Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 30 April 2025 [1]

Case C-282/24

Polismyndigheten
v
Konkurrensverket

(Request for a preliminary ruling from the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden))

(Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 72(2) – Modification of contracts during their term – Modification of the remuneration model of a framework agreement resulting in a minor change in the value of that framework agreement – Modification involving an alteration of the overall nature of that framework agreement)

Introduction

1. This reference for a preliminary ruling concerns the interpretation of Article 72(2) of Directive 2014/24/EU, [2] which provides, in essence, for the possibility of making modifications of limited value to a public contract or framework agreement without the need for a new procurement procedure, provided that the modification does not alter the overall nature of the contract or the framework agreement.

2. The case in the main proceedings concerns framework agreements concluded between the Polismyndigheten (Swedish Police Authority) and two providers with a view to providing vehicle towing services. Those framework agreements, evaluated on the basis of the criterion of the lowest price, were originally awarded on the basis of a fixed price for assignments where the pick-up point of the vehicle was within a 10 km radius of the place where the vehicle was to be returned and an additional price per kilometre for transportation outside that radius. The contracting authority subsequently agreed with the successful tenderers to modify the terms of remuneration for those framework agreements, without increasing the total value thereof, by increasing the radius for which remuneration is purely flat rate from 10 to 50 km, as well as the price level.

[1] Original language: French.

[2] Directive of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

3. Against that background, the Court of Justice is called upon to consider whether such modifications have the effect of altering the overall nature of the framework agreement within the meaning of Article 72(2) of Directive 2014/24 and, consequently, of triggering the obligation to launch a new procurement procedure.

Legal context

European Union law

4. According to recitals 1, 107 and 109 of Directive 2014/24:

'(1) The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the [FEU Treaty], and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.

…

(107) It is necessary to clarify the conditions under which modifications to a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the [Court]. A new procurement procedure is required in case of material changes to the initial contract, 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 contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

Modifications to the contract resulting in a minor change of the contract value up to a certain value should always be possible without the need to carry out a new procurement procedure. To this effect and in order to ensure legal certainty, this Directive should provide for *de minimis* thresholds, below which a new procurement procedure is not necessary. Modifications to the contract above those thresholds should be possible without the need to carry out a new procurement procedure to the extent they comply with the relevant conditions laid down in this Directive.

…

(109) Contracting authorities can be faced with external circumstances that they could not foresee when they awarded the contract, in particular when the performance of the contract covers a long period. In this case, a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement 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, taking into account its available means, the nature and characteristics of the specific

project, good practice 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. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed.'

5. Article 72 of that directive, headed 'Modification of contracts during their term', is worded as follows:

'1. Contracts and framework agreements may be modified without a new procurement 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 procurement documents in clear, precise and unequivocal review clauses, which may include price 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 contract or the framework agreement;

…

(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 could not foresee;

(ii) the modification does not alter the overall nature of the contract;

(iii) any increase in price is not higher than 50% of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive;

…

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

…

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

(i) the thresholds set out in Article 4; and

(ii) 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts.

However, the modification may not alter the overall nature of the contract or framework agreement. 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 contract or a framework agreement during its term shall be considered to be substantial within the meaning of paragraph 1[(e)], where it renders the contract or the framework agreement 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 procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;

…

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

Swedish law

6. Paragraph 8 of Chapter 17 of Lag (2016:1145) om offentlig upphandling (Law No 1145 of 2016 on public procurement), states that a contract or framework agreement may be modified without a new procurement procedure if the modification is made on the basis of one of the provisions in Paragraphs 9 to 14.

7. The first subparagraph of Paragraph 9 provides that a contract or framework agreement may be modified without a new procurement procedure if the overall nature of the contract or framework agreement is not altered and the increase or decrease in the value of the contract or framework agreement is less than the prescribed threshold and 10% of the value of the contract or framework agreement, where there is procurement of goods or services.

8. The first subparagraph of Paragraph 14 of Law No 1145 of 2016 on public procurement states that a contract or a framework agreement may be modified without a new procurement procedure even though the modification is not covered by Paragraphs 9 to 13 of that law, provided that the modification is not substantial. Point 1 of the second subparagraph of Paragraph 14 thereof states that a modification is to be considered to be substantial if, inter alia, it introduces new conditions which, had they been included in the original procurement procedure, would have resulted in other candidates being invited to submit tenders, other tenders being included in the evaluation or additional suppliers participating in the procurement procedure.

