Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 17 October 2024[1]

Case C-452/23

Fastned Deutschland GmbH & Co. KG,
v
Die Autobahn GmbH des Bundes,
interveners:
Autobahn Tank & Rast GmbH,
Ostdeutsche Autobahntankstellen GmbH

(Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany))

(Preliminary ruling proceedings – Public contracts – Concession contract – Directive 2014/23/EU – Modification of a concession during its term – Article 43 – Public contract awarded in-house – Subsequent loss of the conditions for an in-house award)

1. With effect from 2014, the European Union had a legal instrument[2] which was aimed at mitigating the environmental impact of transport by reducing dependence on fossil fuels. That instrument provided for the deployment of infrastructure supplying alternative fuels (including electricity) to road transport.

2. The increase in battery and plug-in electric vehicles, the development of alternative fuels and the preference for those fuels over fossil fuels determined the adoption of a new legal framework, encapsulated in Regulation (EU) 2023/1804.[3]

3. At issue in the proceedings which have given rise to this reference for a preliminary ruling is the lawfulness of a decision adopted by the company in charge of the management of German federal motorways (Die Autobahn GmbH des Bundes; 'Autobahn des Bundes') which, without issuing a call for tenders, extended certain concession contracts for motorway service areas to enable the respective concessionaires to install electric charging points in those service areas.

1 Original language: Spanish.

2 Directive 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the deployment of alternative fuels infrastructure (OJ 2014 L 307, p. 1).

3 Regulation of the European Parliament and of the Council of 13 September 2023 on the deployment of alternative fuels infrastructure, and repealing Directive 2014/94/EU (OJ 2023 L 234, p. 1). Not applicable *ratione temporis* to this dispute.

4. That decision was contested by two undertakings engaged in the installation and operation of electric recharging infrastructure for vehicles. Those undertakings argued that the installation of new electric charging points in German motorway service areas managed by the current concessionaires should be opened up to, and not excluded from, competition.

5. In those proceedings, the Court is required to give a ruling on the application of Directive 2014/23/EU[4] to modifications of concessions where, at the relevant time, those concessions were not awarded in procurement procedures.

I. Legal framework

A. European Union law. Directive 2014/23

6. Paragraph 1(c) of Article 43 ('Modification of contracts during their term') provides:

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

…

(c) where all of the following conditions are fulfilled:

(i) the need for modification has been brought about by circumstances which a diligent contracting authority or contracting entity could not foresee;

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

(iii) in the case of concessions awarded by [a] 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'.

B. National law

1. Gesetz gegen Wettbewerbsbeschränkungen[5]

7. In accordance with Paragraph 132 ('Modification of contracts during their term'):

'(1) Any substantial modification of a public contract during its term shall require a new award procedure. Modifications are substantial if they result in the public contract differing significantly from the public contract originally awarded. …

(2) Notwithstanding subparagraph 1, it is permissible to modify a public contract without conducting a new procurement procedure where

[4] 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).

[5] Law against restrictions on competition (BGBl 2016 I, p. 203 et seq.) ('the GWB').

…

3. the need for modification has been brought about by circumstances that a diligent public contracting authority could not have foreseen, and the overall nature of the contract is not altered by the modification …

In the cases referred to in points 2 and 3 of the first sentence, the price may not be increased by more than 50% of the value of the original contract. …'

8. Paragraph 135 ('Ineffectiveness') states:

'(1) A public contract shall be ineffective from the outset where the contracting authority:

…

2. awarded the contract without prior publication of a contract notice in the *Official Journal of the European Union*, such publication being mandatory in accordance with the law,

and that infringement was declared in the context of review proceedings.

(2) The ineffectiveness to which subparagraph 1 refers may be declared only if it was pleaded in review proceedings within 30 calendar days from the date on which the contracting authority informed the tenderers and candidates concerned of the conclusion of the contract, but no later than 6 months after the conclusion of that contract. If the contracting authority published the award of the contract in the *Official Journal of the European Union*, the time limit for pleading ineffectiveness shall expire 30 calendar days after publication of the contract award notice in the *Official Journal of the European Union*.

…'

9. Pursuant to Paragraph 154 ('Other applicable provisions'):

'In addition, the following provisions shall apply *mutatis mutandis* to the award of concessions … :

…

3. Paragraphs 131(2) and (3) and 132 …,

4. Paragraphs 133 to 135

…'

2. Schnellladegesetz 2021 [6]

10. In accordance with the first sentence of Paragraph 5(3), the holder of a concession to operate an ancillary business with a service station must be offered the responsibility for installing, maintaining and operating the fast-charging points planned for that location on an economically independent basis, if that is required and does not conflict with Part 4 of the GWB. [7]

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

11. Autobahn des Bundes is a company which operates under private law and is the inalienable property of the Federal Republic of Germany. The federal government entrusted it with the planning, construction, operation, maintenance, financing and asset management of federal motorways with effect from 1 January 2021.

12. The federal motorway network has more than 400 service areas. These offer ancillary services such as fuel pumps, vehicle parking, toilets and restaurants.

13. In 1951, the predecessor in law of Autobahn des Bundes entrusted the operation of those service areas to the State company Gesellschaft für Nebenbetriebe der Bundesautobahnen mbH, which was formed in the same year by the Federal Republic of Germany.

14. In 1994, Gesellschaft für Nebenbetriebe der Bundesautobahnen was renamed Tank & Rast AG, retaining the Federal Republic of Germany as the sole shareholder. In the same year, Tank & Rast AG acquired the company Ostdeutsche Autobahntankstellen GmbH.

15. Between 1996 and 1998, the predecessor in law of Autobahn des Bundes concluded with Tank & Rast AG, without a prior invitation to tender, approximately 280 concession contracts for service areas, with a maximum term of 40 years, which remain in force today. During that period, Tank & Rast AG was still a company under federal ownership.

