Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 30 April 2024[1]

Case C-683/22

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 dello Stato,
interveners:
Mundys SpA, formerly Atlantia SpA,
Autostrade per l'Italia SpA,
Holding Reti Autostradali SpA

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy))

(Reference for a preliminary ruling – Motorway management concession – Serious failure to fulfil the obligations to maintain and preserve – Directive 2014/23/EU – Article 43 – Modification of the concession – Retention of the concession by the previous concessionaire – Evaluation of the need to organise a new tendering procedure – Reasons for the decision – Substantial nature of the modifications – Assessment of the reliability of the concessionaire as part of the process of modifying the concession – Article 44 – Termination of the concession – No call for tenders – Unreliability of the concessionaire)

1. On 14 August 2018, the Polcevera Viaduct, known as Ponte Morandi, on the A10 motorway in Genoa (Italy) collapsed. The motorway concessionaire at that time was Autostrade per l'Italia SpA ('ASPI').

2. The national authorities opened proceedings to determine whether ASPI was liable for a serious failure to fulfil its obligations to maintain and preserve the motorway network for which it is responsible.

[1] Original language: Spanish.

3. Those proceedings culminated in an *accordo transattivo* ('settlement agreement') between ASPI and the Italian authorities, which was followed by the *terzo atto aggiuntivo* ('the third supplementary agreement'), signed by the same parties and incorporated into the original concession agreement. In adopting those instruments, the authorities modified the provisions of the concession without opening a new tendering procedure.

4. A consumer association challenged those agreements, along with other related acts, before an Italian court, which has referred to the Court of Justice its doubts as to the interpretation of EU law relating to the modification (and possible termination) of concession contracts governed by Directive 2014/23/EU. [2]

I. Legal framework

A. European Union law: Directive 2014/23

5. Article 3 ('Principle of equal treatment, non-discrimination and transparency') provides:

'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 …'

6. In accordance with Article 38 ('Selection and qualitative assessment of candidates'):

'…

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;

[2] Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

…’

7. According to Article 43 (‘Modification of contracts during their term’):

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

(a) where the modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the concession;

…

(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.'

8. Article 44 ('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 of Justice of the European Union 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.'

B. Italian law

1. Decreto-legge 6 dicembre 2011, n. 201 – Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici [3]

9. Article 43(1) provides that, where updates to or revisions of motorway agreements in force on the date of entry into force of that decree-law entail changes or modifications to the investment plan or to regulatory matters made with a view to protecting the public finances, they are to be subject to the opinion of certain bodies and are to be approved by the authorities specified in that provision.

2. Decreto legislativo 18 aprile 2016, n. 50 – Codice dei contratti pubblici [4]

10. Article 80(5) lists as grounds for the optional exclusion of tenderers, in points (c) and (c-ter) thereof respectively, serious professional misconduct and failure to perform a previous concession.

11. The third part of that legislative decree, which is devoted to concession contracts, contains:

– Article 175, concerning modifications to contracts during their term. It reproduces, with few variations, Article 43 of Directive 2014/23;

– Article 176, concerning termination, *ex officio* revocation, termination for failure to fulfil obligations and replacement of the concessionaire.

[3] Decree-Law No 201 of 6 December 2011 on urgent provisions relating to growth, fairness and the consolidation of public accounts (GURI No 284 of 6 December 2011 – Ordinary Supplement No 251).

[4] Legislative Decree No 50 of 18 April 2016 laying down a public procurement code (GURI No 91 of 19 April 2016 – Ordinary Supplement No 10). Applicable ratione temporis.

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

12. On 12 October 2007, ASPI and the Azienda Nazionale Autonoma delle Strade (Autonomous National Highways Agency, Italy) [5] concluded a *convenzione unica* ('single agreement') [6] whereby ASPI was awarded a concession for the management of a collection of sections of Italian motorways comprising more than 2 800 kilometres. [7]

13. The concession expires on 31 December 2038.

14. On 14 August 2018, a section of the Polcevera Viaduct on the A10 motorway (Ponte Morandi), on the outskirts of Genoa, which forms part of ASPI's concession, collapsed, killing 43 people.

15. On 16 August 2018, the Directorate-General for the supervision of motorway concessionaires initiated proceedings against ASPI for a serious failure to fulfil the obligations to maintain and preserve the motorway network.

16. From 10 July 2019, the concessionaire and the authority held a number of meetings that led to the submission of a proposal by ASPI on 11 July 2020. [8]

17. On the basis of that proposal for a 'negotiated solution', a settlement agreement was drafted and communicated to ASPI in a joint letter from several Italian ministries and the Presidenza del Consiglio dei Ministri (Presidency of the Council of Ministers, Italy) of 23 September 2020.

18. The settlement agreement defined the measures to be taken by the concessionaire and the other obligations entered into by it as part of the negotiated solution to the infringement proceedings which had been brought against it. The settlement agreement proposed a 'renegotiation of the single agreement' of 12 October 2007.

19. On 15 July 2021, ASPI sent a draft supplementary agreement to the single agreement and the annexes thereto.

20. On 14 October 2021, the Ministry of Infrastructure and ASPI signed the settlement agreement, which would be endorsed by Decree No 37 of 22 February 2022 of the Ministry of Infrastructure, in agreement with the Ministero dell'Economia e delle Finanze (Ministry of Economic and Financial Affairs, Italy). [9]

[5] The Ministero delle Infrastrutture e della Mobilità sostenibili (Ministry of Infrastructure and Sustainable Mobility, Italy; 'the Ministry of Infrastructure') succeeded the Autonomous National Highways Agency by operation of law on 1 October 2012.

