Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

7 November 2024*

(Reference for a preliminary ruling – Directive 2014/23/EU – Procedure for awarding concession contracts – Article 43 – Modification made to a concession during its term without opening up to competition – Concession of motorways – Collapse of the Morandi Bridge in Genoa (Italy) – National proceedings for serious failure to fulfil motorway network maintenance and preservation obligations – New obligations imposed on the concessionaire – Obligation of the contracting authority to make a prior decision on whether it is necessary to organise a new award procedure – Obligation of the contracting authority to carry out a prior examination of the reliability of the concessionaire)

In Case C-683/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), made by decision of 19 October 2022, received at the Court on 4 November 2022, in the proceedings

Adusbef – Associazione difesa utenti servizi bancari e finanziari

v

Presidenza del Consiglio dei ministri,

Ministero dell'Economia e delle Finanze,

Ministero delle Infrastrutture e della Mobilità sostenibili,

DIPE – Dipartimento programmazione e coordinamento della politica economica,

Autorità di regolazione dei trasporti,

Corte dei Conti,

Avvocatura generale dello Stato,

intervening parties:

Mundys SpA, formerly Atlantia SpA,

Autostrade per l'Italia SpA,

* Language of the case: Italian.

Holding Reti Autostradali SpA,

THE COURT (Fifth Chamber),

composed of I. Jarukaitis, President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Gratsias and E. Regan (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: C. Di Bella, Administrator,

having regard to the written procedure and further to the hearing on 28 February 2024,

after considering the observations submitted on behalf of:

– Adusbef – Associazione difesa utenti servizi bancari e finanziari, by D. Granara and D. Mazzola, avvocati,

– Mundys SpA, by D. Gallo, G. Vercillo and A. Zoppini, avvocati,

– Autostrade per l'Italia SpA, by F. Anglani, M. Annoni, A. Cogoni, M. Merola and L. Torchia, avvocati,

– Holding Reti Autostradali SpA, by A. Parini, I. Perego, A. Police and G.M. Roberti, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Caselli, S. Fiorentino and G. Galluzzo, avvocati dello Stato,

– the German Government, by J. Möller and P.-L. Krüger, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 30 April 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 38, 43 and 44 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

2 The request has been made in proceedings between the Adusbef – Associazione difesa utenti servizi bancari e finanziari (Association for the defence of users of banking and financial services) and the Presidenza del Consiglio dei ministri (Presidency of the Council of Ministers, Italy), the Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance, Italy), the Ministero delle Infrastrutture e della Mobilità sostenibili (Ministry of Infrastructure and Sustainable Mobility, Italy), the DIPE – Dipartimento Programmazione e Coordinamento della

Politica Economica (Department of Economic Policy Planning and Coordination, Italy), the Autorità di regolazione dei trasporti (Transport Regulatory Authority, Italy), the Corte dei Conti (Court of Auditors, Italy) and the Avvocatura Generale dello Stato (Attorney General's Office, Italy), regarding the lawfulness of modifications made to the motorway concession held by Autostrade per l'Italia SpA ('ASPI') following the collapse of the Morandi Bridge in Genoa (Italy) on 14 August 2018.

Legal context

European Union law

3 Recitals 75 and 76 of Directive 2014/23 state:

'(75) Concession contracts typically involve long-term and complex technical and financial arrangements which are often subject to changing circumstances. It is therefore necessary to clarify the conditions under which modifications of a concession during its performance require a new concession award procedure, taking into account the relevant case-law of the [Court]. A new concession procedure is required in the case of material changes to the initial concession, 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 concession. …

(76) Contracting authorities and contracting entities can be faced with external circumstances that they could not foresee when they awarded the concession, in particular when the performance of the concession covers a long period. In those cases, a certain degree of flexibility is needed to adapt the concession to the circumstances without a new award procedure. The notion of unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority or contracting entity, taking into account its available means, the nature and characteristics of the specific project, good practices in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. …'

4 Under Article 3 of that directive, entitled '[Principles] of equal treatment, non-discrimination and transparency':

'1. Contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

…

2. Contracting authorities and contracting entities shall aim at ensuring the transparency of the award procedure and of the performance of the contract, while complying with Article 28.'

5 Article 38 of Directive 2014/23, entitled 'Selection and qualitative assessment of candidates', provides:

'1. Contracting authorities and contracting entities shall verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of the candidates or tenderers, on the basis of self-declarations, reference or references to be submitted as proof in accordance with the requirements specified in the concession notice that shall be non-discriminatory and proportionate to the subject matter of the concession. The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject matter of the concession and the purpose of ensuring genuine competition.

