenance and possible repairs of the ADIS system. The contract price was 33 294 389 Czech koruny (CZK), excluding value added tax (VAT).

8 According the GTD's claims set out in the order for reference (paragraph 2), without a link to the core and other modules, the independent functioning of the modules and the management and development thereof is not possible; the modules cannot be separated; the subject matter of the contract affects current modules. Since the service performed was the basic servicing of the ADIS system, created and developed by the supplier, who is the owner of the licence rights, technical continuity requirements made it necessary for the supplier to deal with the maintenance and development of that system.

17. The GTD appealed against the decision of 9 October 2017 to the president of the Úřad, who dismissed the appeal. [9]

18. The GTD brought an action against the decision of the president of the Úřad before the Krajský soud v Brně (Regional Court, Brno, Czech Republic), which dismissed the action on the grounds that the conditions laid down in Paragraph 23(4)(a) of Law 137/2006 were not met, given that:

– The need for continuous maintenance servicing of ADIS, a system designed in the long term for a constantly evolving field (taxation), was foreseeable on the date on which the original contract was awarded.

– It is immaterial that, at the time when the original contract was concluded, there was no legislation laying down the obligation to select the supplier through a procurement procedure or stipulating the extent to which the copyright in ADIS should be regulated. The criteria for the subsequent award must be assessed in the light of the legislation in force at the time of that award.

– It is not necessary for the original contracting authority to have acted with the intention of subsequently circumventing Law 137/2006.

– Even if the GTD managed to prove that there is no other operator than IBM capable of performing the contract, that would not alter the fact that the situation of exclusivity resulted from the Ministry of Finance's actions. Accordingly, proof that the formal condition has been satisfied (that is, the technical reasons and the reason relating to protection of the supplier's copyright) is of no relevance when the substantive condition has not been satisfied (the situation of exclusivity was not created by the contracting authority).

19. The GTD lodged an appeal on a point of law against the judgment at first instance before the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic), claiming, in essence, that:

– On the date of conclusion of the original contract, the supplier was the only one capable of providing the required services (supplying servers equipped with their own operating system and guaranteeing maintenance and remote monitoring). For technical reasons, it was not possible to find another supplier.

– The Ministry of Finance could not reasonably have foreseen that later other actions would be required in order for the ADIS system to continue operating.

– Copyright was properly defined in the original contract. It was not possible at the time to obtain full assignment of copyright in the ADIS system because some of its components were exploited commercially worldwide by the supplier and its partners. The law in force was therefore complied with. Since the Ministry of Finance could not have known which future legal provisions it would breach through its actions, the principle of legal certainty prevents the finding that there was a failure attributable to the GTD.

[9] The appeal was dismissed because the Ministry of Finance, the predecessor of the GTD, was responsible for the situation of exclusivity (defined as the requirement that the contract be executed only by the supplier), in that it allowed the supplier to retain ownership of the copyright.

– Nor could the Ministry of Finance have known, when it concluded the original contract, how the taxation system would evolve. Accordingly, it was unaware whether the ADIS system would require further interventions and whether it would remain in use. It had no reason to set rules governing copyright allowing it full independence from the supplier.

– The commencement of a procurement procedure for the supply of a new information system would place the GTD at risk of misspending funds invested in ADIS and of non-profitable and irrational management.

– In 2015, the GTD attempted to extricate itself from dependence on the supplier by acquiring the copyright in ADIS. The supplier refused to transfer the copyright both at that time and in the following three years, and therefore the GTD had no option other than to hold a negotiated procedure without prior publication of a contract notice. Otherwise, the ADIS system would have been unusable and the tax authority would have been unable to carry out its mission.

– In conclusion, before it commenced the procedure for the award of the new contract, it appears that the GTD took all the steps necessary duly to follow the procedure provided for in Paragraph 23(4)(a) of Law 137/2006, as confirmed by a number of expert technical and legal opinions.

20. In its defence to the appeal, the Úřad stated that:

– On the basis of the exclusivity of the original 1992 contract, the GTD developed ADIS by way of negotiated procedures without prior publication of a contract notice until at least the end of 2019.