[6] The concession for the motorways managed by ASPI originates from the award made to the company Autostrade-Concessioni e Costruzioni Autostrade SpA in 1968. The latter entity was privatised in 1999 and, in 2003, transferred its motorway concession activities to ASPI.

[7] The single agreement was formally approved by Article 8-duodecies of Decreto-legge 8 aprile 2008, n. 59 – Disposizioni urgenti per l'attuazione di obblighi comunitari e l'esecuzione di sentenze della Corte di giustizia delle Comunità europee (Decree-Law No 59 of 8 April 2008 on urgent provisions for implementing Community obligations and complying with judgments of the Court of Justice of the European Communities) (GURI No 84, 9 April 2008, p. 3), ratified with amendments by Legge 6 giugno 2008, n. 101 – Conversione in legge, con modificazioni, del decreto-legge 8 aprile 2008, n. 59 (Law No 101 of 6 June 2008 adopting into law, with modifications, Decree-Law No 59 of April 2008) (GURI No 132 of 7 June 2008).

[8] In that proposal, ASPI, in short, offered financial compensation in the amount of EUR 3 400 million, improved safety standards and a corporate restructuring operation involving Cassa Depositi e Prestiti SpA and other investors approved by the latter, to which control over ASPI's shareholder portfolio would be transferred.

[9] The approval of the settlement agreement was preceded by the favourable opinion (Resolution No 75) delivered by the Comitato interministeriale per la programmazione economica e lo sviluppo sostenibile (Inter-ministerial Committee for Economic Planning and Sustainable Development, Italy) on the third supplementary agreement on 22 December 2021.

21. On 21 March 2022, the Ministry of Infrastructure and ASPI signed the third supplementary agreement to the single agreement, which incorporated into the latter certain modifications to the provisions of the concession.

22. By an application registered under number 6020 of 2022, several associations (of which only the Associazione difesa utenti servizi bancari e finanziari ('Adusbef') would ultimately be recognised as having standing to bring proceedings) challenged before the referring court the following measures, which they sought to have annulled:

– Resolution No 75/21 of the Inter-ministerial Committee for Economic Planning and Sustainable Development of 22 December 2021, entitled 'Autostrade per l'Italia SpA – Report on the third supplementary agreement to the single agreement of 12 October 2007 and on the financial economic plan within the meaning of Article 43 of Decree-Law No 201 of 2011 (Decision No 75/2021)';

– Decree No 37 of 22 February 2022 of the Ministry of Infrastructure, by mutual consent with the Ministry of Economic and Financial Affairs, approving the settlement agreement, signed on 14 October 2021, between the Ministry of Infrastructure and ASPI;

– Decision of the Corte dei Conti (Court of Auditors, Italy) No SCCLEG/2/2022/PREV of 29 March 2022;

– the favourable opinion of the Avvocatura Generale dello Stato (State Attorney General's Office, Italy), transmitted by note of 24 September 2021, concerning the draft of the aforementioned agreement;

– the settlement agreement of 14 October 2021, signed between the Ministry of Infrastructure and ASPI;

– Note No 19135 of 5 November 2021, by which the Ministry of Infrastructure transmitted the updated proposal for the economic and financial plan;

– the opinion of 22 December 2021 of 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) on the draft of the third supplementary agreement to the single agreement and the economic and financial plan resulting from it;

– the opinion of 14 October 2020, and the note of 16 December 2021, of the Autorità di regolazione dei trasporti (Transport Regulatory Authority, Italy);

– the minutes of the meetings of the Consiglio dei Ministri (Council of Ministers, Italy) of 14 and 15 July 2020;

– any other preliminary, related or consecutive act.

23. The grounds of challenge raised by Adusbef [10] related to the infringement both of provisions of national law and of Articles 38, 43 and 44 of Directive 2014/23.

[10] Pages 12 to 15 of the Italian version of the order for reference.

24. That challenge was opposed by ASPI; the public institutions and authorities that had adopted the contested acts, represented jointly; Atlantia SpA [11] and, acting as intervener in opposition, Holding Reti Autostradali.

25. It is in that context that the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy) has made a reference to the Court of Justice for a preliminary ruling 'on the rules laid down in 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?'

III. Procedure before the Court of Justice

26. The request for a preliminary ruling was registered at the Court of Justice on 4 November 2022.

27. Written observations have been lodged by Adusbef, ASPI, Holding Reti Autostradali, Mundys, the German, Estonian and Italian Governments, and the European Commission, all of whom, except the German and Estonian Governments, attended the hearing held on 28 February 2024.

IV. Assessment

A. Preliminary observations

1. Applicable directive

28. According to Mundys, Directive 2014/23 is not relevant to the resolution of the dispute, since, according to the second paragraph of Article 54 thereof, it 'shall not apply to the award of concessions tendered or awarded before 17 April 2014'. In this case, the concession at issue was awarded on 12 October 2007.

[11] Atlantia was a shareholder in ASPI until it sold its shareholding to Holding Reti Autostradali SpA as part of the restructuring of ASPI's share capital. On 14 March 2023, Atlantia changed its name to Mundys SpA.

29. Although the original concession was granted prior to the adoption of Directive 2014/23, what matters for the purposes of establishing the applicable legislation is the date of the modifications the validity of which is being challenged.[12] That date is later than 17 April 2014, which renders Directive 2014/23 applicable.

30. The objections relating to the concessionaire's subsequent unreliability and the existence of a ground for termination of the contract can be dismissed on the basis of the same reasoning, *mutatis mutandis*. Both objections concern facts arising from or connected with the contested modifications, which occurred after 17 April 2014.

2. Admissibility of the request for a preliminary ruling

31. ASPI, Holding Reti Autostradali, Mundys and the Italian Government, using arguments which are partly the same and partly different, submit that the reference for a preliminary ruling is inadmissible. In short, they accuse the referring court of having failed to provide sufficient factual and legal material to enable it to obtain a useful answer to its questions, which they claim to be hypothetical.