…

7. Contracting authorities or contracting entities may exclude or may be required by Member State to exclude from participation in a concession award any economic operator if one of the following conditions is fulfilled:

…

(c) where the contracting authority can demonstrate by any appropriate means that the economic operator is guilty of a grave professional misconduct, which renders its integrity questionable;

…

(f) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior concession or a prior contract with a contracting authority or with a contracting entity as defined in this Directive or in 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)] which led to early termination of that prior contract, damages or other comparable sanctions;

…

9. Any economic operator that is in one of the situations referred to in paragraphs 4 and 7 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of the relevant ground for exclusion. If such evidence is considered to be sufficient, the economic operator concerned shall not be excluded from the procedure.

…'

6 Article 43 of Directive 2014/23, entitled 'Modification of contracts during their term', is worded as follows:

'1. Concessions may be modified without a new concession award procedure in accordance with this Directive in any of the following cases:

…

(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 or contracting entity could not foresee;
   (ii) the modification does not alter the overall nature of the concession;
   (iii) in the case of concessions awarded by contracting authority, for the purposes of pursuing an activity other than those referred to in Annex II, any increase in value is not higher than 50% of the value of the initial concession. Where several successive modifications are made, this limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;

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

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

Contracting authorities or contracting entities having modified a concession 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 XI and shall be published in accordance with Article 33.

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

(i) the threshold set out in Article 8; and

(ii) 10% of the value of the initial concession.

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

…

4. A modification of a concession during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the concession 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 concession award procedure, would have allowed for the admission of applicants other than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the concession award procedure;

(b) the modification changes the economic balance of the concession in favour of the concessionaire in a manner which was not provided for in the initial concession;

(c) the modification extends the scope of the concession considerably;

(d) where a new concessionaire replaces the one to which the contracting authority or contracting entity had initially awarded the concession in other cases than those provided for under point (d) of paragraph 1.

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

7 Article 44 of that directive, entitled 'Termination of concessions', provides:

'Member States shall ensure that contracting authorities and contracting entities have the possibility, under the conditions determined by the applicable national law, to terminate a concession during its term, where one or more of the following conditions is fulfilled:

(a) a modification of the concession has taken place, which would have required a new concession award procedure pursuant to Article 43;

(b) the concessionaire has been, at the time of concession award, in one of the situations referred to in Article 38(4) and should therefore have been excluded from the concession award procedure;

(c) the Court … finds, in a procedure pursuant to Article 258 TFEU, that a Member State has failed to fulfil its obligations under the Treaties by the fact that a contracting authority or contracting entity belonging to that Member State has awarded the concession in question without complying with its obligations under the Treaties and this Directive.'

8 The second paragraph of Article 54 of Directive 2014/23 provides that the directive does not apply to the award of concessions tendered or awarded before 17 April 2014.

9 Annex XI to that directive, entitled 'Information to be included in notices of modifications of a concession during its term according to Article 43', is worded as follows:

'…

4. Description of the concession before and after the modification: nature and extent of the works, nature and extent of services.

5. Where applicable, modification of value of the concession, including increase in prices or fees caused by the modification.

6. Description of the circumstances which have rendered necessary the modification.

…'

Italian law

10 Article 43 of decreto-legge n. 201 – Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici (Decree-Law No 201 on urgent provisions relating to growth, fairness and the consolidation of public accounts) of 6 December 2011 (GURI No 284 of 6 December 2011 – Ordinary Supplement No 251), converted, with amendments, into law by legge n. 214 (Law No 214) of 22 December 2011, as amended by Article 16 of decreto-legge n. 109 (Decree-Law No 109) of 28 September 2018, converted, with amendments, into law from legge n. 130 (Law No 130) of 16 November 2018, provides:

'1. Where updates to or revisions of motorway agreements in force on the date of entry into force of the present decree entail changes or modifications to the investment plan or to regulatory matters made with a view to protecting public finances, those updates or revisions shall be communicated, after having heard the Transport Regulatory Authority in respect of the areas of competence laid down in Article 37(2)(g), regarding the determination of tariff systems, by the [Ministero delle Infrastrutture e dei Trasporti (Ministry of Infrastructure and Transport, Italy)] to the CIPE [Comitato interministeriale per la programmazione economica e lo sviluppo sostenibile (Inter-ministerial Committee for Economic Planning and Sustainable Development, Italy)] which, after having consulted the [Nucleo di consulenza per l'attuazione delle linee guida per la regolazione dei servizi di pubblica utilità (Advisory group on implementation of the guidelines for regulating public utility services, Italy)], adopts a decision within 30 days and, subsequently, approved by decree of the Minister for Infrastructure and Transport, issued in agreement with the Minister for Economic Affairs and Finance, to be published within 30 days of the agreement having been communicated to the awarding authority.

2. Updates to or revisions of motorway agreements in force on the date of entry into force of the present decree-law which do not lead to the changes or modifications referred to in paragraph 1 shall be approved by a decree of the Minister for Infrastructure and Transport, issued in agreement with the Minister for Economic Affairs and Finance, to be published within 30 days of the agreement having been communicated to the awarding authority.