The dispute in the main proceedings, the question referred and the proceedings before the Court of Justice

9. In 2020, the Swedish Police Authority issued a call for tenders for a contract for vehicle towing services, under which the tenders were to be assessed on the basis of the criterion of the lowest price offered. The tenderers were required to quote a fixed price for assignments where the pick-up point of the vehicle was within a 10 km radius of the place where the vehicle was to be returned and an additional price per kilometre for transportation outside that radius. Those prices were to remain unchanged for the duration of that contract.

10. That procurement procedure led to the conclusion, in early 2021, of two framework agreements ('the contested framework agreements'), the terms of remuneration of which were modified, in the course of the same year, by an agreement between the Swedish Police Authority and two providers. In order to even out the distribution of costs between different police areas without increasing the total value of those framework agreements, first, the radius of services for which only a fixed price was payable was increased from 10 to 50 km, and, second, the fixed and per kilometre prices were modified ('the contested modifications'). [3]

11. Following an application by the Konkurrensverket (Swedish Competition Authority), the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm, Sweden) imposed a fine of 1 200 000 kronor (SEK) (approximately EUR 120 000) on the Swedish Police Authority for amending the contested framework agreements without a new procurement procedure. [4] After its appeal to the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm, Sweden) was dismissed, the Swedish Police Authority appealed to the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden), the referring court. In this context, the referring court has, in essence, doubts as to the interpretation of Article 72(2) of Directive 2014/24, relating, more specifically, to the concept of 'alteration of the overall nature' of the framework agreement within the meaning of that provision.

12. In those circumstances, the Högsta förvaltningsdomstolen (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Can a modification of the remuneration model in a framework agreement originally awarded on the basis of the award criterion of the lowest price offered, whereby the balance between fixed and variable prices is altered and the price levels are adjusted to such an extent that the total contract value does not change to more than a marginal degree, mean that the overall nature of the framework agreement is to be considered to have been altered within the meaning of Article 72(2) of the Public Procurement Directive?'

13. Written observations have been lodged by the Swedish Police Authority, the Swedish Competition Authority, the Czech and Estonian Governments and by the European Commission.

[3] The referring court points out in that regard that, as regards one of the successful tenderers, namely Lidköpings Biltjänst Hyr AB, the fixed price per assignment was increased from SEK 0 to SEK 4 500 (approximately EUR 450) and the price per kilometre was reduced from SEK 185 (approximately EUR 18.50) to SEK 28 (approximately EUR 2.80) for certain transportations and from SEK 275 (approximately EUR 27.50) to SEK 55 (approximately EUR 5.50) for other types of transport. Those changes resulted in a marginal reduction in the total remuneration in comparison with what would have been paid under the original terms.

[4] That court found that the modifications were 'substantial' on the ground that, if they had been included in the initial call for tenders, they could have led to the participation of other tenderers or to the selection of another tender and that, for the same reason, the modifications altered the overall nature of the contested framework agreements.

Analysis

14. By its sole question referred for a preliminary ruling, the referring court has requested the Court of Justice to interpret Article 72(2) of Directive 2014/24, which provides for the possibility of making modifications of limited value to a framework agreement without the need for a new procurement procedure.

15. As a preliminary point, I note that Article 72 of that directive states that contracts and framework agreements may be modified without a new procurement procedure in one of the six situations defined in that provision,[5] namely, in essence, where:

– modifications are provided for in the initial procurement documents, provided that they do not alter the overall nature of the contract (paragraph 1(a));

– additional activities (works, services or supplies) are necessary, subject to compliance with certain conditions (paragraph 1(b));

– modifications have become necessary by unforeseeable circumstances involving an increase not higher than 50% of the value of the original framework agreement, provided that they do not alter the overall nature of the contract (paragraph 1(c));

– certain cases of a change of contractor have occurred (paragraph 1(d));

– the modifications are not substantial (paragraph 1(e), paragraph 4 and recital 107);[6]

– *de minimis* modifications,[7] provided that they do not alter the overall nature of the contract or framework agreement (paragraph 2).