16. Those contracts:

– are for the operation of ancillary services on federal motorways, based on a model [8] which gives the concessionaire the right to install and operate an ancillary service to serve the needs of users on a defined operational site; in return, the concessionaire has to pay a fee based on turnover;

– include an operational plan which stipulates a set number of fuel pumps and parking spaces as well as a restaurant and public toilets; the ancillary service must be available 24 hours a day.

17. In 1998, a privatisation process was commenced for Tank & Rast AG in which approximately 50 national and overseas candidates participated. [9]

[6] Gesetz über die Bereitstellung flächendeckender Schnellladeinfrastruktur für reine Batterieelektrofahrzeuge (Schnellladegesetz) (Federal law on fast charging) (BGBl 2021 I, p. 2141 et seq) ('the Schnellladegesetz 2021').

[7] That title includes provisions on the award of public contracts and concessions.

[8] The model concession contract was published in the official section of the *Verkehrsblatt*, the official gazette of the Federal Ministry of Transport and Digital Infrastructure, of 1997, under No 226, p. 825 et seq.

[9] In paragraphs 15 and 16 of its written observations, Autobahn Tank & Rast GmbH states that it publicised the privatisation operation in German newspapers, Agence France-Presse and the *Financial Times*.

18. The privatisation process concluded on 29 October 1998 with the purchase of Tank & Rast AG by a consortium comprising LSG Lufthansa Service Holding AG, Allianz Capital Partners GmbH and three investment funds. [10]

19. After the privatisation of Tank & Rast AG, approximately 80 more concession contracts for service areas were awarded to Autobahn Tank & Rast and Ostdeutsche Autobahntankstellen [11] between 1999 and 2019, of which 19 were, according to those companies, awarded under a procurement procedure.

20. On 28 April 2022, Autobahn des Bundes agreed with Autobahn Tank & Rast and Ostdeutsche Autobahntankstellen to extend the existing concession contracts to include responsibility, on their own account, for the installation, maintenance and operation of functional electric fast-charging infrastructure in the service areas concerned. The new clause laid down the obligation to make available a certain number of charging points for each location. [12]

21. Autobahn des Bundes published the agreement to amend the contracts in the *Supplement to the Official Journal of the European Union* of 6 May 2022. [13]

22. In that notice, Autobahn des Bundes explained that the new additional clause in the concession contracts was not subject to a procurement procedure; the extension was therefore awarded directly. There had not been a substantial modification of the existing concession contracts for the purposes of Paragraph 132(1) of the GWB and, even if that modification had been substantial, it would come under Paragraph 132(2). The provision of fast-charging infrastructure had become necessary as an additional service in the concession contracts and could not have been foreseen at the time when those contracts were concluded.

23. Fastned Deutschland GmbH & Co KG ('Fastned') and Tesla Germany GmbH ('Tesla') are companies which install and operate charging infrastructure for electric vehicles.

24. By letter of 20 May 2022, Fastned and Tesla contacted the Vergabekammer des Bundes (Federal Public Procurement Review Board, Germany) to request the opening of review proceedings against the extension of the concession contracts.

25. In support of their request, Fastned and Tesla argued that, under Paragraph 135(1)(2) of the GWB, the supplementary agreement was null and void, since the original contracts had been awarded without prior publication of a contract notice at EU level. The modification could not be based on Paragraph 132 of the GWB, which was not applicable because the existing concessions had not been awarded within the framework of an invitation to tender.

[10] The undertakings forming part of the consortium gave notice of the planned acquisition to the Commission of the European Communities. On 7 December 1998, the Commission declared, under Article 6(1)(b) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), that it had no objections to the operation, which it considered to be compatible with the common market (Case No IV/M.1361).

[11] According to the order for reference (paragraph 4), as a result of the changes of company name, Tank & Rast AG created the current concessionaires of the service areas, that is to say, Autobahn Tank & Rast and Ostdeutsche Autobahntankstellen.

[12] The extension of the contracts complied with the first sentence of Paragraph 5(3) of the Schnellladegesetz 2021, applicable to electric vehicles within the meaning of Article 4 of Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC (OJ 2018 L 151, p. 1).

[13] *Supplement to the Official Journal of the European Union*, S 89/2022, 6 May 2022, Tender No 2022/S 089-245969.

26. On 15 June 2022, the Federal Public Procurement Review Board rejected the request. [14]

27. Fastned and Tesla [15] brought an action before the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), which was contested by Autobahn des Bundes, Autobahn Tank & Rast and Ostdeutsche Autobahntankstellen.

28. According to the referring court, [16] the positions adopted before it are set out below.

– Fastned and Tesla argue that Paragraph 132(1) and (2) of the GWB is not applicable as that provision does not apply to the amendment of public contracts which were originally awarded in-house, that is to say, without an invitation to tender, as is evident from the judgment of the Court in *Comune di Lerici*. [17] That applies a fortiori where the concession was awarded in contravention of the provisions on public procurement at the time; it is unlawful to award contracts in-house when it is known that that award will be followed by a privatisation.

– Autobahn des Bundes, Autobahn Tank & Rast and Ostdeutsche Autobahntankstellen maintain that non-substantial modifications of public contracts are always lawful. In any event, Article 72 of Directive 2014/24 and Paragraph 132 of the GWB refer only to substantial modifications, as these are provisions which apply irrespective of the circumstances in which the original award was made. The judgment in *Comune di Lerici* is relevant only to the question whether a new invitation to tender had to be issued when the conditions for in-house procurement were no longer met, because this was a substantial modification not covered by any exception.

29. In those circumstances, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) referred the following question to the Court of Justice for a preliminary ruling:

'Is Article 72(1)(c) of Directive [2014/24] to be interpreted as meaning that its scope also includes public contracts which were previously awarded to in-house entities outside the scope of Directive [2014/24] but to which the conditions of in-house procurement no longer apply at the time of the contract modification?'