2a. In the cases referred to in paragraphs 1 and 2, after hearing the Transport Regulatory Authority, the concessionaire shall monitor the application of the criteria for establishing tariffs while also taking into consideration the actual progress of the implementation of the investments already included in the tariffs.

3. Updates to or revisions of motorway agreements, the draft supplementary agreements of which have previously been subject to the opinion of the CIPE on the date of entry into force of the present decree-law, shall be approved by a decree of the Minister for Infrastructure and

Transport, issued in agreement with the Minister for Economic Affairs and Finance, to be published within 30 days of the agreement having been communicated to the awarding authority.'

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

11 On 12 October 2007, the ASPI and the Azienda Nazionale Autonoma delle Strade (Autonomous National Motorways Agency, Italy) concluded the 'Single agreement for management of a collection of sections of motorways', covering over 2 800 km of sections. According to Article 4 of that agreement, the concession was to end on 31 December 2038. On 1 October 2012, the Ministry of Infrastructure and Sustainable Mobility replaced the Autonomous National Motorways Agency as contracting authority.

12 On 14 August 2018, the Morandi Bridge in Genoa collapsed, causing the death of 43 people. That bridge was part of the Polcevera viaduct, on the A10 motorway, the operation of which was awarded to ASPI. On 16 August 2018, the Ministry of Infrastructure and Transport initiated proceedings against ASPI for serious failure to fulfil the obligations to maintain and preserve the motorway network.

13 From 10 July 2019, several meetings took place between ASPI, the Presidency of the Council of Ministers, the Ministry of Economic Affairs and Finance and the Ministry of Infrastructure and Sustainable Mobility in order to find a negotiated solution to the disputes pending in relation to the collapse of the Morandi Bridge.

14 On 11 July 2020, ASPI submitted a proposal for a negotiated solution in which it committed, first, to paying EUR 3 400 million in compensation, second, to strengthening the safety standards of the conceded motorway network and, third, to transferring control – together with Mundys SpA, formerly Atlantia Spa, its parent company – of ASPI to the Cassa Depositi e Prestiti SpA and to investors found to be acceptable by the Cassa Depositi e Prestiti SpA.

15 On 14 October 2021, on the basis of that proposal, ASPI and the Ministry of Infrastructure and Sustainable Mobility concluded a settlement agreement ('the settlement agreement'). Pursuant to the procedure laid down in Article 43 of Decree-Law No 201 referred to in paragraph 10 of the present judgment, the agreement was approved by Decision No 75 of 22 December 2021 of the CIPE and by Decree No 37 of 22 February 2022 of the Minister for Infrastructure and Sustainable Mobility, issued in agreement with the Minister for Economic Affairs and Finance.

16 The settlement agreement concluded the proceedings initiated against ASPI for serious failure to fulfil the obligations to maintain and preserve the motorway network, without any formal finding that ASPI had failed to fulfil its obligations.

17 Adusbef brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), the referring court, for annulment of the two measures referred to in paragraph 15 of the present judgment, which approved the settlement agreement, and of several measures related to that agreement.

18 In its order for reference, that court emphasised that the contracting authority did not formally examine compliance with Directive 2014/23 of the modification by the settlement agreement of the motorway concession awarded to ASPI.

19 First, the contracting authority did not ascertain formally whether the modification of that concession fulfilled the conditions laid down in point (c) of the first subparagraph of Article 43(1) of the directive. The referring court considers, in that regard, that a concessionaire's failure to fulfil its maintenance obligations, which may affect road safety, cannot be regarded as an unforeseeable circumstance within the meaning of that provision.

20 Second, the contracting authority also did not ascertain whether the proposed modification was liable to alter 'the overall nature of the concession' within the meaning of point (c)(ii) of the first subparagraph of Article 43(1) of that directive.

21 Third, the referring court states that, pursuant to the settlement agreement, Mundys sold 88% of ASPI's capital to a holding company; the majority shareholder of that company is Cassa Depositi e Prestiti Equity, holding 51% of the shares, and two foreign holding companies, Macquarie and Blackstone, each holding 24.5% of the shares. However, the contracting authority did not examine formally whether that modification to the composition of ASPI's shareholders required a new concession award procedure to be organised, in particular in the light of point (d) of the first subparagraph of Article 43(1) of Directive 2014/23.

22 Fourth, that court is uncertain, in the light of Article 38(7)(f) and Article 38(9) of Directive 2014/23, whether the settlement agreement, which resulted in the continuation of the motorway concession at issue in the main proceedings, should have been preceded by a formal assessment of ASPI's reliability following the collapse of the Morandi Bridge. In that connection, that court observes that the reconstruction of the Morandi Bridge was entrusted to third companies, not to ASPI, despite that company holding the concession which included the operation of that bridge.