16. Of those six situations, the last two referred to appear relevant to the present case. Indeed, given that the value of the contested modifications, in the case of one of the two contested framework agreements, is below the *de minimis* thresholds provided for in points (i) and (ii) of the first subparagraph of Article 72(2) of Directive 2014/24,[8] it is for the referring court to determine whether those modifications do not alter the overall nature of that framework agreement, in accordance with the second subparagraph of Article 72(2). In that regard, the

[5] That provision has no equivalent in previous directives on the award of public work contracts, public supply contracts and public service contracts. Before the entry into force of Directive 2014/24, the Court had held that, in order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract (see judgment of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351 paragraph 34 and the case-law cited). That provision, as is clear from the wording of paragraphs 1 and 5 thereof, introduced a *numerus clausus* of exceptions to the principle that a new procurement procedure is required in respect of modifications to the provisions of a public contract or a framework agreement. See, inter alia, Bogdanowicz, P., 'Article 72 – Modification of Contracts during Their Term', in Caranta, R. and Sanchez-Graells, A. (eds), *European Public Procurement*, Edward Elgar, Cheltenham, 2021, pp. 779 and 780.

[6] More specifically, the definition of the concept of 'substantial modification' provided for in Article 72(4) of Directive 2014/24 refers to modifications which render the contract or framework agreement 'materially different in character from the one initially concluded' and states, 'in any event', 'conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure' (point (a)). For example, recital 107 of the directive uses the expression 'conditions [which] would have had an influence on the outcome of the procedure, had they been part of the initial procedure'.

[7] Namely, modifications of which the value does not exceed the threshold laid down for the application of Directive 2014/24 and is less than 10% of the initial contract value in the case of service contracts.

[8] At least as regards the framework agreement concluded between Lidköpings Biltjänst Hyr and the Swedish Police Authority, which is the only one in respect of which the national court provides that clarification.

referring court submits that, while the Court has provided clarification on the concept of a 'substantial modification' to a contract, referred to in paragraph 1(e) of that provision and defined in paragraph 4 thereof, it has not yet ruled on the concept of an 'alteration of the overall nature' of the contract (provided for in the second subparagraph of paragraph 2 of that provision). [9]

17. Having made those introductory remarks, I shall, in the following points, provide clarification as to the interpretation to be given to the concept of an 'alteration of the overall nature' of a public contract within the meaning of the second subparagraph of Article 72(2) of Directive 2014/24, in particular in the light of that of a 'substantial modification' to a public contract within the meaning of paragraph 4 of that provision, before providing the referring court with information concerning the nature of the contested modifications.

The concepts of an 'alteration of the overall nature' of and a 'substantial modification' to a public contract within the meaning of Article 72 of Directive 2014/24

18. As regards the interpretation of the concepts of an 'alteration of the overall nature' of and a 'substantial modification' to a public contract within the meaning of Article 72 of Directive 2014/24, the positions taken by the parties to the main proceedings and the interveners differ. While the Swedish Police Authority and the Czech and Estonian Governments claim, in essence, that a substantial modification to a framework agreement does not necessarily amount to an alteration of the overall nature of that framework agreement, the Swedish Competition Authority and the Commission submit, in essence, that the two concepts are the same. [10]

19. In that context, I shall examine the scope of the relevant provisions, taking into account, in accordance with settled case-law of the Court, both the terms in which they are couched and their context, as well as the objectives pursued by the legislation of which they form part and, in the circumstances of this case, the origin of that legislation. [11]

20. As regards, in the first place, the *textual interpretation* of the two abovementioned concepts, I note at the outset that, unlike that of 'substantial modification', the definition of which appears in Article 72(4) of Directive 2014/24, that of an 'alteration of the overall nature' of the contract is not defined in the context of that directive, and the wording of Article 72 thereof is not, moreover, a model of clarity in that regard.

21. That said, I would point out, first of all, that recital 109 of that directive provides two examples of 'modifications resulting in an alteration of the nature of the overall procurement', an expression which corresponds, in essence, to the concept of an 'alteration of the overall nature' of the contract. Those are, first, cases in which the works, supplies or services to be procured are

[9] The same concepts were introduced in 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 (OJ 2014 L 94, p. 1) and in Article 89 of 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), provisions which have not yet been subject to interpretation by the Court.