32. Requests for a preliminary ruling on the interpretation of EU law enjoy a presumption of relevance. Moreover, it is the responsibility of the national court to define the factual and legal framework, the accuracy of which it is not for the Court to verify. The Court may refrain from ruling on such a request only in the exceptional cases which it has specified.[13]

33. It is my opinion, notwithstanding my comments below on the third question referred for a preliminary ruling and certain ambiguities in the others, that the first two questions do bear a relation to the subject matter of the dispute in the main proceedings. Although the description of the facts is not as precise as it should be,[14] that account and the legal considerations contained in the order for reference[15] provide the Court with the minimum material it requires to answer the first two questions.

B. First question referred for a preliminary ruling

34. The referring court wishes to ascertain whether it is consistent 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'.

[12] Judgment of 2 September 2021, *Sisal and Others* (C-721/19 and C-722/19, 'the judgment in *Sisal and Others*', EU:C:2021:672, paragraph 28): '… in the event of a substantial amendment 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 amendment. The Court has stated in that context that the fact that the original concession contract was concluded prior to the adoption of EU rules on the matter is therefore without consequence in that regard …' See, in the same vein, judgments of 11 July 2013, *Commission* v *Netherlands* (C-576/10, EU:C:2013:510, paragraph 54), and of 18 September 2019, *Commission* v *Italy* (C-526/17, EU:C:2019:756, paragraph 60).

[13] That is to say, where it is 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 referring court. See, inter alia, judgment of 14 September 2023, *TGSS (Refusal of the maternity supplement)* (C-113/22, EU:C:2023:665, paragraphs 30 and 31).

[14] In the order for reference (paragraph 2.1), the referring court states that, as regards the subject matter of the dispute and the account of the relevant facts, 'the Court recalls in full the "facts" section of the present judgment'. However, that part contains a description not of the facts which the court itself deems to be established but of the facts alleged by the parties.

[15] The order for reference takes the unusual form of a 'non-final judgment'.

35. As worded, that question must be construed as referring to Article 43 of Directive 2014/23, which governs the modification of concession contracts during their term. I shall address it by analysing that provision and the formal and substantive aspects of the modifications agreed in the present case.

1. Modifications to concession contracts under Directive 2014/23

36. Article 43 of Directive 2014/23 allows concessions to be modified without a new award procedure in the cases listed in paragraph 1 thereof. Prominent among those for our purposes here is the situation where 'the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4' (paragraph 1(e)).

37. Paragraph 4 of that same article governs when the modification of a concession during its term is to be considered substantial. In that event, under paragraph 5, 'a new concession award procedure … shall be required'.

38. Recital 75 of Directive 2014/23 states that '… 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 …'.

39. Before the entry into force of Directive 2014/23, the Court had already held that substantial amendments to essential provisions of a concession contract could require the award of a new contract. [16]

40. In 2011, a debate [17] was launched into the need to reform the public procurement directives. One of the questions submitted for consultation was 'whether a legal clarification at EU level is needed to set out the conditions under which a modification of the contract requires a new tender procedure', in the light of the case-law of the Court. The result that is reflected in the three procurement directives adopted in 2014 is similar so far as contractual modifications are concerned.

41. In the subsequent case-law relating to Article 43 of Directive 2014/23, the Court interprets that article in line with its previous decisions. Thus, in the judgment of 2 September 2021, it held 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 … 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'. [18]

42. As I have just stated, Article 43(1) and (2) of Directive 2014/23 sets out which modifications do not require the opening of a new call for tenders. Paragraph 4 of that article stipulates when a modification is to be considered to be substantial, with the result (paragraph 5) that a new concession award procedure must be initiated.

[16] Judgment of 13 April 2010, *Wall* (C-91/08, EU:C:2010:182, paragraph 37). For the legislation applicable prior to Directive 2014/23, see, to that effect, judgments of 18 September 2019, *Commission* v *Italy* (C-526/17, EU:C:2019:756, paragraph 59), and of 11 July 2013, *Commission* v *Netherlands* (C-576/10, EU:C:2013:510, paragraph 54).

[17] Green Paper on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market (Brussels, 27 January 2011, COM(2011) 15 final). Page 25 thereof states that, 'for certain types of amendments, the case-law does not appear to be sufficiently clear in terms of establishing whether a new tender procedure is needed'.

[18] The judgment in *Sisal and Others*, paragraph 31.

43. The foregoing must form the basis of the answer to be given to the referring court in response to the first question referred for a preliminary ruling. However, the wording of that question is ambiguous. As worded, it appears to be aimed exclusively at ascertaining whether there is a *formal obligation* on the contracting authority to state its position by way of a reasoned decision, the *material* content of which would thus be secondary.

44. That formal approach contrasts, however, with the attention which the referring court devotes in its order for reference to one of the (alleged) substantial modifications to the concession, that relating to the concessionaire's shareholding structure.

45. For the sake of completeness, I shall address both aspects of the question, the formal and the material. First, I must stress that, other than in relation to the change of shareholders, the order for reference does not specifically identify either the origin or the content of the modified provisions of the concession.

46. As I have already explained, the modification took place as a result of two acts which, although, interlinked, have a different legal form:

– on the one hand, the conclusion on 14 October 2021 of the settlement agreement between the Ministry of Infrastructure and ASPI, which brought an end to the investigations into the concessionaire's failure to fulfil its obligations; [19]

– on the other hand, the signature by the same parties on 21 March 2022 of the third supplementary agreement to the single agreement. It was that supplementary agreement which actually incorporated the modifications into the concession. The order for reference devotes little attention to it, however.