23 Fifth, should a new concession award procedure have been organised and/or should the contracting authority have assessed the reliability of the concessionaire before the settlement agreement was concluded, the referring court asks the Court to rule on the interpretation of Article 44 of Directive 2014/23, which governs termination of concessions by the contracting authority. More specifically, that court is uncertain whether that article requires that an existing concession be terminated where a modification was made in breach of the directive.

24 In those circumstances, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'[In the light of Articles 38, 43 and 44 of Directive 2014/23:]

(1) Would it be inconsistent with [EU] law to interpret the national legislation as meaning that the awarding authority is entitled to conduct a procedure to modify an existing motorway concession, with respect to the entities concerned and the substance, or to renegotiate such a concession, without assessing and expressing a position on the obligation to launch a public procurement procedure?

(2) Would it be inconsistent with [EU] law to interpret the national legislation as meaning that the awarding authority is entitled to conduct a procedure to modify an existing motorway concession, with respect to the entities concerned and the substance, or to renegotiate such a concession, without assessing the reliability of a concessionaire that is guilty of a serious failure to fulfil its obligations?

(3) Where an infringement of the principle of public procurement is established and/or the unreliability of the holder of a motorway concession is established, does [EU] law impose an obligation to terminate the relationship?'

Procedure before the Court

25 The referring court, relying on the national significance of the case in the main proceedings, requested that the Court apply the expedited preliminary ruling procedure laid down in Article 105 of the Rules of Procedure of the Court of Justice.

26 By decision of 15 December 2022, the President of the Court, after hearing the Judge-Rapporteur and the Advocate General, refused to grant that request.

27 In that connection, it must be borne in mind that the expedited procedure laid down in Article 105(1) of the Rules of Procedure is a procedural instrument intended to address matters of exceptional urgency (judgment of 28 April 2022, *Caruter*, C-642/20, EU:C:2022:308, paragraph 21 and the case-law cited).

28 In the present case, it is not apparent from the information provided by the referring court in its request for a preliminary ruling, in support of its request for an expedited procedure in particular, that the nature of the present case requires, on an exceptional basis, that it be dealt with within a short time under Article 105(1) of the Rules of Procedure.

29 More specifically, the economically or socially sensitive nature alone of the case in the main proceedings does not mean that that case must be dealt with within a short time under that provision (see, to that effect, judgment of 10 March 2022, *Commissioners for Her Majesty's Revenue and Customs (Comprehensive sickness insurance cover)*, C-247/20, EU:C:2022:177, paragraph 45).

Admissibility of the request for a preliminary ruling

30 Mundys, ASPI, Holding Reti Autostradali SpA, and the Italian Government have argued that the request for a preliminary ruling is inadmissible in its entirety.

31 In the first place, Mundys submitted that Directive 2014/23 is not applicable *ratione temporis* to the concession at issue in the main proceedings, which was awarded on 11 October 2007, given that, under the second paragraph of Article 54 of that directive, the directive does not apply to the award of concessions tendered or awarded before 17 April 2014.

32 In that connection, it must be borne in mind that, in the event of a substantial modification of a concession contract, the EU legislation in the light of which that modification must be assessed is that in force at the date of that modification, notwithstanding the fact that the original concession contract was concluded prior to the adoption of the relevant provisions of EU law (see, to that effect, judgment of 2 September 2021, *Sisal and Others*, C-721/19 and C-722/19, EU:C:2021:672, paragraph 28).

33 In the present case, the referring court is being asked to determine, inter alia, whether the modifications made by the settlement agreement concluded on 14 October 2021, that is, after Directive 2014/23 entered into force, must be regarded as substantial in relation to the initial concession contract.

34 It follows that, in the dispute in the main proceedings, the question whether substantial modifications were made to that concession contract must be assessed in the light of Directive 2014/23.

35 In the second place, Mundys, ASPI, Holding Reti Autostradali and the Italian Government argued, in essence, that the request for a preliminary ruling must be declared to be inadmissible on account of, first, the hypothetical nature of the questions referred and, second, the lack of sufficient information on the factual context of the dispute in the main proceedings and on the applicable national rules.

36 In that regard, it should be noted that, according to settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 21 March 2023, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, C-100/21, EU:C:2023:229, paragraph 52 and the case-law cited).

37 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 21 March 2023, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)*, C-100/21, EU:C:2023:229, paragraph 53 and the case-law cited).

38 In that regard, the Court has repeatedly pointed out that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them and that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute (judgment of 9 January 2024, *G. and Others (Appointment of judges to the ordinary courts in Poland)*, C-181/21 and C-269/21, EU:C:2024:1, paragraph 62 and the case-law cited).

39 As is apparent from the very wording of Article 267 TFEU, the preliminary ruling sought must be ‘necessary’ to enable the referring court to ‘give judgment’ in the case before it (judgment of 9 January 2024, *G. and Others (Appointment of judges to the ordinary courts in Poland)*, C-181/21 and C-269/21, EU:C:2024:1, paragraph 63 and the case-law cited).