[10] The Swedish Competition Authority considers, in essence, that the application of the concept of an 'alteration of the overall nature' involves, as does the concept of 'substantial modification', examining whether the outcome of the initial procurement procedure would have been affected. The Commission points out that it is not necessary to establish a hierarchy between, on the one hand, the concept of an 'alteration of the overall nature of the contract or framework agreement', provided for in Article 72(2) of Directive 2014/24, and, on the other hand, the expression 'renders the contract or framework agreement materially different in character from the one originally concluded', set out in paragraph 4 of that article with regard to the concept of 'substantial modification'.

[11] See judgment of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2015:433, paragraph 30 and the case-law cited).

replaced by something different and, second, circumstances in which the nature of procurement is fundamentally changed, 'since, in such a situation, a hypothetical influence on the outcome may be assumed', in the words of that recital. Since that expression corresponds, in essence, to substantial modifications set out in Article 72(4)(a) of the same directive,[12] this implies, in my view, that certain alterations of the overall nature of the procurement also constitute substantial modifications to the procurement.

22. Next, Article 72(2) of Directive 2014/24 applies, as is apparent from its wording, 'without any need to verify whether the conditions set out under points (a) to (d) of paragraph 4' of that provision (relating to substantial modifications) are met,[13] which makes it possible to apply that provision irrespective of whether the modifications permitted by it all fall within the concept of 'substantial modifications' set out in paragraph 1 of that provision.

23. Lastly, taking the ordinary meaning in everyday language of the two expressions into consideration, it seems, in my view, rather clear that the concept of an 'alteration of the overall nature' of the procurement implies modifications which go beyond mere substantial modifications.[14]

24. Those considerations lead me to conclude that, from a purely literal point of view, the concept of an 'alteration to the overall nature' of the procurement constitutes a kind of 'sub-category' which includes the most serious cases of substantial modifications,[15] without, however, exhausting all the situations included in that category.[16]

25. In the second place, as regards the *origin* and *context* of Article 72 of Directive 2014/24, I would point out that that provision, which codifies the Court's previous case-law prior to the entry into force of that directive,[17] aims to identify modifications to contracts during their term

[12] See footnote 6 to this Opinion.

[13] Similarly, Article 72(4) of Directive 2014/24 refers to situations in which, 'in any event', a modification is regarded as substantial 'without prejudice to paragraphs 1 and 2' of that provision.

[14] By way of example, I consider that the broader concept of 'substantial modifications' includes, in principle, significant modifications to the price, duration or subject matter of a contract, whereas the narrower concept of 'alterations of the overall nature' of a contract includes modifications which more profoundly affect the very essence of the contract (for example, adding the supply of goods to a service contract or changing the place of supply).

[15] Such as the examples given in recital 109 of Directive 2014/24.

[16] In other words, the concept of 'substantial modifications' refers to modifications which, in principle, are such as to affect the outcome of the procurement procedure, whereas the concept of an 'alteration of the overall nature' of the contract, while included in the first concept, is limited to modifications which more profoundly transform the contract, in particular as regards its subject matter or type (for example, the purchasing of works instead of services or a service contract instead of a concession contract). See, in that regard, Treumer, S., 'Regulation of Contract Changes in the New Public Procurement Directive', in Lichère, F., Caranta, R. and Treumer, S. (eds), *Modernising Public Procurement*: *The New Directive*, DJØF Publishing, Copenhagen, 2014, p. 293. Therefore, while all alterations of the overall nature of the contract constitute substantial modifications, conversely, not all possible substantial modifications are capable of affecting the overall nature of the contract.

[17] Under Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), which, unlike Directive 2014/24, did not contain a specific provision on the amendment of contracts during their term, Advocate General Kokott, in her Opinion in *pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:167, point 48), noted, in essence, that, against the background of the objective pursued by Directive 92/50 (namely, the free movement of services and the opening-up to competition that is undistorted and as comprehensive as possible), not every amendment, however slight, to contracts for public services requires a prior award procedure and that only *material contractual amendments* which are such as to distort competition on the relevant market and to favour the contracting authority's contractual partner as against other possible service providers justify conducting a new procurement procedure. This criterion has been confirmed by the Court (see judgment of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraph 34 and the case-law cited).

which are permitted without the need for a new procurement procedure.[18] Some of those modifications are authorised in so far as they do not lead to an alteration of the overall nature of the procurement. This is the case in the three scenarios set out in paragraph 1(a) and (c), as well as in paragraph 2 of Article 72 of that provision, which allow for such modifications provided that, in the first scenario, they are provided for in the procurement documents, in the second scenario, they are made necessary by unforeseeable circumstances and do not entail a price increase of more than 50% of the value of the original contract or framework agreement or, in the third scenario, the *de minimis* ceiling is complied with.