III. Procedure before the Court of Justice

30. The request for a preliminary ruling was received at the Registry of the Court of Justice on 19 July 2023.

[14] It stated that Paragraph 132 of the GWB is applicable to the concessions at issue and that the modification inserted by the supplementary agreement of 28 April 2022 is not substantial within the meaning of Paragraph 132(1) of the GWB. The ancillary services serve the refuelling needs of motorway users, and this, at least from a functional perspective, also includes refuelling with electricity. In any event, that modification is lawful under the first sentence of Paragraph 132(2)(3) of the GWB, as the need for fast-charging infrastructure could not have been foreseen in 1998.

[15] See footnote 18 below on Tesla's subsequent withdrawal from the proceedings.

[16] Paragraphs 10 and 11 of the order for reference.

[17] Judgment of 12 May 2022 (C-719/20, 'the judgment in *Comune di Lerici*', EU:C:2022:372). In that judgment, the Court interpreted 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).

31. Written observations were lodged by Fastned, Tesla, Autobahn des Bundes, Autobahn Tank & Rast, Ostdeutsche Autobahntankstellen, the German Government and the European Commission. With the exception of Tesla,[18] all those parties attended the hearing, which was held on 9 July 2024.

IV. Analysis

A. The applicable directive

32. I agree with all the parties and interveners in the proceedings that, since the dispute concerns the modification of concession contracts, Article 43 of Directive 2014/23 applies rather than Article 72 ('Modification of contracts during their term') of Directive 2014/24, about which the referring court has asked.[19]

33. In any event, given the similar wording of those two provisions, the considerations about one may be applied to the other.

B. Scope of the question referred for a preliminary ruling

34. In order to clarify and focus the debate, I believe it is helpful to reflect the subject matter of the question by examining both what it covers and what it does not cover.

35. The referring court requests only the interpretation of Article 72(1)(c) of Directive 2014/24 in order to determine whether it applies to contracts which were not subject to that directive at the time when they were concluded but which were modified after the directive entered into force. The associated provision of Directive 2014/23 is, as I have already pointed out, Article 43(1)(c).

36. The presumptions adopted by the referring court are:

– the concessions concerned were, at the relevant time, awarded to an in-house entity, that is to say, an entity of the contracting authority itself and under its control, outside the scope of part 4 of the GWB;

– at the time of modification of the concessions, the conditions for an in-house award were not met because the concessionaire was wholly owned by private investors.

37. However, the referring court does *not* question the *nature* of the modifications included in 2022 in the concession contracts, for the purposes of Article 43(1)(c) of Directive 2014/23.

[18] On 5 July 2024, the Court received a letter notifying it that Tesla had withdrawn from the national proceedings.

[19] It is common ground that, from a temporal point of view, the modification of the contract is governed by the rule in force at the time of that modification. The Court previously clarified that point in its judgment of 2 September 2021, *Sisal and Others* (C-721/19 and C-722/19, EU:C:2021:672, paragraph 28).

38. The referring court takes the view that those modifications are, in principle, *substantial*, within the meaning of Paragraph 132(1) of the GWB,[20] but that they also meet the conditions laid down in Paragraph 132(2)(3), which correspond to the conditions laid down in Article 43(1)(c) of Directive 2014/23, because:

– on the date on which the concessions were granted, between 1996 and 1998, neither the need for electric fast-charging infrastructure in service areas on federal motorways nor the fact that a legal framework would be adopted which would require the installation of that infrastructure could have been foreseen;

– the modification does not alter the overall nature of the concessions for the operation of ancillary services in motorway service areas;

– the value of the original concession has not increased by more than 50%.

39. What the referring court wishes to know, therefore, is not whether the modifications, although substantial, are permissible by reason of their *subject matter* (in other words, based on whether or not they fulfil the conditions laid down in Article 43(1)(c) of Directive 2014/23),[21] but rather on the basis of the *origin* of the concession contracts that have been amended.

40. While some of the parties and interveners have expressed reservations about the referring court's classification with regard to the nature of the contractual modifications and, in particular, whether those modifications come under Article 43(1)(c) of Directive 2014/23, I believe that the Court must confine itself to the strict wording of the question. In their written observations, Fastned and Tesla openly acknowledge that that question does not include the matter of the nature of the agreed modification.[22]

41. Since the focus of the question is the effect which the original award of the concession may have on its subsequent modification, I believe that it is necessary to differentiate between two aspects, which I shall deal with separately.

– The first (Section C) focuses on the *method* of awarding the original concession. The question is whether Article 43(1)(c) of Directive 2014/23 covers only, as a matter of principle, alterations of concessions awarded by means of a call for tenders, which excludes concessions awarded in-house. If the latter are excluded, it is still necessary to deal with the effects derived from the non-existence of the conditions for an in-house award at the time of modification of the contract.

– The second (Section D) concerns the implications which the possible *unlawfulness* of the original concession may have for the rules governing its subsequent amendment. It will be

[20] Paragraph 18 of the order for reference. The referring court repeats, in paragraph 20, the same assertion regarding the substantial nature of the modifications introduced by the agreements supplementing the concession contracts. It appears to disagree, therefore, with the proposition accepted by the Federal Public Procurement Review Board in its decision of 15 June 2022.

[21] In a different temporal context from that at issue, the referring court would be required to take into account the new legal framework on the installation of recharging infrastructure, that is to say, Regulation 2023/1804. Recital 32 of that regulation states that 'Member States should seek, to the extent possible and in compliance with [Directive 2014/23], to competitively award new concessions specifically for recharging stations on or adjacent to existing motorway rest areas in order to … enable new market entrants'.