40 In the present case, the first and second questions referred by the national court do not fall within the situations listed in paragraph 37 of the present judgment, in which the presumption of relevance of a question referred may be rebutted. The interpretation of EU law sought in those questions, intended to determine whether the modification of the motorway concession awarded to ASPI following the collapse of the Morandi Bridge is compatible with Directive 2014/23, is related directly to the subject matter of the main proceedings, as an action for annulment of the settlement agreement has been brought before the referring court.

41 This is, however, not the case of the third question referred by the national court, as pointed out by the Advocate General in points 89 and 90 of his Opinion.

42 By that question, the referring court asks, in essence, whether Article 44 of Directive 2014/23 establishes an obligation to terminate a concession during its term where a modification has been made thereto in breach of either the obligation to organise a new award procedure or the potential obligation to examine the concessionaire's reliability.

43 In accordance with Article 44 of the directive, Member States are to ensure that contracting authorities have the possibility to terminate a concession during its term where a modification of the concession has taken place without a new concession award procedure having been organised, in breach of Article 43(5) of the directive, or where the concessionaire should have been excluded from the concession award procedure under Article 38(4) of the directive.

44 In the present case, it is apparent from the request for a preliminary ruling and from the observations submitted to the Court that the action before the referring court is an action for annulment brought by Adusbef, a consumer association, against measures which approved the settlement agreement and against several measures related to that agreement.

45 Accordingly, there is nothing in the file before the Court to show that the referring court is being asked to examine a potential termination by the contracting authority of the motorway concession held by ASPI, in line with Article 44 of Directive 2014/23.

46 Moreover, the Court notes that, first, the order for reference does not contain any reference to 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) and, second, the explanations given by the referring court do not make it possible to identify with sufficient accuracy the provisions of that directive, interpretation of which might, as the case may be, prove relevant for an answer to the third question.

47 It follows that, in line with the settled case-law recalled in paragraphs 38 and 39 of the present judgment, the third question must be declared to be inadmissible.

Consideration of the questions referred

The first question

48 By its first question, the referring court asks, in essence, whether Directive 2014/23 must be interpreted as precluding national legislation under which a contracting authority may modify a concession during its term regarding the entities concerned and the substance thereof, without organising a new concession award procedure and without having set out why that authority considered that it was not required to organise such a procedure.

49 The modification of concession contracts during their term is governed by Article 43 of Directive 2014/23.

50 It is therefore appropriate to answer the first question in the light of that article.

51 The Court has previously had the opportunity to specify that that article provides for exhaustive harmonisation of the circumstances in which, on the one hand, concessions may be modified without it being necessary for that purpose to organise a new concession award procedure in accordance with the rules laid down by that directive, and the circumstances in which, on the other hand, such an award procedure is required in the event of modification of the terms of the concession (judgment of 2 September 2021, *Sisal and Others*, C-721/19 and C-722/19, EU:C:2021:672, paragraph 31).

52 Under Article 43(5) of Directive 2014/23, any modification to the provisions of a concession during its term requires, in principle, that a new award procedure be organised, save for the modifications referred to in paragraphs 1 and 2 of that article.

53 It is apparent from the foregoing that Article 43(1) and (2) of that directive lists exhaustively all the situations in which a concession may be modified during its term without a new award procedure being organised.

54 In the present case, it is common ground that, following the collapse of the Morandi Bridge on 14 August 2018, the motorway concession awarded to ASPI was modified on 14 October 2021 by the settlement agreement without a new concession award procedure having been organised.

55 It must be borne in mind, in that regard, that, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law (judgment of 24 July 2023, *Lin*, C-107/23 PPU, EU:C:2023:606, paragraph 76).

56 As a result, it is not for the Court, but for the national court alone, to assess, in the light of all the relevant facts, whether each of the modifications made by the settlement agreement to the motorway concession held by ASPI falls within one of the situations referred to in Article 43(1)and (2) of Directive 2014/23. As the case may be, it would follow that those modifications could be made without organising a new concession award procedure.

57 By contrast, should the national court find that one or more of those modifications does not fall within any of the situations set out in Article 43(1) and (2) of the directive, it must be inferred that the modification or modifications concerned were made in breach of the obligation laid down in Article 43(5) of the directive to organise a new concession award procedure.

58 In the present case, the referring court and the parties that submitted observations to the Court referred to the possibility that the modifications made by the settlement agreement are caught by the provisions of points (c), (d) or (e) of the first subparagraph of Article 43(1) of Directive 2014/23. In that connection, the referring court must be provided with the points of interpretation of EU law relevant to the resolution of the dispute in the main proceedings.

59 First of all, under point (c) of the first subparagraph of Article 43(1) of that directive, a concession may be modified during its term without a new award procedure on condition, inter alia, that the need for that modification has been brought about by circumstances which a diligent contracting authority could not foresee and that it does not alter the overall nature of the concession.