26. It seems therefore, in my view, that, in the three situations described in the previous point of this Opinion, that provision does not refer to 'substantial modifications' at all, but only to those that lead to an 'alteration of the overall nature' of the contract.[19] Moreover, if the two concepts at issue were to be interpreted as identical, the *de minimis* exception in Article 72(2) of Directive 2014/24 would be rendered ineffective.[20]

27. It follows that those situations allow for certain substantial modifications to be made without having to undertake a new procurement procedure, with the exception of more significant modifications, which involve alterations to the overall nature of the procurement.[21]

28. In the third and last place, as regards the *objectives* pursued by Article 72 of Directive 2014/24, I would point out that, as is apparent from the case-law of the Court, that provision aims, in essence, to ensure compliance with the principles of transparency of procedures and of equal treatment of tenderers, by preventing the contracting authority and the successful tenderer from amending the provisions of the contract in such a way as to make them substantially different from those of the original contract, in line with the more general objective of the EU provisions in the field of public procurement to ensure the free movement of services and the opening-up to undistorted competition in all Member States.[22] In that regard, it seems in my view that the situations referred to in point 25 of this Opinion, in which that provision allows certain substantial modifications to be made without the need for a new procurement procedure, are

[18] The text of Article 72, as derived from the Commission's original proposal (proposal for a directive of the European Parliament and of the Council on public procurement (COM (2011) 896 final), specified, more clearly, in paragraph 1, that a substantial modification of the provisions of a public contract during its term was considered to be a new award of contract and required a new procurement procedure, with the exception of the situations set out in the subsequent paragraphs. It thus seems clear, from that wording, that Article 72 of the proposal for a directive, in its entirety, concerned only substantial modifications.

[19] That interpretation is not called into question by the fact that recital 107 of Directive 2014/24 states that a new procurement procedure is required where material changes are made to the initial contract. It does not follow from that statement that *all* substantial changes necessarily lead to a new procurement procedure. Moreover, the case of 'conditions which would have had an influence on the outcome of the procedure, had they been part of the initial procedure' (namely, 'substantial modifications' *lato sensu*) is cited in this recital by way of illustration (as is clear from the use of the term 'in particular').

[20] Indeed, as the Czech Government rightly points out, in such a case, even in the case of a minor change in the value of a framework agreement, the contracting authority would have to examine whether that change does not fulfil one of the conditions set out in Article 72(1) of Directive 2014/24, thereby depriving the *de minimis* exception provided for in paragraph 2 of that provision of any usefulness.

[21] It must also be borne in mind that it is settled case-law that any derogations from the rules intended to ensure the effectiveness of the rights conferred by the FEU Treaty in connection with public procurement must be strictly interpreted and that the burden of proving the actual existence of exceptional circumstances justifying a derogation lies on the person seeking to rely on those circumstances (see, inter alia, judgment of 2 October 2008, *Commission* v *Italy*, C-157/06, EU:C:2008:530, paragraph 23 and the case-law cited).

[22] See, to that effect, judgment of 7 December 2023, *Obshtina Razgrad* (C-441/22 and C-443/22, EU:C:2023:970, paragraph 61 and the case-law cited). The Court has also stated that the specific objective of the exception provided for in that provision is to introduce a degree of flexibility in the application of the rules in order to respond pragmatically to a range of extraordinary circumstances (see judgment of 3 February 2022, *Advania Sverige and Kammarkollegiet*, C-461/20, EU:C:2022:72, paragraph 37).

justified by the fact that these less significant modifications are likely to affect compliance with the principles of transparency of procedures and equal treatment of tenderers to a lesser extent. [23]

29. It follows that, even in the light of the objectives pursued by Article 72 of Directive 2014/24, the two concepts analysed cannot be regarded as equivalent and, in particular, that the concept of 'alterations of the overall nature' of the contract, while included in that of 'substantial modifications', is limited to the most significant substantial modifications. [24]

30. In conclusion, I consider that the *de minimis* exception provided for in Article 72(2) of Directive 2014/24 may apply where the modifications made to the contract, although substantial, do not result in an alteration of the overall nature of the contract. [25] That being established, in the following points, I will examine the contested modifications, having regard to the latter concept.