[22] See paragraph 15 of Fastned's written observations and paragraph 16 of Tesla's written observations: 'Da es für den Fall, dass der Gerichtshof vorliegend Art. 43 Abs. 1 lit. c RL 2014/23/EU für anwendbar halten sollte, für die Entscheidung des Rechtsstreits auf die Auslegung von dessen Tatbestandsmerkmalen ankommt, bittet die ASt. zu 2. [Tesla] den Gerichtshof … *trotz fehlender Vorlage um weitergehende Auslegungshinweise*' (emphasis added). Those matters were debated before the referring court which, however, does not appear to have any uncertainties in that regard and, in any event, has not asked the Court of Justice about them.

necessary to clarify whether the application of Article 43(1)(c) of Directive 2014/23 is dependent on the non-explicit condition that the original award of the concession (and other acts pertaining to the concession itself, prior to its modification) [23] was lawful.

C. Application of Article 43(1)(c) of Directive 2014/23 to modifications of concessions originally awarded to in-house entities

42. I will say now that, in my view, Article 43(1)(c) of Directive 2014/23 does not apply to modifications of concessions awarded in-house while those concessions remain in force as such, that is to say, where they retain the status which justified their exclusion from the scope of that directive.

1. General exclusion of in-house awards from the scope of Directive 2014/23

43. Title I of Directive 2014/23 defines its subject matter and scope. Article 17, [24] in Section II ('Exclusions') of Title I, Chapter I, provides that concessions awarded under the conditions which it lays down do not fall within the scope of the directive. [25]

44. Recital 45 of Directive 2014/23 explains that the directive clarifies 'in which cases contracts concluded within the public sector are not subject to the application of the rules laid down in this Directive'. Neither that recital nor Article 17 draws distinctions depending on whether the provisions *the application of which is excluded* govern the award, performance, modification or termination of concession contracts. [26]

45. Article 17 of Directive 2014/23 authorises Member States to exclude from the scope of that directive an 'in-house transaction' between entities in the public sector. [27] That respects the freedom of Member States to exercise the functions within their competence through their own executive services, without having recourse to the market. [28]

[23] As occurred in this case with the privatisation of Tank & Rast AG in 1998. After that, the concessions awarded in-house passed into the hands of private undertakings. The Commission maintains that, for that reason, the operation was subject to a prior publication obligation which was not sufficiently fulfilled.

[24] Article 17(1) of Directive 2014/23 governs the conditions under which a concession awarded by a contracting authority or a contracting entity to another legal person governed by private or public law falls outside the scope of that directive.

[25] In accordance with that provision, Articles 46 and 47 of Directive 2014/23, which amend, respectively, Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33) and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14), alter the scope of those two directives so that they do not apply to public contracts or concessions awarded in-house in accordance with the 'classic' public procurement directives. From now on, I shall refer to Directives 89/665 and 92/13 as the 'Remedies Directives'.

[26] The interpretation of Article 17 of Directive 2014/23 to that effect is confirmed by the judgment in *Comune di Lerici*. See footnote 32 to and point 49 et seq. of this Opinion.

[27] See, in relation to Article 12 of Directive 2014/24, which corresponds to Article 17 of Directive 2014/23, judgments of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829, paragraphs 43 to 45); and of 28 May 2020, *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:395, paragraph 33); and order of 6 February 2020, *Rieco* (C-89/19 to C-91/19, EU:C:2020:87, paragraph 32).

[28] Article 2(1) of Directive 2014/23: 'This Directive recognises the principle of free administration by national, regional and local authorities in conformity with national and Union law. Those authorities are free to decide how best to manage the execution of works or the provision of services …'

46. It would be incomprehensible if that freedom were limited solely to the original award of a concession by a contracting authority to a legal person controlled by it. Where the need to modify substantially a concession granted to, and retained by, the contracting authority's own services arises, the same reasons which justified the original in-house award continue to exist in principle.

47. When it exercises the in-house option, either for the purpose of the original award of the concession or for the purpose of subsequent substantial modifications of that concession, the contracting authority is, logically, bound by the conditions [29] and limits [30] applicable to awards of that kind. In particular, the introduction of a substantial modification consisting of a change of concessionaire must satisfy the requirements for the use of executive services (or horizontal cooperation). Otherwise, a call for tenders must be issued.

48. If the substantial modification concerns subjective elements which, after having enabled the in-house award, no longer exist for the purpose of such an award, the concession will come under the normal regulatory regime. A change having those characteristics (the replacement of the original contractor with another which is not under the contracting authority's control) requires the launch of a tendering procedure under Directive 2014/23, since the situation is no longer excluded from its scope. [31]

49. Even if the exceptional nature of the circumstances underlying the judgment in *Comune di Lerici* is accepted, that judgment supports what I am saying since it states that the modification of a contract originally awarded to an in-house entity (without a call for tenders) 'cannot fall within the scope of Article 72 of Directive 2014/24' [32] and then goes on to state that the analysis of that modification should be carried out under Article 12 of that directive (similar to Article 17 of Directive 2014/23). [33]

50. At that second stage, the Court:

– examined first whether, after the modifications undergone by the in-house company which was awarded a contract for services, the conditions laid down in Article 12(3) of Directive 2014/24 were still met;

– held that, since that did not appear to be the case, the company concerned could only continue to perform the contract if it was awarded that contract following a procedure in accordance with Directive 2014/24.

[29] Laid down in Article 17 of Directive 2014/23.

[30] In other words, with due regard to 'the fundamental rules of the FEU Treaty, in particular the free movement of goods, the 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': judgment of 3 October 2019, *Irgita* (C-285/18, EU:C:2019:829, paragraph 48), and order of 6 February 2020, *Rieco* (C-89/19 to C-91/19, EU:C:2020:87, paragraph 37). See also judgment of 28 May 2020, *Informatikgesellschaft für Software-Entwicklung* (C-796/18, EU:C:2020:395, paragraphs 68 and 69).