60 The referring court is uncertain as to whether that provision is applicable where the need for the modification made to the concession during its term has been brought about by the concessionaire's failure to fulfil contractual obligations, consisting, in the present case, in a serious failure to fulfil obligations to maintain the motorway network, operation of which was awarded to ASPI.

61 It is for the national court alone to assess whether the concessionaire has committed such a failure to fulfil its contractual obligations in the circumstances of the dispute in the main proceedings and, as the case may be, whether there is a causal relationship between that failure to fulfil obligations and the modification made to the concession during its term.

62 That being said, first, it is apparent from recital 75 of Directive 2014/23 that concession contracts typically involve long-term and complex technical and financial arrangements which are often subject to changing circumstances, with the result that the EU legislature considered it necessary to clarify the conditions under which modifications of a concession during its performance require a new concession award procedure to be organised, taking into account the relevant case-law of the Court.

63 Second, it is apparent from recital 76 of Directive 2014/23 that point (c) of the first subparagraph of Article 43(1) of that directive is intended to confer on contracting authorities and contracting entities a certain discretion to adapt the concession to external circumstances that they could not foresee when they awarded the concession.

64 A concessionaire's failure to fulfil contractual obligations cannot, per se, be regarded as a circumstance which a diligent contracting authority could not foresee for the purposes of point (c) of the first subparagraph of Article 43(1) of Directive 2014/23. As a result, having regard to the purpose of that provision as follows from recital 76 of that directive, a concessionaire's failure to fulfil its contractual obligations is not liable to justify modification of a concession during its term without opening up to competition.

65 Next, regarding point (d) of the first subparagraph of Article 43(1) of Directive 2014/23, that provision lays down the conditions under which a new concessionaire may replace the original concessionaire without it being necessary to organise a new award procedure.

66 The referring court is uncertain whether that provision is applicable in the circumstances of the dispute in the main proceedings, given that the settlement agreement led to a modification in the composition of the shareholders of the concessionaire, namely ASPI, described in paragraph 21 of the present judgment, which led to a lasting change of control of ASPI.

67 In that connection, it is not apparent that a modification of the composition of the concessionaire's shareholders may per se be regarded as a modification of the concession itself, within the meaning of Article 43(5) of Directive 2014/23.

68 More specifically, transfers of the concessionaire's shares, whether to new shareholders or to existing shareholders, do not result in the replacement of the original concessionaire by a new concessionaire, as foreseen in point (d) of the first subparagraph of Article 43(1) of the directive, but merely in modifications to the composition or distribution of that concessionaire's shares.

69 In so far as modifications affecting the concessionaire's shares do not alter the concession for the purposes of Article 43(5) of Directive 2014/23, they do not require a new award procedure to be organised.

70 Last, it is apparent from point (e) of the first subparagraph of Article 43(1) of Directive 2014/23, read in conjunction with Article 43(4) thereof, that modifications that are not 'substantial' must not be subject to a new award procedure. A modification is to be regarded as 'substantial' where it alters the characteristics of the concession to be substantially different from those provided for initially. Recital 75 of that directive specifies, in that connection, that such changes demonstrate the parties' intention to renegotiate essential terms or conditions of the concession.

71 According to the settled case-law recalled in paragraph 55 of the present judgment, it is for the national court alone to assess whether the modifications to the settlement agreement, the content of which was summarised in paragraph 14 of the present judgment, are 'substantial' for the purposes of the provisions referred to above.

72 The Court notes in that connection that the new obligations imposed on the concessionaire, such as the payment of financial compensation or the strengthening of the safety standards of the conceded motorway network, fall outside the presumption established in Article 43(4)(b) of the directive, under which modifications which change the economic balance of the concession in favour of the concessionaire must always be regarded as substantial.

73 It is apparent from the explanations given by the referring court that that court is also uncertain as to the formal requirements with which the contracting authority must comply where a modification – such as those set out in the settlement agreement which are the subject of the dispute in the main proceedings – is made to a concession during its term. In that regard, two sets of circumstances must be distinguished according to whether the modifications in question must be subject to a new award procedure under Article 43 of Directive 2014/23, which it is for that court to ascertain.

74 Where the planned modification does not fall within one of the situations referred to in Article 43(1) and (2) of that directive, with the result that that modification must be subject to a new award procedure, all the formal requirements laid down in Title II of that directive must be met, in particular the publication of a concession notice in accordance with Article 31 of that directive.

75 Where this is not the case, that is, when the modification of a concession during its term does not require that a new award procedure be organised, the formal requirements established in Title II of that directive are not applicable.

76 In that situation, the second subparagraph of Article 43(1) of Directive 2014/23 does, however, provide, in certain cases, for the publication of a modification notice in the *Official Journal of the European Union* in accordance with Article 33 of that directive; that notice must contain the information provided for in Annex XI to the directive.