The nature of the contested modifications

31. According to the referring court, the contested modifications, which were not foreseeable on the basis of the information contained in the initial procurement documents, are below the *de minimis* threshold set out in points (i) and (ii) of the first subparagraph of Article 72(2) of Directive 2014/24. [26] It is therefore necessary to ascertain whether those modifications constitute 'alterations of the overall nature of the contract' within the meaning of that provision.

32. Although it is for the referring court to give a definitive ruling on that aspect by assessing the facts in the main proceedings, it is for the Court of Justice to provide it with useful guidance in that regard.

[23] First, in the situation referred to in Article 72(1)(a) of Directive 2014/24, the fact that the modifications were provided for in the procurement documents ensures that they do not undermine the principles of transparency and equal treatment. Next, in the scenario referred to in paragraph 1(c) of that provision, it is the unforeseeable nature of the circumstances and the limited effect of the amendments which reduce the possible infringement of the aforementioned principles. Lastly, in the scenario referred to in paragraph 2 of that provision, which is the situation in the present case, it is the *de minimis* nature of the modifications which means that the infringement of those principles, as well as of the general balance of the contract, is not significant (see, to that effect, de La Rosa, S., *Droit européen de la commande publique*, 2nd ed., Bruylant, Brussels, 2021, p. 492). According to the author, this situation is particularly useful for incorporating the increased cost of certain products or additional costs that were inadequately calculated when the contract was awarded. In all three cases, therefore, the same provision takes care to exclude the most significant changes which affect the overall nature of the contract. By contrast, the EU legislature considered that this limitation was not necessary in the other two situations where a substantial modification is permitted, that is to say, first, in the case provided for in Article 72(1)(d) of Directive 2014/24, concerning 'subjective' modifications (that is, the replacement of the contractor in certain specific circumstances) which obviously do not affect the subject matter or nature of the contract, and, second, in the case referred to in paragraph 1(b) of that provision, concerning situations in which, when faced with the need for additional activities, a change of contractor cannot be made or would be disadvantageous for the contracting authority and where the increase in price does not exceed 50% of the value of the initial contract.

[24] This distinction is also significant in relation to the burden of proof. Indeed, where there are alterations of the overall nature of the contract, it can be presumed that these are substantial modifications within the meaning of Article 72(4)(a) of Directive 2014/24 (see recital 109 thereof), whereas, in the case of other modifications, the interested party (in particular a potential tenderer who could have participated in the contract) is required to demonstrate that those changes would have been likely to influence the outcome of the procedure (see, to that effect, Bogdanowicz, P., 'Article 72 – Modification of Contracts during Their Term', in Caranta, R. and Sanchez-Graells, A. (eds), *European Public Procurement*, Edward Elgar, Cheltenham, 2021, p. 795). According to one author (see de La Rosa, S., *Droit européen de la commande publique*, 2nd ed., Bruylant, Brussels, 2021, p. 487), the reference to the overall nature requires consideration of the general balance of the contract and not an assessment *in concreto* of the amendment of a clause considered to be substantial (see, to that effect, footnote 22 to this Opinion).

[25] See, in this respect, Bogdanowicz, P., 'Article72 – Modification of Contracts during Their Term', in Caranta, R. and Sanchez-Graells, A. (eds), *European Public Procurement*, Edward Elgar, Cheltenham, 2021, p. 791, and de La Rosa, S., *Droit européen de la commande publique*, 2nd ed., Bruylant, Brussels, 2021, pp. 486-488. The latter author gives the example of the addition of new services, the extension of a network or the modification of the fee schedule for concessions.

[26] See footnote 7 to this Opinion.