2. Obligation of the contracting authority to state the reasons for its decision

47. Article 43(1), (2) and (4) of Directive 2014/23, in prescribing how concessions may be modified (and whether or not their modification makes it necessary to initiate a new tendering procedure), does not require the contracting authority to explain the reasons for its view that one of the situations referred to in those provisions is present.

48. In principle, given that Article 43 of Directive 2014/23 is silent in this regard, it would be for the Member States to decide whether or not to impose on contracting authorities a duty to state the reasons for their decisions on the modification of concessions.

[19] The settlement agreement is in fact an administrative act adopted in accordance with Article 11 of Legge 7 agosto 1990, n. 241 – Nouve norme in material di procedimento amministrativo e di diritto di accesso ai documenti amministrativi (Law No 241 of 7 August 1990 establishing new rules on administrative procedure and on the right of access to administrative documents) (GURI No 192 of 18 August 1990). This is reflected in Article 5 of the settlement agreement itself. As an administrative act (adopted in the form of an 'agreement with the interested party', provided for in Article 11(1) of that law), it is subject to the general obligation to state reasons and to the same checks as other acts of the administration.

49. However, the Court has already held that, in certain circumstances, the contracting authority is subject to that duty, so as to put the person concerned in a position to 'defend its rights and decide in full knowledge of the circumstances whether it is worthwhile to bring an action against [decisions adopted by the national authorities]', and so as to 'enable the courts to review the legality of those decisions'. [20]

50. The referring court will have to decide whether, given the subject matter of the dispute, the contested acts should have been reasoned and, if so, whether they contain sufficient reasoning to enable their addressees to defend their rights and to make the acts amenable to judicial review. [21]

51. From that point of view, the order for reference reproduces sufficient material to support the inference that the contracting authority's decision was preceded by evaluations that could satisfy the requirement to state reasons. In particular, the competent authorities explained (rightly or wrongly, but that is another matter) why modifying the concession was the most suitable solution.

52. Thus, a reading of paragraph 2.2. of the order for reference shows that the contracting authority weighed up the negative and positive consequences of the two alternatives put forward (modifying the concession without a new call for tenders or terminating the contract). [22] The reasons why the Italian authorities opted for the first of those solutions are set out extensively in the various documents forming part of the case file. [23]

53. That being the case, the contracting authority's reasoning could be inferred from the content of the collection of documents comprising the acts contested in the application filed by Adusbef. Those include the opinions of the national bodies and institutions highlighting the advisability of adopting the settlement agreement and the third supplementary agreement, as a result of which the contracting authority formed the view that it was appropriate to modify the original concession without a prior call for tenders.

54. In the action brought by Adusbef before the referring court, that association recognises that 'the reasons on the basis of which the [settlement] agreement does not terminate but carries on the contract …' are set out in that agreement, and it reproduces part of the content thereof. [24] In

[20] Judgments of 7 September 2021, *Klaipėdos regiono atliekų tvarkymo centras* (C-927/19, EU:C:2021:700, paragraph 120 and the case-law cited), and of 21 December 2023, *Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias* (C-66/22, EU:C:2023:1016, paragraph 87).

[21] At the hearing, it was discussed whether, since it had modified the concession in accordance with Article 43(1)(c) of Directive 2014/23, the contracting authority should have published a notice in the *Official Journal of the European Union* containing the information laid down in Annex XI. The referring court does not question that omission, but confines its question to the fact that the acts concerned do not state the reasons on which they are based. In any event, it is my view that one of the three conditions laid down in that provision, namely that the overall nature of the concession must have been altered, would not be met in this case.

[22] To that end, the referring court reproduces the negative consequences of terminating the concession that were outlined in the settlement agreement. They include a break in activities under the contract, which might bring with it a risk of financial crisis for ASPI's contractors and suppliers, and the possibility that the administration would incur additional costs arising from the need to pay penalties; and the deterrent risk that the administration might face litigation culminating in the enforcement of a provision of the single agreement and, as a result, the imposition on the State of a considerable financial burden and the obligation to pay compensation to the concessionaire.

[23] The referring court highlights as positive aspects of the settlement agreement as mentioned therein: (i) seamless continuation of service management, thus avoiding the need to interrupt a service that is essential to the community and pause the resolution of circumstances potentially hindering its regular operation; (ii) the immediate launch of the process of implementing the investment and maintenance programme for the motorway network, and promotion of the plans to invest in ecological transition and sustainable mobility; (iii) maintenance and growth of current levels of employment and the adoption of ASPI-sponsored initiatives to support the community, in accordance with priorities set directly by the administration; (iv) guaranteed payments for the work to reconstruct the bridge to replace the Polcevera Viaduct; (v) conclusion of the pending litigation between the concessionaire and the administrative authorities; (vi) adaptation of the contractual provisions of the concession so as to remove clauses considered unfairly favourable to the concessionaire; (vii) the introduction of a more robust system of penalties than that provided for in the single agreement; *(viii) the desire by both parties to avoid any future litigation.*

[24] Pages 10 and 11 of the application.

the same document,[25] it advances arguments of its own to criticise the arguments in favour of continuing the contract which are contained in the settlement agreement and those which the Corte dei conti (Court of Auditors) had put forward 'by way of reasoning'.

55. Adusbef was therefore able to take cognisance of and challenge the content of the acts modifying the concession, which it submits to the referring court for judicial review.[26]

3. Classification of the modifications to the concession contract

56. The order for reference focuses primarily on the (alleged) modification of the concession contract brought about by the alteration of ASPI's shareholding structure. The issue is whether there was a change of concessionaire within the meaning of Article 43(4)(d) of Directive 2014/23 in conjunction with paragraph 1(d) thereof.