77 In accordance with the second subparagraph of Article 43(1) of Directive 2014/23, that obligation to publish a modification notice does not relate to all of the modifications that may be made without organising a new award procedure, but only to those referred to in points (b) and (c) of the first subparagraph of Article 43(1) of the directive.

78 In addition, that modification notice must be published after the planned modification, not before. The wording of the second subparagraph of Article 43(1) of the directive unequivocally refers to the contracting authorities 'having modified' a concession during its term.

79 That being said, it should also be borne in mind that, according to settled case-law, the contracting authority must comply with the general principle of EU law relating to sound administration, which the Member States must observe when implementing EU law. Among the requirements flowing from that principle, the obligation to state reasons for decisions adopted by the national authorities is particularly important, since it puts their addressee in a position to defend its rights and decide in full knowledge of the circumstances whether it is worthwhile to bring an action against those decisions (judgment of 21 December 2023, *Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias*, C-66/22, EU:C:2023:1016, paragraph 87).

80 That obligation to state reasons, which is incumbent on the contracting authorities, also flows from their obligation to ensure transparency of the award procedure and of the performance of the concession contract, in accordance with Article 3(2) of Directive 2014/23.

81 In the context of Article 43(1) and (2) of that directive, that obligation to state reasons must allow, more specifically, persons other than the concessionaire to familiarise themselves with the reasons why the contracting authority considered that the concession could be modified during its term without organising a new award procedure.

82 In practice, that reasoning must make it possible for any interested party to determine easily the reasons why the contracting authority considered that it was not required to organise a new concession award procedure under the relevant provisions of Article 43(1) and (2) of Directive 2014/23 and/or national measures transposing those provisions.

83 Failing such reasoning, the persons liable to have an interest in bringing proceedings against such a decision, in particular those potentially harmed by that decision, are not in a position to assess, in full knowledge of the circumstances, whether it is expedient to bring an action against that decision.

84 In the circumstances of the dispute in the main proceedings, it is for the referring court to ascertain whether the decisions implementing the modification of the motorway concession awarded to ASPI satisfied that obligation to state reasons.

85 Having regard to the foregoing considerations, the answer to the first question is that Article 43 of Directive 2014/23, read in conjunction with the general principle of sound administration, must be interpreted as not precluding national legislation under which a contracting authority may modify a concession during its term with regard to the entities concerned and the substance

thereof, without organising a new concession award procedure, provided that that modification does not fall under Article 43(5) of that directive and that the contracting authority has set out the reasons why it considered that it was not required to organise such a procedure.

The second question

86 By its second question, the referring court asks, in essence, whether Directive 2014/23 must be interpreted as precluding national legislation under which the contracting authority is entitled to modify a concession during its term without having assessed the reliability of a concessionaire, where that concessionaire has committed a serious failure to fulfil its obligations or is suspected to have done so.

87 As a preliminary point, as regards the declarations of ASPI, Mundy and the Italian Government that there was no official finding that the concessionaire had failed to fulfil its contractual obligations in the present case, it must be borne in mind that the national court alone has jurisdiction to find and assess the facts in the case before it.

88 The second question asked by the referring court covers expressly the assessment of the reliability of a 'concessionaire that is guilty of a serious failure to fulfil its obligations'. Consequently, the Court will examine that question on the basis of that factual premiss.

89 As has already been stated in paragraph 73 of the present judgment, two sets of circumstances must be distinguished according to whether the modifications to a concession during its term must be the subject of a new award procedure under Article 43 of Directive 2014/23, which it is for the referring court to ascertain.

90 In the first place, where the planned modification does not fall within one of the situations referred to in Article 43(1) and (2) of that directive, with the result that that modification must be the subject of a new award procedure under Article 43(5) of that directive, all the formal requirements laid down in Title II of that directive must be met.

91 Those requirements include, inter alia, those relating to the selection and qualitative assessment of a candidate, listed in Article 38 of Directive 2014/23.

92 Under Article 38(1) of the directive, the conditions for participation, relating to technical and professional ability in particular, must be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject matter of the concession and the purpose of ensuring genuine competition.

93 Similarly to the first subparagraph of Article 57(4) 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), the provisions of which correspond, in essence, to those of Article 38(7) of Directive 2014/23, the option, or indeed obligation, for the contracting authority to apply the exclusion grounds set out in the latter provision is specifically intended to enable it to assess the integrity and reliability of each of the economic operators participating in a public procurement procedure (see, by analogy, judgment of 21 December 2023, *Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias*, C-66/22, EU:C:2023:1016, paragraph 56).

94 The EU legislature thus intended to ensure that contracting authorities have, in all Member States, the possibility of excluding economic operators regarded as unreliable by those authorities (see, by analogy, judgment of 21 December 2023, *Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias*, C-66/22, EU:C:2023:1016, paragraph 57).