[31] That was the Court's finding when it interpreted the provisions which preceded the current procurement directives, in relation to changes in contracting entities, where, as a result of those changes, the contracting authority no longer exercises over those entities control similar to that exercised over their own departments. See judgments of 6 April 2006, *ANAV* (C-410/04, EU:C:2006:237, paragraphs 30 to 32), and of 10 September 2009, *Sea* (C-573/07, EU:C:2009:532, paragraph 53). The judgment in *Comune di Lerici* refers to that approach, under Directive 2014/24.

[32] The judgment in *Comune di Lerici*, paragraph 43. The Court's analysis was therefore carried out from a different perspective from that which I am using, since, in paragraphs 40 to 41 of the judgment, it focuses on Article 72 of Directive 2014/24. However, the substantive reasoning is similar: in order to apply the provision relating to modifications of contracts during their term, the original award procedure would have to have been open to competition from economic operators. The Court draws the conclusions from that premiss in paragraph 43.

[33] Paragraphs 44 to 53.

2. Exclusion, inter alia, of modifications of concessions where those concessions, in turn, did not fall within the scope of Directive 2014/23 from the outset: Article 43(1)(c)

51. The examination of Article 43(1)(c) of Directive 2014/23, which specifically concerns the legal rules governing modifications of concessions during their term, does not alter the view I have set out.

52. The wording of the provision does not give any indication at all about the concessions to which it applies. That lacuna is not sufficient to argue that Article 43(1)(c) of Directive 2014/23 simply applies to concessions excluded from that directive. In other words, the provision does not have its own, independent scope which differs from the general scope indicated by the directive.

53. A contextual interpretation of the provision confirms that it is confined to modifications made to concessions which, at the relevant time, were awarded by a competitive tendering procedure. That follows from other paragraphs of Article 43, including:

– paragraph 1(d)(ii), which refers to the replacement of the original concessionaire by an 'economic operator that fulfils the criteria for qualitative selection initially established';

– paragraph 2, concerning the *de minimis* rule: a modification the value of which does not exceed certain thresholds does not require 'a new concession award procedure';

– paragraph 4(a), which categorises as a 'substantial modification' one which introduces into the contract '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'.

54. As I have observed above, the judgment in *Comune di Lerici* results in the non-application of Article 72 of Directive 2014/24 *as a whole* to contracts originally awarded to executive services. That follows from paragraphs 1(d)(ii) and 4 of that article, which are identical to the associated paragraphs of Article 43 of Directive 2014/23.

3. Interim conclusion

55. Two important conclusions for this dispute flow from the above considerations, with regard to the interpretation of Article 43(1)(c) of Directive 2014/23.

– The provision does not apply, in principle, to substantial modifications of concessions awarded in-house while those concessions remain in force as such, that is to say, where those concessions retain the status which justified their exclusion from the scope of that directive.

– The subsequent loss of the conditions for an in-house award, as a result of a substantial modification of the terms which entails the replacement of the original contractor with another not under the contracting authority's control, brings the concession back within the scope of Directive 2014/23, Article 43 of which becomes applicable.

D. Lawfulness of the original award (and of subsequent acts prior to the modification) as a condition for the application of Article 43(1)(c) of Directive 2014/23

56. Fastned and, with certain nuances, the Commission [34] argue that the application of Article 43(1)(c) of Directive 2014/23 is conditional on the non-explicit requirement that the original award [35] of the concession complied with the public procurement legislation in force at the time.

57. Their line of argument focuses on the protection of the guiding principles of public procurement. In their submission, if an award is unlawful from the outset, the authorisation of a later (substantial) alteration of the concession, without a call for tenders, is tantamount to committing an initial infringement of those principles.

58. They maintain, however, and reiterated this at the hearing, that a finding of an initial breach of the public procurement legislation does not affect the validity of the concessions in force [36] but rather only the later modification of those concessions, which requires the launch of a tendering procedure. [37]

59. I believe that that interpretation ('the Fastned-Commission argument') is essentially incorrect.

60. First of all, the Fastned-Commission argument is hardly supported by Directive 2014/23. From a *literal* perspective, Article 43(1)(c) of the directive does not include the requirement that the original award, or any other act preceding the modification of the contract, must have been lawful. The permissibility of a substantial modification without a call for tenders is evaluated, under the provision, by taking the following as references:

– material circumstances for deciding whether a diligent contracting authority 'could not foresee', at the outset, events which later created the need for modification of the concession terms;

– aspects of the original concession which must be retained at all events: its 'overall nature' and a specified value.

[34] See paragraphs 37 and 48 to 50 of Fastned's written observations and paragraph 44 et seq. of the Commission's written observations.

[35] In point of fact, they also refer to the lawfulness of acts subsequent to the award of the concession but prior to the modification of the contract. For greater clarity of expression, I include the latter in the concept of 'original award'.

[36] Fastned's written observations, paragraphs 18 and 49.

[37] In its written observations, in paragraphs 44, 45 and 47, the Commission restricts that prohibition of subsequent *substantial* modifications to awards which, on account of time, are subject to the rules of public procurement and are made in *serious* breach of public procurement law. Also in its observations, the Commission classifies that prohibition, which serves to preclude the extension or continuation of the original unlawfulness, as a *penalty*. At the hearing, however, the Commission stated that classification as a penalty may not be the most appropriate.

61. The Fastned-Commission argument is not supported either by the *legislative history*.[38] Rather, compared with the earlier legislation, the current legislation is broader in scope as regards the contractual modifications to which it refers. The conditions it lays down for carrying out those modifications are more flexible.[39]

62. From a *contextual* point of view, the requirement that the original award must have been lawful, as an essential condition for subsequent modification without a call for tenders, does not feature in any of the cases provided for in Article 43 of Directive 2014/23.[40]

63. The Fastned-Commission argument is not readily compatible with a provision which has as its premiss an existing concession and which, looking to the future, is intended to enable the performance of that concession to be extended. It is inconsistent to allow for the modification of a concession to enable its continued performance while, at the same time, making the benefit of flexibility subject to an event in the past which, while it could have rendered the contract invalid at the relevant time, did not do so.