57. The referring court also wishes to ascertain:

– whether the collapse of Ponte Morandi constituted an 'unforeseeable circumstance' for the purposes of Article 43(1)(c)(i) of Directive 2014/23;

– whether ASPI's undertaking to provide financial compensation of EUR 3 400 million and improve safety standards on the motorway network, and the actual implementation thereof, constitutes a substantial modification of the concession.

58. It is for the referring court to determine whether an award procedure should have been opened in accordance with Article 43(5) of Directive 2014/23. The Court can, however, provide that court with some guidance to assist it in formulating its judgment.

(a) Is a change to the shareholding structure a substantial modification of the concession contract?

59. According to Article 43(1)(d)(ii) of Directive 2014/23, 'concessions may be modified without a new concession award procedure … where a new concession replaces the one to which the contracting authority or the contracting entity had initially awarded the concession as a consequence of … universal or partial succession into the position of the initial concessionaire, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator …'.

60. In order to interpret that provision, regard must be had to recital 77 of Directive 2014/23, which refers to *structural changes* during the performance of the concession, such as purely internal reorganisations, takeovers and mergers. Such structural changes, it goes on to say, 'should not automatically require new award procedures …'.

[25] Eighth paragraph of the section entitled 'diritto', at page 29 of the application.

[26] At the hearing, Adusbef pressed the argument that Decree No 37 of the Ministry of Infrastructure of 22 February 2022 lacked reasoning. That decree, which Adusbef adduced as an annex, contains two articles preceded by numerous recitals. The first article confines itself to approving the settlement agreement and the second to providing that 'enforceability of the agreement is subject to compliance with the conditions set out in Article 10 thereof'. To my mind, therefore, that decree is sufficiently reasoned, in itself and by reference to another act, in so far as it adopts as its own the (extensive) reasoning contained in the settlement agreement. The two acts must be read together.

61. The written observations of, and oral argument presented at the hearing by, the parties to the dispute, as well as the information contained in the order for reference,[27] support the inference that there was no substitution, either universal or partial, of the concessionaire (ASPI was and remains the concession holder), but an internal reshaping of the shareholding structure,[28] whereby a number of new shareholders replaced others as part of an operation notified to the Commission.[29]

62. At the hearing, it was discussed whether the acquisition by Cassa Depositi e Prestiti of a majority interest[30] in ASPI's share capital amounted by its nature[31] to a transformation of the concessionaire such as to make a tendering procedure necessary.

63. Now, in principle, the mere replacement of some shareholders by others as part of a reshaping of the shareholding structure that does not entail the removal of the concession holder does not constitute a substantial subjective novation requiring a new call for tenders for the purposes of Article 43(1)(d)(ii) of Directive 2014/23. This was confirmed by the Court when it held that '… internal reorganisations of the initial contractor are capable of constituting insubstantial changes in the terms of the public contract concerned which do not require the opening of a new public procurement procedure'.[32]

64. From another point of view, the referring court will have to consider whether that subjective modification was allowed under Article 10-bis of the single agreement. If so, it will have to assess whether the contested acts were in conformity with the provisions of Article 43(1)(d)(i) of Directive 2014/23,[33] that is to say whether the modification was provided for as an unequivocal review clause or option in the original concession instrument.[34]

27 Paragraph 2.5. of the order for reference.

28 According to the first subparagraph of paragraph 2.5. of the order for reference, Atlantia sold 88% of ASPI to a holding company (Holding Reti Autostradali) whose majority shareholder (with a 51% interest) was Cassa Depositi e Prestiti Equity SpA and in which two foreign funds, Macquarie Group Ltd and Blackstone Group Inc., each held a 24.5% interest. Footnote 2 to the observations of Holding Reti Autostradali states that, of the remaining capital, 6.94% belongs to Appia Investments Srl and 5% to Silk Road Fund Co. (those percentages are referred to in the second subparagraph of paragraph 2.5. of the order for reference).

29 In Decision C(2021) 8274 final, the Commission decided not to oppose the notified transaction, which it declared to be compatible with the internal market. According to the notification of the proposed concentration (in accordance with Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1)), several companies (Cassa Depositi e Prestiti Equity, part of the Cassa Depositi e Prestiti group, Macquarie Group and Blackstone Group) intended to take joint control of the whole of ASPI through the purchase of shares.

30 According to the information available, which is subject to subsequent verification, ASPI is 88.06% owned by Holding Reti Autostradali, which is in turn 51% controlled by Cassa Depositi e Prestiti Equity, 100% of whose share capital belongs ultimately to Cassa Depositi e Prestiti.

31 One of the arguments put forward concerned the change in the (public or private) nature of the concessionaire as a result of the participation of the Ministry of Economic and Financial Affairs in the capital of Cassa Depositi e Prestiti. The referring court nonetheless states that the latter is not a public undertaking. It was also discussed whether the entry of new shareholders into ASPI's equity structure constituted an act of self-cleaning on the part of the concessionaire, whether offered up to a greater or lesser extent by the latter or imposed by the Italian authorities, that would be indicative of the substantial nature of the subjective modification. To my mind, that argument can be dismissed, since self-cleaning measures are by definition ones which the concessionaire itself (that is to say, the concessionaire whose identity remains the same) adopts in order to participate in a subsequent award procedure in the manner provided for in Article 38(9) of Directive 2014/23.

32 Judgment of 3 February 2022, *Advania Sverige and Kammarkollegiet* (C-461/20, EU:C:2022:72, paragraph 34), citing judgment of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:351).

33 On the application of that rule, see the judgment in *Sisal and Others*, paragraphs 39 to 43.

34 So says Holding Reti Autostradali in paragraphs 10 and 40 of its written observations when referring to Article 10-bis of the single agreement, which lays down the criteria for authorising changes of motorway concessionaires that come about as a result of concentrations at EU level.