33. In the first place, as I explained above,[27] the contested modifications do not involve alterations of the overall nature of the contract purely because they might be described as 'substantial modifications'.[28]

34. In the second place, as referred in point 21 of this Opinion, it follows from recital 109 of Directive 2014/24 that the concept of 'alterations of the overall nature' of the contract includes, in particular, alterations of the subject matter or nature of the contract.[29]

35. In that regard, a modification in the price does not seem, in my view, in principle, to be included in that concept, in so far as the three provisions referring to it either specify that the monetary value of the modifications is irrelevant,[30] or they themselves set thresholds for the application of the exception.[31] That said, in that context, I will confine myself to noting that, first, the contested modifications do not constitute a simple modification of the remuneration for the service which is the subject matter of the contested framework agreements. The substantial modification to the radius within which the fixed price applies (from 10 to 50 km) and the significant increase in that fixed price (which increased from SEK 0 to SEK 4 500, approximately EUR 450) have profoundly modified the structure of the remuneration, involving, in essence, a shift to a remuneration system based primarily not on a variable price but on a fixed price. Second, as the referring court noted, those amendments nevertheless resulted, as regards one of the providers, in a marginal reduction in the total value of the contract.[32]

36. In conclusion, I am of the view that Article 72(2) of Directive 2014/24 must be interpreted as meaning that a modification to the remuneration model in a framework agreement originally awarded on the basis of the criterion of the lowest price offered, whereby the balance between fixed and variable prices is altered and the price levels are adjusted to such an extent that the total contract value does not change to more than a marginal degree, may have the effect of altering the overall nature of the framework agreement only if that modification is likely to entail modifications to the subject matter or type of contract, irrespective of whether such a modification is covered by the broader concept of 'substantial modifications' provided for in Article 72(1)(e) and (4) of that directive.

[27] See, in particular, point 30 and footnote 14 to this Opinion.

[28] I note, moreover, that, according to the Swedish Police Authority, the conditions for establishing the existence of a substantial modification have not been met in the present case. In its view, given that, of the situations provided for in Article 72(4)(a) to (d) of Directive 2014/24, only that set out in point (a) is, in principle, relevant, there are reasons to doubt that one of the three situations listed in that provision corresponds to the situation in the present case. The first case concerns conditions which would have allowed for the admission of other candidates and concerns restricted and negotiated procedures; the second refers to conditions which would have allowed for the acceptance of a tender other than that originally accepted, which would concern only the modification of the mandatory conditions or the subject matter of the contract, and the third refers to conditions which would have attracted additional participants in the procurement procedure, which would have been highly unlikely in the present case inasmuch as the remuneration conditions were affected in a manner unfavourable to the supplier.

[29] See footnote 16 to this Opinion. According to legal doctrine, a significant change in the duration of the contract could also constitute such a situation, in particular in the case of the modification of a fixed-term contract into a contract of indefinite duration (see, to that effect, Bogdanowicz, P., 'Article 72 – Modification of Contracts during Their Term', in Caranta, R. and Sanchez-Graells, A. (eds), *European Public Procurement*, Edward Elgar, Cheltenham, 2021, p. 795), which is not, however, relevant in the present case.

[30] See, as regards modifications provided for in the initial procurement documents, Article 72(1)(a) of Directive 2014/24.

[31] For modifications due to unforeseeable circumstances, see Article 72(1)(c) of Directive 2014/24, and for *de minimis* changes, see Article 72(2) of that directive.

[32] In that regard, I note that a modification which does not affect the outcome of the procedure or change the economic balance of the contract in favour of the contractor does not constitute a substantial modification to the contract within the meaning of Article 72(4) of Directive 2014/24 (see, to that effect, judgment of 19 June 2008, pressetext Nachrichtenagentur, C-454/06, EU:C:2008:351, paragraph 37). Furthermore, it has been argued that, if the change is in favour of the contracting authority, this situation does not entail a risk of distortion of competition, with the exception of specific cases (see, to that effect, in particular, Hartlev, K. and Liljenbøl, M.W., 'Changes to Existing Contracts under the EU Public Procurement Rules and the Drafting of Review Clauses to Avoid the Need for a New Tender', *Public Procurement Law Review*, Vol. 2, 2013, p. 56).

Conclusion

37. In the light of all of the foregoing considerations, I propose that the Court of Justice should answer the question referred for a preliminary ruling by the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden) as follows:

Article 72(2) 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

must be interpreted as meaning that a modification to the remuneration model in a framework agreement originally awarded on the basis of the criterion of the lowest price offered, whereby the balance between fixed and variable prices is altered and the price levels are adjusted to such an extent that the total contract value does not change to more than a marginal degree, may have the effect of altering the overall nature of the framework agreement only if that modification is likely to entail modifications to the subject matter or type of contract, irrespective of whether such a modification is covered by the broader concept of 'substantial modifications' provided for in Article 72(1)(e) and (4) of that directive.