– The expert report does not demonstrate that the selected operator was the only possible supplier of the system for technical reasons. It has not been shown that a situation of exclusivity existed which can be explained by the protection of copyright.

– The aim of the service provided was to create a tax administration system in three phases, only the first of which was the subject of the original contract. The GTD knew that the original contract would be followed by others.

– The description and aim of ADIS indicate that it is a sound system which should operate long term. Therefore, it was clear that technical assistance would at least be required.

– Neither the Ministry of Finance or later the GTD reacted to the changes in the law and instead they adopted an interpretation of the contract and of Law 137/2006 which enabled the maintenance of the system without a call for tenders.

21. The referring court is uncertain whether one of the conditions, which it describes as ‘substantive’, for use of the negotiated procedure without prior publication of a contract notice has been met (namely, that the situation of exclusivity must not have been caused by the contracting authority). It asks whether, for those purposes, it must examine the factual and legal circumstances existing when the original contract was concluded.

22. In those circumstances, the Nejvyšší správní soud (Supreme Administrative Court) decided 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]?'

III. Procedure before the Court of Justice

23. The request for a preliminary ruling was received at the Registry of the Court on 19 September 2023.

24. Written observations were lodged by the Czech and Slovak Governments and the European Commission.

25. The Court did not consider it necessary to hold a hearing.

IV. Assessment

26. The dispute on which the referring court must decide has its origin in a contract for the supply of IT services which was concluded, without a competitive procedure, in 1992, before the Czech Republic acceded to the European Union, when such an approach was permitted under national law.

27. That original contract granted the supplier rights which placed it in a position of exclusivity vis-à-vis the development and maintenance of the IT system installed.

28. The GTD claims that, following the Czech Republic's accession to the European Union, the supplier's exclusive copyright justified the use, in 2016, of the negotiated procedure without prior publication of a contract notice, provided for in Article 31(1)(b) of Directive 2004/18, for the purposes of concluding a new contract [10] for basic post-warranty servicing of the IT system.

A. The applicable directive

29. The national court requests the interpretation of Directive 2004/18, and not Directive 2014/24/EU, [11] which repealed it.

30. The applicable directive is, as a rule, the one in force when the contracting authority chooses the procedure to be followed. [12]

[10] It was not, therefore, a mere extension or amendment of the original contract.

[11] Directive 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).

[12] Judgment of 14 January 2021, *RTS infra and Aannemingsbedrijf Norré-Behaegel* (C-387/19, EU:C:2021:13, paragraph 23).

31. The order for reference states that the GTD commenced the procedure for the award of the new contract on 1 March 2016. That date therefore preceded the expiry of the period for transposition of Directive 2014/24, which, in accordance with Article 90(1) thereof, was 18 April 2016.

32. That being the case, Directive 2004/18 is applicable *ratione temporis*. However, that fact does not preclude account being taken of the rules laid down in Directive 2014/24, as a contrasting or confirmatory factor, for the purpose of interpreting the rules laid down in Directive 2004/18.

B. Article 31(1)(b) of Directive 2004/18 and the situation of exclusivity created by the contracting authority

33. In accordance with Article 31(1)(b) of Directive 2004/18, two cumulative conditions must be satisfied in order to use the direct procedure governed by that provision: (i) technical or artistic reasons, or reasons connected with the protection of exclusive rights; and (ii) those reasons make it absolutely necessary to award the contract to a particular undertaking.

34. Other procurement directives which preceded Directive 2004/18 contained similar wording to that article. [13] The Court interpreted those directives when ruling on actions for failure to fulfil obligations brought by the Commission against individual acts of the Member States relating to contracts subject to Directive 71/305 [14] or Directive 93/37 [15] which were concluded under the negotiated procedure without prior publication of a contract notice.

35. The case-law on the interpretation of those two directives and subsequent directives has emphasised repeatedly that the provisions relating to negotiated procedures without prior publication must be interpreted strictly and that the burden of proving the existence of extraordinary circumstances justifying a derogation lies on the contracting authority. [16]

36. The referring court differentiates between the 'formal conditions' and the 'substantive conditions' which must be met in order to use the negotiated procedure without prior publication of a contract notice. In its view:

– The formal conditions require the existence of a reason related to the protection of exclusive rights and that, for that reason, the contract may be awarded only to a particular economic operator.