(b) Other (objective) modifications

65. According to the referring court,[35] the modifications to the single agreement are not the result of 'circumstances which a diligent contracting authority or contracting entity could not foresee'.

66. In its view, a failure to fulfil obligations that is capable of adversely affecting road safety or of giving rise, in and of itself or in conjunction with other such failures, to a tragic event such as the collapse of Ponte Morandi does not constitute an unforeseeable circumstance.

67. In my view, the focus should be not so much on whether the event was unforeseeable as on the 'need' for the contractual modification to have been brought about by that event. Article 43(1)(c)(i) of Directive 2014/23 specifically refers to the case where the *need for modification* has been brought about by circumstances which a diligent contracting authority or contracting entity could not foresee.

68. Whatever the cause of the modifications agreed, what matters in this dispute is whether they are to be classified as substantial, in which case it will fall to be decided whether, irrespective of their origin, a tendering procedure should have been organised because those modifications altered the subject matter or the overall nature of the concession.

69. At the hearing, the parties discussed what objective modifications the settlement agreement and the supplementary agreement, in particular, had introduced to the single agreement. Of those, the referring court mentions ASPI's undertakings to provide financial compensation of EUR 3 400 million and to ensure improved safety standards on the motorway network. It does not, however, refer to the tariff modification or to any other types of modification contained in those agreements.

70. Once again, it will be for the referring court to assess whether the undertakings made by ASPI entail a substantial modification of the contract for the purposes of Article 43(1), (2) and (4) of Directive 2014/23. In making its assessment, it may wish to consider, as the parties discussed at the hearing without reaching a conclusive outcome, whether the changes introduced actually make the concessionaire's position worse by subjecting it to more onerous conditions,[36] or, conversely, are beneficial to its interests in allowing it to retain the concession. It may also wish to assess whether those changes result from the implementation of new legislative measures of a general nature[37] or, rather, from ad hoc decisions freely adopted by the contracting authority for the benefit of the concessionaire.

[35] Third and fourth subparagraphs of paragraph 2.6. of the order for reference.

[36] The representative for Holding Reti Autostradali referred to the judgment in *Sisal and Others* in order to press the argument that, in that case, the substantial modification had not benefited the concessionaire because the concessionaire was subjected to more onerous conditions than those which had been laid down in the first place. Paragraph 53 of that judgment states that 'in so far as that advance payment might be capable of increasing the amount to be paid, such a modification does not appear to alter the economic balance of the concession in favour of the concessionaire, within the meaning [of Article 43(4) of Directive 2014/23]'.

[37] That was the case made at the hearing by the representative for ASPI, who argued that the modifications to the settlement agreement and the supplementary agreement derived at least in part from the entry into force of Decreto-legge 28 settembre 2018, n. 109 – Disposizioni urgenti per la città di Genova, la sicurezza della rete nazionale delle infrastrutture e dei trasporti, gli eventi sismici del 2016 e 2017, il lavoro e le altre emergenze (Decree-Law No 109 of 28 September 2018 establishing urgent provisions for the city of Genoa, the security of the national infrastructures and transport network, the seismic events of 2016 and 2017, employment and other emergencies) (GURI No 226 of 28 September 2018), which would apply to all motorway concessions. It is doubtful, however, whether, so far as ASPI is concerned, the content of that decree-law can be disassociated from its conduct as a concessionaire, as the Corte Costituzionale (Constitutional Court, Italy) implies in paragraphs 1.1. to 1.6., headed 'Considerato in diritto', of its judgment No 168/2020 of 8 July 2020.

71. It is my view that, within the exclusive context of the changes mentioned by the referring court, the two objective modifications specified by that court do not appear to be of a substantial nature. First, ASPI's financial contribution (onerous, as such, for the concessionaire) seeks to counteract the economic repercussions of what has happened transactionally. Secondly, the undertaking to improve the safety of the motorway network is not significantly different from the obligations entered into in the single agreement.

C. Second question referred for a preliminary ruling

72. The referring court wishes to ascertain whether it would 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'. [38]

73. The premiss from which the question starts is that the concessionaire seriously failed to fulfil its obligations to maintain and preserve the motorway infrastructure. However, the contracting authority did not *formally* declare that the concessionaire had failed to fulfil its obligations in that way because the proceedings instituted to that end were the subject of the settlement agreement so often referred to.

74. The referring court takes note of the opinion, issued by an inter-institutional working group on 28 June 2019, [39] in which the concessionaire was found to have seriously failed to fulfil its obligations to maintain and preserve. That opinion, however, already had in mind that the declaration of failure to fulfil obligations could be dispensed with in exchange for a renegotiation of the single agreement, [40] which is what in fact happened.

75. The question must be understood as referring to Article 38 of Directive 2014/23, which is one of the provisions cited in the heading common to all three questions.

76. Article 38 of Directive 2014/23 governs the selection and qualitative assessment of candidates. It forms part of a title (II) concerning the award of concessions. In that context, Directive 2014/23 includes reliability as a key component of the initial selection. According to recital 70 thereof, the contracting authorities may exclude 'economic operators which have proven unreliable'.

[38] As one of the interveners has observed, the second question referred for a preliminary ruling is to some extent contradictory to the first. If the introduction of new shareholders constitutes a substantial subjective modification, inasmuch as it effectively involves a change of concessionaire (first question), there is no longer any point in assessing whether or not the 'former' concessionaire was reliable.

[39] Eleventh subparagraph of the description of the facts and first subparagraph of paragraph 2.7. of the order for reference, which reproduces part of the preamble to the settlement agreement. The referring court also relies on judgment No 168/2020 of the Corte Costituzionale (Constitutional Court) of 8 July 2020.