64. Article 43(1)(c) of Directive 2014/23 takes as its starting point a concession in force, the lawfulness of which is derived either (i) from the fact that the concession was awarded in accordance with the law, or (ii) from the fact that it was not contested within the time limit in accordance with the review system, or (iii) from the fact that it was contested but the outcome of the review did not require the termination of the concession.

65. In my view, it makes no sense to link that provision with a punitive purpose[41] when, in reality, it is an enabling provision: within certain parameters, it allows modifications to be made to a concession which would otherwise be possible only through a call for tenders.

66. A reading of the provision governing the modification of concessions from a punitive perspective[42] would also, in addition to introducing a 'foreign body' into Directive 2014/23, indirectly alter the review system to which that directive refers and with which I shall deal below.

[38] The public procurement legislation has focused on the actions of the contracting authority during the stage prior to the conclusion of the contract. With the exception which I mention in footnote 39, the directives preceding those currently in force did not refer to the modification of contracts. By contrast, the Court has given rulings in that connection, both in reply to questions referred for a preliminary ruling and in appeals or actions for failure to fulfil obligations. See, in relation to modifications as a result of circumstances arising during the contract term, judgments of 18 March 1992, *Commission* v *Spain* (C-24/91, EU:C:1992:134); of 28 March 1996, *Commission* v *Germany* (C-318/94, EU:C:1996:149); of 29 April 2004, *Commission* v *CAS Succhi di Frutta* (C-496/99 P, EU:C:2004:236); of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:351); and of 7 September 2016, *Finn Frogne* (C-549/14, EU:C:2016:634). For reasons of legal certainty, the Commission suggested the inclusion of the rules on the modification of contracts in the three proposals on public procurement in 2011, taking into account the case-law of the Court. Neither the latter nor the proposal for a Directive of the European Parliament and of the Council on the award of concession contracts (COM(2011) 897) made the right to modify substantially a concession conditional on the lawfulness of the original award.

[39] Article 31(4)(a) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) was the precursor to the current provision. The provision only permitted a modification consisting of the inclusion of 'additional works or services'. The restriction of those works and services to those which were inseparable from the original contract or were strictly necessary for its completion has been replaced by the more relaxed requirement that the modification must not alter the overall nature of the concession.

[40] It does not appear either in Article 72(1)(c) of Directive 2014/24 or in Article 89(1)(c) 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).

[41] As the Commission did in its written observations: footnote 37 above.

[42] Contrary to what may appear to be the case at first sight, Article 44 ('Termination of concessions') of Directive 2014/23 does not set out directly the effects of an unlawful award on the subsequent term of the contract. What that article stipulates is that contracting authorities must be given the possibility to terminate a concession in the light of certain circumstances which are listed in the article.

67. Ultimately, from the perspective of the *substantive* principles informing the law on public procurement,[43] the principle of opening up concessions to competition could indeed come into play in situations of that kind, as recital 32 of Regulation 2023/1804 (which is not applicable *ratione temporis* to these proceedings) points out.[44]

68. In order to foster competition, it is not necessary to declare that the substantial modification effected is invalid, especially as the referring court states that the conditions for the application of Article 43(1)(c) of Directive 2014/23 are met. The outcome could be achieved by other means:[45] for example, by assigning to the current concessionaires responsibility for the functions granted to them under the Schnellladegesetz 2021, while requiring them in turn to offer charging operators (like Fastned) the opportunity to take over, following a tendering procedure, the provision of that ancillary service in their service areas.[46]

69. There are also two objections to the Fastned-Commission argument which require a broader analysis: the objection relating to legal certainty and the objection focusing on the application of the Remedies Directives.

1. Legal certainty

70. In the absence of an indication in Article 43(1)(c) of Directive 2014/23 which would leave no room for doubt that the legislature had a different intention, it is my view that reasons of legal certainty prevent the acceptance of the Fastned-Commission argument.

71. A challenge to the lawfulness of the original award on the basis of a future, uncertain event, such as the need to modify the contract due to later circumstances which, at the time of that award, could not have been foreseen by a diligent operator, is difficult to reconcile with the principle of legal certainty.

72. The principle of legal certainty requires, in general, 'that rules of law be clear, precise and predictable in their effects, in particular where they may have negative consequences for individuals and undertakings'.[47] As regards limitation periods for bringing an action for review, 'in order to fulfil their function of ensuring legal certainty, limitation periods must be fixed in

[43] I shall deal with those principles, from the perspective of EU procedural law, below.

[44] See footnote 21 above. It must be noted, however, that that recital has no legislative expression in the articles of Regulation 2023/1804, as the Commission confirmed at the hearing.

[45] Including, as they explained in detail at the hearing, that used by Autobahn Tank & Rast and Ostdeutsche Autobahntankstellen in relation to the service areas they manage. According to that model, the service area concessionaire concludes cooperation contracts with charging point operators (four, currently) which it selects through a competitive procedure. Indeed, as stated at the hearing, Fastned was invited to participate in such a procedure and ultimately chose not to submit a tender.

[46] That model currently exists in France, as that country's competition authority explains in its Opinion 24-A-03 of 30 May 2024 relating to the electric vehicle recharging infrastructure sector, point 554 et seq. Point 549 of that opinion states that, for the purpose of the operation of that infrastructure on the motorway network to which the concession relates, charging operators either take part in a consultation procedure launched by the company holding the concession (case 1), or they are selected, without a public call for tenders, by means of an agreement which permits them to operate charging points in the service area of which they are sub-concessionaires or by concluding a 'third-party-operator' contract with the sub-concessionaire present in that area (case 2). In point 595 et seq., the authority criticises the model of selecting operators of the electric charging network in service areas without a call for tenders. A similar criticism appears in the report of the German Monopolkommission of 2023 'Energie 2023: Mit Wettbewerb aus der Energiekrise', point 314 et seq. In previous reports, the Monopolkommission recommended allowing multiple operators in the sector to have access to electric charging points.