– The substantive conditions require that the contracting authority could not have foreseen those formal reasons or that their existence would be attributable to it.

[13] Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971(II), p. 682) and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54).

[14] Judgment of 18 May 1995, *Commission* v *Italy* (C-57/94, EU:C:1995:150, paragraph 23).

[15] Judgment of 14 September 2004, *Commission* v *Italy* (C-385/02, EU:C:2004:522, paragraphs 19 and 20).

[16] See, for example, judgment of 14 September 2004, *Commission* v *Italy* (C-385/02, EU:C:2004:522, paragraph 19): 'The provisions of Article 7(3) of [Directive 93/37], which authorise derogations from the rules intended to ensure the effectiveness of the rights conferred by the EC Treaty in relation to public works contracts, must be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances'. It cites as exponents of that interpretation the judgments of 18 May 1995, *Commission* v *Italy* (C-57/94, EU:C:1995:150, paragraph 23), and of 28 March 1996, *Commission* v *Germany* (C-318/94, EU:C:1996:149, paragraph 13).

37. In reality, the conditions which the referring court describes as 'formal conditions' are those corresponding to the wording of Article 31(1)(b) of Directive 2004/18. The conditions which it describes as 'substantive conditions' go further as they concern conditions not expressly included in that provision.

38. The debate has focused on the 'substantive condition' requiring that the situation of exclusivity was not caused by the contracting authority. The views set out by those intervening in the preliminary ruling proceedings are divided:

– The Czech Government argues that the derogation permitted by Article 31(1)(b) of Directive 2004/18 applies only if the objective conditions set out therein are met. [17]

– The Commission and the Slovak Government argue that that derogation also requires that the contracting authority must not have created the situation of exclusivity.

39. If it were necessary to decide the dispute under the rules laid down in Directive 2014/24, the position adopted by the Commission and the Slovak Government would definitely prevail. Both recital 50 and Article 32(2)(b) of that directive include the stipulation that the situation of exclusivity must not have been created the contracting authority:

– Recital 50 of Directive 2014/24 states that '… only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure'. [18]

– Article 32(2)(b)(iii) of Directive 2014/24 provides that the negotiated procedure without prior publication may be used where the works, supplies or services can be supplied only by a particular economic operator on the grounds of 'the protection of exclusive rights, including intellectual property rights'. However, that exception applies only 'when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement'.

40. In contrast, Directive 2004/18 did not refer explicitly in Article 31(1)(b) to the possible effect of the attribution of the situation of exclusivity to the contracting authority. [19] However, its silence does not mean that the contracting authority itself was free to create a situation of exclusivity.

41. Indeed, as the referring court rightly points out, Directive 2014/24 simply clarified, in that regard, a rule which already existed, implicitly, in the previous directives in this field. [20] That is why, in its view, '… Union law requires that the reason why a public contract needs to be

[17] That is the tenor of the first of the six lines of argument set out in its written observations to the Court.

[18] That wording is preceded by the following considerations: 'In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should be used only in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract. … Exclusivity can also arise from other reasons …'

[19] The omission contrasts with Article 31(1)(c) of Directive 2004/18, under which the negotiated procedure without prior publication is permitted in cases of extreme urgency, provided that the circumstances invoked to justify extreme urgency are not in any event 'attributable to the contracting authority'.

[20] Paragraph 22 of the order for reference.

awarded only to a particular economic operator, in a negotiated procedure without publication pursuant to Article 31(1)(b) of Directive 2004/18, *must not be attributable to the contracting authority…'* [21]

42. I shall adopt the same premiss as the referring court with regard to the contracting authority's involvement in the circumstances determining the situation of exclusivity. There are several reasons why I endorse that assessment by the referring court.

43. Firstly, by way of background, the overall objective of the EU provisions in the field of public procurement is 'to ensure the free movement of services and the opening-up to undistorted competition in all the Member States'. [22] Use of the negotiated procedure without prior publication is the conduct of a contracting authority which commits the most serious infringement of the objective of the opening-up of public procurement to competition.

44. Secondly, it is contrary to that objective for contracting authorities themselves to create the circumstances which they invoke in order to use procedures to select contractors in which competitors are not allowed to participate.