95 More specifically, Article 38(7)(c) of Directive 2014/23 provides that contracting authorities may exclude or may be required by Member States to exclude an economic operator where the contracting authority can demonstrate by any appropriate means that the economic operator is guilty of grave professional misconduct rendering its integrity questionable. The Court has previously had the opportunity to specify that the concept of 'professional misconduct', which covers all wrongful conduct which has an impact on the credibility, integrity or professional reliability of the economic operator in question, must be interpreted broadly (see, by analogy, judgment of 15 September 2022, *J. Sch. Omnibusunternehmen and K. Reisen*, C-416/21, EU:C:2022:689, paragraph 45).

96 Further, although Article 38(7) of the directive lists exhaustively the optional grounds for exclusion capable of justifying the exclusion of an economic operator from participation in a concession award procedure for reasons based on objective factors relating to its professional qualities (see, by analogy, judgment of 15 September 2022, *J. Sch. Omnibusunternehmen and K. Reisen*, C-416/21, EU:C:2022:689, paragraph 54), there is nothing to prevent the contracting authority from imposing particularly high requirements for the suitability and reliability of concessionaires (see, by analogy, judgment of 7 September 2023, *Commission* v *Poland*, C-601/21, EU:C:2023:629, paragraph 92).

97 It follows that the contracting authority is required, prior to the modification of a concession requiring the organisation of a new award procedure under Article 43(5) of the directive, to examine the suitability of candidates in accordance with Article 38 of that directive.

98 In the second place, should the modification not be required to be the subject of a new award procedure, since it falls within one of the situations provided for in Article 43(1) and (2) of Directive 2014/23, it is clear that the only provision establishing an obligation on the part of the contracting authority to verify the reliability of the concessionaire is in point (d)(ii) of the first subparagraph of Article 43(1) of the directive.

99 Under that provision, where a new concession replaces the initial concessionaire as a consequence of universal or partial succession into the position of the initial concessionaire, following corporate restructuring, including takeover, merger, acquisition or insolvency, the new concessionaire must fulfil the criteria for qualitative selection initially established.

100 However, on the grounds set out in paragraphs 65 to 69 of the present judgment and subject to verification of the facts, which it is for the referring court to carry out, it is not apparent that point (d) of the first subparagraph of Article 43(1) of Directive 2014/23 is applicable to circumstances such as those in the main proceedings, which feature a modification of the composition of the shareholders of the concessionaire, that is, ASPI.

101 No other provision of Article 43 of the directive, which governs exhaustively the situations in which a concession may be modified without a new award procedure being organised, lays down an obligation on the contracting authority to verify the reliability of the concessionaire.

102 Moreover, even though Article 44 of Directive 2014/23 requires Member States to provide that contracting authorities have the possibility to terminate a concession during its term in three situations, inter alia, under point (a) of that article, where the modification of the concession should have been the subject of a new award procedure, neither that article nor any other provision of that directive identifies the obligations on the contracting authority that the Member States should lay down in the event that the concessionaire is in breach of its obligations under the concession contract.

103 Failing any harmonisation at EU level, it is for each Member State to determine the rules allowing the contracting authority to react when the concessionaire has committed a serious failure to fulfil its obligations or is suspected to have done so, which calls into question its reliability, during the term of the concession.

104 Having regard to the foregoing considerations, the answer to the second question is that Article 43 of Directive 2014/23 must be interpreted as not precluding national legislation under which the contracting authority is entitled to modify a concession during its term without having assessed the reliability of the concessionaire, where that modification is not caught by either point (d)(ii) of the first subparagraph of Article 43(1) or Article 43(5) of the directive. It is for each Member State to determine the rules allowing the contracting authority to react when the concessionaire has committed a serious failure to fulfil its obligations or is suspected to have done so, which calls into question its reliability, during the term of the concession.

Costs

105 Since these proceedings are, for the parties to the main proceedings, a step in the action pending 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 (Fifth Chamber) hereby rules:

1. **Article 43 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, read in conjunction with the general principle of sound administration,**

   must be interpreted as not precluding national legislation under which a contracting authority may modify a concession during its term with regard to the entities concerned and the substance thereof, without organising a new concession award procedure, provided that that modification does not fall under Article 43(5) of that directive and that the contracting authority has set out the reasons why it considered that it was not required to organise such a procedure.

2. **Article 43 of Directive 2014/23**

   must be interpreted as not precluding national legislation under which the contracting authority is entitled to modify a concession during its term without having assessed the reliability of the concessionaire, where that modification is not caught by either point (d)(ii) of the first subparagraph of Article 43(1) or Article 43(5) of the directive. It is for each Member State to determine the rules allowing the contracting authority to react when the concessionaire has committed a serious failure to fulfil its obligations or

is suspected to have done so, which calls into question its reliability, during the term of the concession.

[Signatures]