[47] Inter alia, judgments of 16 February 2023, *DGRFP Cluj* (C-519/21, EU:C:2023:106, paragraph 105), and of 26 March 2020, *Hungeod and Others* (C-496/18 and C-497/18, 'the judgment in *Hungeod*', EU:C:2020:240, paragraph 93, with further references).

advance' and 'be sufficiently foreseeable'.[48] By definition, periods for bringing an action to determine the unlawfulness of a contract, which start to run on the occasion of a future, uncertain event and are beyond the contracting parties' control, do not meet those characteristics.

73. Article 43(1)(c) of Directive 2014/23 does not apply to contracts awarded before 18 April 2016.[49] Acceptance of the Fastned-Commission argument would amount to agreeing that it is possible to contest[50] the lawfulness of concessions predating Directive 2014/23, for which purpose it would suffice if the (substantial) modification of such concessions took place after that date.[51]

74. The Court has stated that EU law does not require a Member State to intervene, at the request of an individual, in existing legal relationships concluded for an indefinite period or for several years, even if those relationships were created in a manner incompatible with a particular directive, where those relationships came into being before expiry of the period for transposition of that directive.[52]

75. The Court has also recalled, in settled case-law, that the principle of legal certainty precludes a new legal rule from applying retroactively, namely to a situation established prior to its entry into force.[53]

76. Also on grounds of legal certainty, the Court has held that national legislation under which it is possible to initiate procedures to review the legality of amendments to public contracts is not permitted where the limitation period laid down in the legislation under which those amendments were made has expired.[54]

77. In terms of legal certainty for the contracting authority and for the awardee of a concession in force, the declarations made in the judgment in *Hungeod* (relating to the reopening, pursuant to a piece of legislation, of the limitation periods for bringing an action for review which were set by another, earlier, piece of legislation and which had already expired) can be extrapolated to situations like that at issue in the present case. In situations of that kind, the *substantive* effect of the reopening of the expired limitation periods is linked to circumstances which a diligent contracting authority could not have foreseen when it issued the call for tenders (but which later make it necessary to amend that contract).

78. Fastned seeks to counter the legal certainty argument[55] by maintaining that, in an action for review of a modification of a concession, an indirect finding that the original award infringed the provisions on public procurement is not made with a view to a declaration that the concession is

48 The judgment in *Hungeod*, paragraph 95, and the judgments cited. In the field of public procurement, that aim is also specifically expressed in the Remedies Directives: see Articles 2a and 2c of those directives and recitals 25 and 27 of Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31), and points 87 and 89 to 91 above.

49 Deadline for transposition of Directive 2014/23, in accordance with Article 51 thereof.

50 Having the scope which I reproduced in point 58, in accordance with the Fastned-Commission argument.

51 Footnote 19 above on the date of modification as the decisive date for the purposes of the applicable legal provisions.

52 Judgments of 24 September 1998, *Tögel* (C-76/97, EU:C:1998:432, paragraph 54), and of 5 October 2000, *Commission* v *France* (C-337/98, EU:C:2000:543, paragraph 38).

53 Judgment of 25 January 2022, *VYSOČINA WIND* (C-181/20, EU:C:2022:51, paragraph 47).

54 The judgment in *Hungeod*, in reply to the first, third and fourth questions referred in that case.

55 Paragraphs 47 to 49 of its written observations. The Commission, in contrast, accepts the difficulty it represents. When addressing that, in paragraphs 45 and 47 of its written observations, the Commission limits the situations to which its interpretation would apply: footnote 37 above.

invalid or to the imposition of a fine.[56] Fastned adds that that action for a review does not affect the contractual obligations still to be performed but rather only the amendment of the contract itself.[57]

79. I can accept that, in principle, there is less of a requirement to maintain legal certainty (inherent in situations already established in law) where there has not been a direct application for a declaration that a concession is invalid but rather there has been one only for a declaration of invalidity of the clauses modifying that concession to adapt it to new circumstances.[58]

80. That does not mean that legal certainty is not applicable in the second situation (indirect challenge to the lawfulness of the original concession). If the modification is due to circumstances which could not have been foreseen initially and is necessary in order to maintain the continuity of the concession without disrupting its financial equilibrium, then it cannot be ruled out that, in fact, the success of the indirect challenge may lead to termination of the contract.

81. In those circumstances, challenging the modification on the basis of the alleged unlawfulness of the original award is equivalent to reopening a debate about a situation which, specifically for reasons of legal certainty, already enjoyed undisputable legal protection (*stability*). It would lead to a kind of permanent threat as regards performance of the concession, even if, owing to the passage of time, a principal declaration that that concession is invalid is no longer possible.

82. Legal certainty is not limited to certainty as to when the limitation period for bringing an action for annulment of the concession starts and ends. It also involves the certainty that the concession will not be indefinitely at risk of challenges based on arguments concerning the original award which, where they are put forward in a timely manner, could lead to a negative outcome for the grantor and the holder of the concession.

2. The Remedies Directives

83. The Fastned-Commission argument also comes up against the Remedies Directives. If that argument were accepted, the operators concerned would not only have a mechanism to challenge the validity of clauses amending a concession as such but also a mechanism for a court to rule out of time on the legality of the original award at the time of that modification.[59]

84. Through the Remedies Directives, the EU legislature lays down the common minimum framework within which national courts examine the legality of acts adopted for the award of a public contract (or a concession) and determine the implications of a finding of illegality.

85. As currently worded, the Remedies Directives do not require Member States to provide for a mechanism of the kind proposed in the Fastned-Commission argument. That they do not do so is an additional ground for questioning the correctness of that argument, especially since the legislature was careful to ensure the relationship between those directives and Directive 2014/23, as Title IV of the latter shows.