45. Thirdly, as I pointed out above, the extraordinary circumstances which permit the use of the negotiated procedure without prior publication of a contract notice must be interpreted strictly, on the basis of restrictive criteria. [23]

46. Fourthly, allowing the contracting authority to rely on a situation of exclusivity which it itself created would reverse the logic of Article 31(1)(b) of Directive 2004/18. According to that logic, the circumstances justifying the inability to use the ordinary procedure (with publication of a contract notice) are those unconnected with the contracting authority, not those caused by it.

47. Ultimately, the maxim *nemo auditur propriam turpitudinem allegans* prohibits the possibility that a party may derive advantages from his, her or its wrongdoing. [24]

C. Examination of the exclusivity in relation to the dispute

1. The original contract (1992)

48. According to the GTD's stance, which is set out in the order for reference, at the time when the original contract was concluded (1992) there was no national legislation governing copyright or public procurement. Accordingly, it was impossible to foresee the legal provisions which would apply to that field in the future or how national case-law would develop. Nor was it foreseeable 'that the definition of the conditions for granting licences in respect of ADIS would subsequently give rise to a questionable situation …' [25]

[21] Paragraph 23 of the order for reference (emphasis added). The referring court considers that 'the interpretation of EU law in that respect is *acte clair*', an assertion which I believe is exaggerated.

[22] Judgment of 7 December 2023, *Obshtina Razgrad* (C-441/22 and C-443/22, EU:C:2023:970, paragraph 61).

[23] Judgment of 11 September 2014, *Fastweb* (C-19/13, EU:C:2014:2194, paragraph 49): 'the negotiated procedure may only be used in the circumstances precisely delimited in Articles 30 and 31 of Directive 2004/18 and …, as compared with open and restricted procedures, that procedure is exceptional'.

[24] The Court is mindful of the attribution of unfavourable consequences to the actual breach. See judgment of 15 June 2023, *Bank M. (Consequences of the annulment of the contract)* (C-520/21, EU:C:2023:478, paragraph 81).

[25] Paragraph 17 of the order for reference.

49. The referring court essentially agrees with that point of view, subject to a few qualifications. It accepts that, in 1992, there was no national legislation governing the award of public contracts, [26] which enabled the Ministry of Finance to conclude the ADIS contract under the terms agreed at that time. The referring court adds that, moreover, the contracting authority 'could legitimately have assumed that the follow-on contract could also be awarded to the same provider, without the need also to offer others the opportunity to submit a tender to supply the service required'. [27]

50. For my part, I have no objection to make to those findings which refer to a time in history when, quite simply, since the Czech Republic was not yet a member of the European Union, EU law was not applicable. It is for the referring court to define the facts and the legal framework pertaining to the conclusion of the original contract.

51. In those circumstances, it is immaterial whether or not the exclusivity, which was basis for the conclusion of the original contract in 1992, was created by the contracting authority.

2. The new contract (2016)

52. The perspective changes if account is taken of the fact that the contractual relationship between the Czech authorities [28] and the supplier lasted for many years (from 1992 to 2016, for the present purposes).

53. During that period, the legal framework was amended, particularly since the Czech Republic joined the European Union in 2004. As from its accession, the Czech Republic was required to comply with the public procurement directives 'in accordance with the principle that the provisions of EU law apply *ab initio* and *in toto* to new Member States'. [29]

54. The referring court draws attention to the importance of the new framework and to the change in the contracting authority's obligations: when the GTD awarded the contract in 2016, Law 137/2006 and Directive 2004/18 were in force. Accordingly, the GTD was required to ensure that its acts did not create situations of exclusivity in order to legitimise the use of the negotiated procedure without prior publication.

55. On the basis of that finding, and after examining the two opposing views, the referring court states the following in paragraph 32 of the order for reference:

– '… From 1992 to 2016, [the GTD] (or its predecessor in law) could either have negotiated a new contractual arrangement for proprietary copyright, and thus awarded the public contracts relating to ADIS in one of the more open forms of tendering procedure, or it could have launched a new procurement procedure for a new IT system, even if that would have resulted in a temporary increase in expenditure, which could nevertheless have led to long-term savings.