[40] According to the referring court, the preamble to the settlement agreement reproduced the part of that opinion which proposed, as an alternative to termination, that the competent authorities be entrusted with the task of 'assessing the advisability of renegotiating the single agreement, if this would better protect the interests of the State, with a view to rebalancing the concession and ensuring that the motorway network is once again entirely safe, and recalls in point 11 the potential risks associated with litigation and with the operational repercussions of a measure involving the termination of the contract'.

77. The element of reliability permeates the grounds for exclusion based on the subjective circumstances of both the successful candidate and the other economic operators.[41] There must be a connection between the candidate's (un)reliability and the specific grounds for exclusion set out in Article 38 of Directive 2014/23.

78. The grounds for exclusion have their proper part to play at the stage of selecting the contractor, not when the contractual relationship has already been established and, as is the case here, the concession has been producing its own effects for years. Although one of the paragraphs of Article 38 provides that the contracting authority may decide to exclude an economic operator *at any time during the procedure* (for awarding the concession), it is the procedure for selecting and evaluating tenders that is being referred to.

79. The issue raised here is whether reliability should be a relevant criterion when it comes to modifying the clauses of a contract that is in force, that is to say, whether Directive 2014/23 requires the concessionaire's reliability to be assessed as part of a modification to the contract.

80. The answer to that question will depend on the nature of the changes proposed. If the modification is substantial, within the meaning analysed above, the contracting authority must open a new award procedure in the course of which it has a responsibility to assess the reliability of all the candidates, including the previous concessionaire (if it elects to participate).[42] A reliability assessment will therefore have to be carried out in the tendering procedure opened to award the new contract. Conversely, if the modifications are not substantial, there is nothing in Directive 2014/23 which calls for a new assessment of the concessionaire's reliability to be carried out. In those circumstances, there will be no need to assess the grounds for exclusion under Article 38.

81. The difference between those two situations can be seen more clearly by examining the treatment of subjective modifications in Directive 2014/23. Article 43(1)(d)(ii) thereof provides, in the event of universal or partial succession into the position of the initial concessionaire by another economic operator, that the latter must '[fulfil] the criteria for qualitative selection initially established'. When assessing whether those criteria are fulfilled, the contracting authority will, logically, have to take into account the reliability of the new operator that is replacing the previous one.

82. However, where what is involved is not a subjective modification of that nature but merely an internal corporate restructuring brought about by changes to the shareholding portfolio of the undertaking that is and continues to be the concessionaire, the contracting authority is under no obligation to reassess the concessionaire's reliability, which was demonstrated in the initial award procedure.

83. The treatment of insubstantial objective modifications is analogous to that of subjective modifications, in the light of the rules governing contractual modifications which are laid down in Directive 2014/23.

[41] I made this point in my Opinion in *Tim* (C-395/18, EU:C:2019:595, point 44), in connection with 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 content of which runs parallel to that of Directive 2014/23. See judgments of 3 October 2019, *Delta Antrepriză de Construcții și Montaj 93* (C-267/18, EU:C:2019:826, paragraph 26), and of 19 June 2019, *Meca* (C-41/18, EU:C:2019:507, paragraphs 29 and 30).

[42] In that event, according to Article 38(9) of Directive 2014/23, any economic operator that is in one of the situations referred to in paragraphs 4 and 7 of that article may provide evidence to the effect that (self-cleaning) measures taken by that 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 is not to be excluded from the procedure.

84. The position is different from the foregoing if, during the term of the contract, the concessionaire has seriously failed to fulfil its contractual obligations. This factor could, in certain circumstances, adversely affect the concessionaire's relationship with the contracting authority in so far as it amounts to a (subsequent) want of integrity or reliability. Within that limited context, it may be argued that the concessionaire must remain reliable throughout the life of the concession.

85. After all, the concessionaire's unreliability by virtue of having seriously failed to comply with the provisions of a current concession contract is a factor capable of warranting the termination of that contract, as I shall explain below. In that connection, the response to the serious failure to fulfil obligations, once established and declared to be such by the contracting authority, may be to terminate the concession, a scenario not regulated by Article 38 of Directive 2014/23.

86. This need not necessarily be the response, however, if the contracting authority, acting within its discretion, considers it preferable, for reasons in the public interest, to make appropriate contractual modifications (provided that these are not substantial).

D. Third question referred for a preliminary ruling

1. Admissibility

87. The referring court wishes to ascertain whether, 'where an infringement of the principle of public procurement is established and/or the unreliability of the holder of a motorway concession is established', EU law imposes an obligation 'to terminate the relationship'.

88. The question must be understood as referring to Article 44 of Directive 2014/23, the subject matter of which is the termination [43] of concessions, and which was incorporated into Italian law by Article 176 of the Public Procurement Code.

89. As so construed, it is my opinion that the question is inadmissible on the ground that it is unnecessary to the resolution of the dispute in the main proceedings. That dispute concerns an *action for the annulment* of the acts mentioned above (approving contractual modifications) but not an application for the *termination* of the concession. [44]

90. Since the dispute before the referring court is confined to the legality of the contractual modifications concerned, it is impossible to see what public interest there might be, in this case, in giving an answer concerning the application of the termination mechanism provided for in Article 44 of Directive 2014/23. [45]

[43] The term which the various language versions use to describe that concept does not always have the same meaning as that given to it in some Member States as compared with others. It has been rendered as 'résiliation' (in French); 'termination' (in English); 'risoluzione' (in Italian); 'Kündigung' (in German); 'rescisão' (in Portuguese); 'beëindiging' (in Dutch) and 'încetarea' (in Romanian). The Spanish version uses 'resolución', but, in recital 80 of that directive, employs the term 'rescisión', as if this were synonymous.