[56] Paragraph 48. It refers specifically to the judgment in *Hungeod*, a case which dealt with penalties.

[57] The Commission agrees with that assertion, as I have observed.

[58] In a similar way to what happens in the case of an action which, rather than a declaration of invalidity of the contract, seeks damages; see judgment of 8 May 2014, *Idrodinamica Spurgo Velox and Others* (C-161/13, EU:C:2014:307, paragraphs 45 and 46).

[59] An adjudication out of time also faces all kinds of practical difficulties which are inherent in any scrutiny of decisions adopted several decades ago, subject to different legislation from that now in force, and relating to entities which may no longer even exist. Those participating in the proceedings referred to that situation at the hearing, in relation to the original concession.

86. In the Remedies Directives, the procedural guarantee of the correct application of the provisions on public procurement is based on the reactions of economic operators who are directly affected by the breach of those provisions.[60] That can be inferred from Article 1(3) of the Remedies Directives. Member States are not under an obligation to give other operators access to remedies before the courts.[61]

87. For reasons of effectiveness and legal certainty, the Remedies Directives require that affected operators must react rapidly. In accordance with Article 1(1) of those directives, Member States must ensure that decisions taken by contracting authorities that are contrary to EU law, or to the national provisions transposing EU law, may be reviewed 'effectively' and 'as rapidly as possible'. The imposition of (reasonable) time limits for bringing actions which will be time-barred if those time limits are not complied with reflects that obligation.[62]

88. The Fastned-Commission argument does not comply with that formula; rather, it entails that the decision adopted in the procurement procedure may be challenged, as to its substance, by economic operators which neither participated in that procedure nor were disadvantaged, as such, by the alleged infringement committed at that time.

89. If the Fastned-Commission argument were accepted, any economic operator with an interest in the agreement supplementing the original concession would be able to challenge it by requesting the court to review, even indirectly, the legality of the original award.[63] That possibility would be irrespective of legal standing to initiate a direct judicial review and of whether or not the time limits for that purpose have expired.[64] It would entail the *resuscitation* of a defect attributed to the original award which, from the perspective of the Remedies Directives, should be deemed to have been cured.

90. Therefore, the Fastned-Commission argument would allow the legality of the original award of a concession in force to be challenged, even though, as I have indicated,[65] an action against the (alleged) infringement was not brought within the time limit stipulated for that purpose, or that action was brought and dismissed, or, having established the infringement, the court with jurisdiction for adjudicating the action did not order the termination of the contract.[66]

91. I do not believe, therefore, that that argument is compatible with the provisions of the Remedies Directives or that reliance on the principles governing public procurement is sufficient in order to accept it.

– On the one hand, the wording of Article 43(1)(c) of Directive 2014/23 reflects a legislative decision as to the form and scope of compliance with those principles, following the

[60] Or on the Commission's reaction to a serious infringement of EU law; see Article 3 of the Remedies Directives. Moreover, those directives do not preclude national legislation from broadening the class of persons having access to remedies.

[61] Recital 122 of Directive 2014/24 recognises that other persons also have 'a legitimate interest, as taxpayers, in sound procurement procedures'. Those persons 'should … be given a possibility, *otherwise than through the review system pursuant to Directive 89/665/EEC* and without it necessarily involving them being given standing before courts and tribunals, to indicate possible violations of this Directive to a competent authority or structure'. Emphasis added.

[62] Judgment of 24 February 2022, *Alstom Transport* (C-532/20, EU:C:2022:128, paragraphs 21 and 22).

[63] Including the decision of a contracting entity not to launch a procurement procedure; judgment of 11 January 2005, *Stadt Halle and RPL Lochau* (C-26/03, EU:C:2005:5, paragraphs 33, 36 and 37).

[64] In practice, actions which those with an interest in the original concession could have brought for infringement of the applicable legislation will have become time-barred.

[65] Point 64 above.

[66] In accordance with the Remedies Directives, infringement of the public procurement legislation is not automatically penalised by a declaration that the contract concluded is ineffective. I refer to my Opinion in *CROSS Zlín* (C-303/22, EU:C:2023:652, points 78 to 87).

modification of a concession, which results in the express conditions imposed on that modification, if it is substantial.

– On the other hand, the options laid down by the EU legislature when giving concrete expression to those principles determine how, by whom and when a review is to be carried out of compliance with the public procurement legislation with regard to the award of a concession.

3. Second interim conclusion

92. The above considerations lead me to conclude that the application of Article 43(1)(c) of Directive 2014/23 to the substantial modification of a concession is not conditional on the legality of the original award of that concession.

93. That conclusion does not preclude economic operators with an interest in challenging the modification of the contract from having legal standing to bring an action for review of that modification where they consider that the modification is substantial but that the conditions which, under Article 43 of Directive 2014/23, enable that modification to be carried out without the commencement of a new tendering procedure, are not satisfied. For that purpose, the economic operators concerned do not need to have participated in the original procedure for the award of that concession. [67]

V. Conclusion

94. In the light of the foregoing considerations, I propose that the Court of Justice reply as follows to the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany):

Article 43(1)(c) 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 it does not apply to substantial modifications of concessions awarded in-house while those concessions remain in force as such, that is to say, where they retain the status which justified their exclusion from the scope of Directive 2014/23.

It does, however, apply to substantial modifications of such concessions if those modifications were made following the subsequent loss of the conditions for an in-house award, as a result of the replacement of the original contractor with another which is not under the contracting authority's control.

The application of Article 43(1)(c) of Directive 2014/23 to the substantial modification of a concession is not conditional on the legality of the original award of that concession.

[67] Judgment of 2 September 2021, *Sisal and Others* (C-721/19 and C-722/19, EU:C:2021:672, point 3 of the operative part.)