– Therefore, the factual situation at the time when the original contract was concluded cannot be relied on if the situation of exclusivity continued after the relevant legislation on public

[26] The referring court describes the development of national law, as reflected in the adoption of a law on copyright (law applicable to software) in 1965 and a law on public procurement in 1994.

[27] Paragraph 29 of the order for reference.

[28] I assume that the succession of contracting bodies (Ministry of Finance in 1992 and the GTD in 2016) is purely formal: both are part of the same governmental structure and the latter is under the control of the former. The GTD is the legal successor of the Ministry of Finance.

[29] Judgment of 6 December 2017, *Compania Națională de Administrare a Infrastructurii Rutiere* (C-408/16, EU:C:2017:940, paragraph 37).

procurement was adopted in the Czech Republic. In determining whether it is possible to use the negotiated procedure without prior publication, account must be taken of the point in time at which the decision was adopted to award the contract using that procedure …' [30]

56. As an assessment of the decisive facts for the purposes of the dispute and of the situation under national law, the Court of Justice can have no objection to those considerations set out by the referring court. As regards the considerations set out at the end of paragraph 32 of the order for reference, which I have transcribed above, I believe these contain a correct interpretation of Directive 2004/18.

57. The reply to the question referred for a preliminary ruling which follows from the foregoing is that the fact that the original contract was concluded before the Czech Republic's accession to the European Union is irrelevant for the present purposes. On the other hand, the contracting authority's actions carried out between 2004 and 2016 are decisive. Logically, the key is the conclusion of the new contract in 2016.

58. However, the Czech Government attempts to deny that it has any responsibility for the creation of the situation of exclusive dependency, arguing that the examination must concern the time when the original contract was concluded. Since there were no objections to the lawfulness of its conduct at that time, nor is there any basis for attributing intent to the contracting authority.

59. I disagree with that argument:

– As I have already stated, a Member State's obligation to bring its actions into line with EU law arises when it accedes to the Union. From that moment, the contracting authority, as a State body, assumed the obligation to ensure compliance with the EU provisions on public procurement, including Directive 2004/18. In that context, it does not matter whether the breach by the State tax authorities is the result of actions or omissions. [31]

– For the purposes of assessing the contracting authority's conduct, *a direct intention* to create the situation of exclusivity is not required. [32] It will suffice if, in disregarding its obligation to put an end to the existing situation of exclusivity (which it, or its predecessor in law, created) at the time when the new contract was concluded, the contracting authority excluded that contract from competition, as occurred in the case of the original contract.

60. From a different perspective, the Czech Government, while acknowledging that, when faced with situations like that at issue, it has to take decisions enabling it to free itself from dependence on a specific supplier, argues that a 'reasonable solution' should be accepted; it defines this as the solution which is the most economical and which ensures the stable operation of the national administrative authority's critical information systems. In its submission, those factors legitimise, in this case, the use of the negotiated procedure without prior publication of a contract notice [33]

[30] The referring court cites in support of that assertion the judgment of 5 October 2000, *Commission* v *France* (C-337/98, EU:C:2000:543, paragraph 37).

[31] In its written observations, the Czech Government refers repeatedly to 'positive actions' of the contracting authority (conduct, acts, situation created, exclusivity caused, definition of the conditions of the new contract vis-à-vis the original contract). In contrast, it does not refer to its 'inaction' when it came to concluding the new contracts in accordance with EU law.

[32] The Czech Government points out repeatedly that the contracting authority's conduct in relation to the situation of exclusivity must be 'intentional' (paragraphs 11, 12, 14, 15, 16, 17 and 18 of its written observations).

[33] Paragraph 30 of the Czech Government's written observations.

61. I do not agree with that argument either, although I do understand the problems with which the contracting authority was faced, de facto, in 2016. The tax authorities, like all the other State authorities, may not rely on practical, administrative or financial difficulties [34] in order to justify non-compliance with the obligations laid down by a directive, since it is for the Member States to overcome these by adopting appropriate measures. [35]

62. Another line of defence put forward by the Czech Government in support of the contracting authority's actions is the argument that that authority attempted to extricate itself from dependence on the supplier by acquiring the copyright; it did not succeed in doing this because the supplier objected. [36]

63. That claim cannot succeed in view of the fact that, from 2004, the contracting authority had sufficient time (until 2016) to overcome IBM's refusal. Faced with the situation of exclusivity which had lasted for decades, it should have adopted initiatives which would have resulted in it extricating itself from dependence on the supplier, by looking for offers from other operators, something which it does not appear to have done. Such views were expressed by the referring court [37], with which, I once again concur.