[44] Adusbef claimed before the referring court (fifth plea in law in its application) that there had been an infringement of, inter alia, Article 44 of Directive 2014/23, but did so as an argument to support its contention that there should be a new award procedure given that the concession had been substantially modified.

[45] At the hearing, the Italian Government maintained in the same vein that, since Adusbef had not made an application for termination before the referring court, that court would be committing a procedural infringement (judgment *ultra petita*) if it were to rule on something which had not been requested of it.

2. Substance

91. In the event that the Court considers the question to be admissible, I shall briefly analyse the bearing of Article 44 on the dispute.

92. Under that provision, '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 …' in three specific cases. [46]

93. The list of those three cases is not exhaustive. Member States may provide in their domestic law for the termination of a concession in the event of a serious failure to comply with provisions of the concession contract which is attributable to one of the parties. [47]

94. After all, national legal systems usually contain provisions whereby, in the case of reciprocal obligations, there is understood to be an implicit right to terminate those obligations if one of the obligors fails to perform that which is incumbent upon it. This is the case with Article 1453 of the Italian Civil Code, which provides that, in the case of contracts providing for reciprocal acts of performance, where one of the contracting parties fails to fulfil its obligations, the other may elect to institute proceedings for performance or termination of the contract, without prejudice, in any event, to the award of compensation for the damage caused.

95. By Article 176 of the Public Procurement Code, the Italian legislature incorporated Article 44 of Directive 2014/23 into its domestic law, [48] but it also provided for the termination of a concession in the event of the concessionaire's failure to fulfil its obligations. Article 176(7) of the Public Procurement Code refers in connection with that scenario to Article 1453 of the Civil Code.

96. It follows from this (subject to the referring court's interpretation of Italian law) that, irrespective of Article 44 of Directive 2014/23, failure to fulfil obligations under a concession could be a legitimate ground for terminating a concession contract. Indeed, the documents before the Court show that the proceedings instituted against ASPI for failure to fulfil its obligations to maintain and preserve the motorway network envisaged termination of the concession as one of the possible measures of relief.

97. However, what the referring court wishes to ascertain is whether, 'where an infringement of the principle of public procurement is established and/or the unreliability of the holder of a motorway concession is established', EU law imposes an obligation 'to terminate the relationship'.

[46] See their reproduction in point 8 of this Opinion.

[47] The reference in recital 77 of Directive 2014/23 to the situation in which 'a concession is terminated because of deficiencies in the performance' implicitly recognises grounds for termination which are not provided for in the articles of that directive. At the hearing, the Commission accepted that there is nothing to stop Member States providing for other grounds for termination.

[48] Article 176 of the Public Procurement Code provides for *ex officio* nullity contingent upon a defect not attributable to the concessionaire (paragraph 3); termination of the concession for failure to fulfil obligations on the part of the contracting authority and revocation of the concession by that authority on public interest grounds, and specifies the economic consequences of such termination and revocation (paragraphs 4, 5 and 6); termination for failure to fulfil obligations on the part of the concessionaire or on other grounds attributable to it (paragraphs 7 and 8); and replacement of the concessionaire by a new economic operator, the rights and obligations of which it establishes (paragraphs 9 and 10).

98. As the Italian Government, the Commission and one of the parties to the dispute argue,[49] the answer to the third question can be inferred from the answer to the second. The latter supports the inference that neither of the two factors referred to by the referring court warrants the termination of the concession in the present case. As regards the first factor (that there was no call for tenders), a new procedure is required only in the event of substantial modifications to the concession. According to Article 44(a) of Directive 2014/23, termination is called for where 'a modification of the concession has taken place, which would have required a new concession award procedure pursuant to Article 43', which does not appear to be the case here, for the reasons already given. As regards the second factor (that the concessionaire is unreliable), I have already explained that that would fall to be assessed at the selection and evaluation stage, not in the event of insubstantial modifications to the concession. If the unreliability is linked to a serious failure to fulfil the conditions of the contract, it is that failure which will allow the contracting authority to terminate the contract, on a ground other than those set out in Article 44 of Directive 2014/23.

V. Conclusion

99. In the light of the foregoing, I suggest that the Court declare the third question referred for a preliminary ruling by the Tribunale Amministrativo Regionale per il Lazio (Regional Administrative Court, Lazio, Italy) inadmissible and answer the first and second questions as follows:

(1) Article 38 and Article 43(1), (4) and (5) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts

must be interpreted as meaning that, in accordance with Article 43 of Directive 2014/23, a concession contract may be modified without the need to initiate a new public tendering procedure where the modifications made to the provisions thereof, without altering the overall nature of the concession, are not substantial, a matter which it falls to the referring court to determine.

The contracting authorities or contracting entities must evaluate whether it is necessary to initiate a new public tendering procedure, after assessing the nature, substantial or otherwise, of the modifications to the provisions of the concession. Their decision must enable the parties concerned to defend their rights and, where appropriate, be amenable to judicial review.

(2) Article 38 and Article 43(1), (4) and (5) of Directive 2014/23

must be interpreted as meaning that Article 38 of Directive 2014/23 requires contracting authorities or contracting entities to assess the reliability of candidates, against the relevant grounds for exclusion, as part of the process of selecting and qualitatively evaluating those candidates. That assessment is called for both when it comes to granting the initial concession and when it comes to making to the concession contract substantial modifications requiring a new public call for tenders.

[49] Paragraphs 58 and 59 of the written observations of the Italian Government. The Commission takes the same approach with regard to the reliability of the concessionaire (paragraph 65 of its written observations). For ASPI, the answer to the third question is contingent upon the previous two questions (paragraphs 27 and 76 of its written observations).