64. Moreover, it cannot be inferred from the order for reference that the contracting authority made 'serious' attempts to find new suppliers which would enable it to overturn the situation of dependence in which it found itself. In accordance with the case-law of the Court, the contracting authority must 'investigate seriously' whether there are undertakings capable at European level of supplying (or, as the case may be, replacing) specific software. [38]

65. When discussing the problem of 'lock-in' in relation to IT systems, the Commission suggests a number of options [39] to contracting authorities for overcoming restrictions of competition in public procurement, like that examined here.

66. Even though the Czech authorities claim that they established prior checks to combat the lock-in to which the 2013 Communication refers, [40] the contract at issue in this reference for a preliminary ruling confirmed the pre-existing situation of exclusivity, without altering it. Thus, it is possible to attribute to the contracting authority the perpetuation in 2016, by action or omission, of a situation of exclusivity created by its predecessor in law, which should have prevented it from using the negotiated procedure without prior publication of a contract notice.

[34] The obstacles pleaded by the Czech Government are predominantly financial (paragraphs 26 and 27 of its written observations). The referring court, on the other hand, maintains that any immediate increase in expenditure is offset by the long-term savings resulting from the introduction of competition between tenderers. In the 2013 Communication, the Commission refers to the difficulties arising from dependence on a single supplier of IT solutions. It points out that such exclusivity, in addition to creating other problems (there is a risk that the supplier will stop supporting the system or certain features of the system), may affect innovation and lead to excessive prices which are not subject to competitive pressure from other operators in the sector.

[35] Judgment of 18 October 2012, *Commission* v *United Kingdom* (C-301/10, EU:C:2012:633, paragraph 66).

[36] Paragraph 31 of the Czech Government's written observations, referring to the GTD's arguments before the Supreme Court, transcribed in point 10 of the order for reference.

[37] Paragraph 32 of the order for reference, transcribed in point 55 of this Opinion.

[38] See judgment of 15 October 2009, *Commission* v *Germany* (C-275/08, EU:C:2009:632, paragraph 63). That case concerned software for the centralised management of vehicle registration.

[39] The 2013 Communication states that 'using ICT systems based on standards instead of proprietary technology will help to open up restrictive public procurement practices, because standards make essential knowledge about a system available to anyone, implying that other potential suppliers could maintain or evolve the system under more competitive terms and conditions'.

[40] That point is made by the Czech Government, inter alia, in paragraphs 32 to 35 of its written observations, stating that it created a specialist department and a working group to combat lock-in in contracts for IT services. It adds that those 'systemic measures' were implemented when the contract was concluded in 2016.

67. Finally, it should be recalled that the Court previously ruled on the need to open up to competition contracts similar to that at issue here, on the assumption that they are subject to the general rules of administrative procurement: '… if a contracting authority is considering organising a public procurement procedure for the maintenance, adaptation or development of software acquired from an economic operator, it must ensure that adequate information is communicated to potential candidates and tenderers in order to allow effective competition to develop on the secondary market for the maintenance, adaptation or development of the software'. [41]

V. Conclusion

68. In the light of the foregoing considerations, I propose that the Court of Justice answer the question referred for a preliminary ruling by the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) as follows:

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 a contracting authority may not create, by its own actions, a situation of exclusivity on which it seeks to rely to justify the use of a negotiated procedure without prior publication of a contract notice.

Where a contracting authority concludes a new contract to which Directive 2004/18 is applicable, it is immaterial that the situation of exclusivity is derived from the original contract concluded by the authorities of a Member State before its accession to the European Union. When assessing the contracting authority's conduct in relation to the new contract, regard must be had to the factual and legal context at the time when that new contract was concluded.

[41] Judgment of 28 May 2020, *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:395, paragraph 74).