

# Modification of concession when concessionaire no longer has in-house status: the CJEU clarifies when a new award procedure is not required

Judgment of the Court of Justice of the European Union (CJEU) of 29 April 2025 (Case C-452/23) addresses the modification of public contracts originally awarded to an in-house entity which, during performance of the contracts, has lost such status.

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**T**he Judgment of the Court (Grand Chamber) of 29 April 2025, in Case C-452/23 (*Fastned Deutschland*), gives a preliminary ruling on the matter referred by the Higher Regional Court of Düsseldorf.

### 1 Background

The reference for a preliminary ruling was made in the context of a dispute in which an electric mobility operator challenged

the subject-matter extension of 360 existing concession contracts relating to service facilities ancillary to German federal motorways (representing 90% of the service areas of those motorways) to include the construction, maintenance and operation of fast-charging infrastructure.

The operator claimed that this modification was ineffective under German public procurement law, which transposes the relevant European directives, because it was

concluded without prior publication of an invitation to tender at EU level.

The notice of modification published in the *Supplement to the Official Journal of the European Union*, however, justified the waiver of an invitation to tender on the grounds that the fast-charging infrastructure constituted a complementary supply of services, which became necessary under the concession contracts concerned, that being something which was not foreseeable on the date on which they were concluded; this case would fall under those listed both in the European directives and in German law where a contract may be modified without the need for a new invitation to tender.

The operator challenged the application of these legislative rules, arguing that the initial concessions had been awarded without a competitive tendering procedure to a subsequently-privatised in-house entity. The referring court therefore referred the question as to whether the European directive applicable to the case “must be interpreted as meaning that, if the conditions laid down in that provision are satisfied, a concession may be modified without a new award procedure, including where that concession was awarded, without a competitive tendering procedure, to an in-house entity and the modification of that concession is carried out on a date on which the concessionaire no longer has the status of an in-house entity”.

## 2 The EU law provision that is the subject of interpretation

Although the referring court asks for an interpretation of Article 72(1)(c) of Di-

rective 2014/24/EU on public procurement, the Court considers that Article 43(1)(c) of Directive 2014/23/EU on the award of concession contracts is in fact applicable.

According to the judgment, taking into account the indications provided by the referring court, the disputed operation must be classified as a “concession”, and not a public “contract” in so far as “the fact that the remuneration of the contracting partner of a contracting authority came not from the public authority concerned, but from sums paid by third parties for the use of the work or services concerned, means that the service provider assumes the associated operating risk and thus that the relevant contract is therefore a concession and not a public contract”. The Court recalls that this view has been confirmed by previous case law and is currently enshrined in Directive 2014/23 (Art. 5(1)).

The wording of the two provisions is, however, the same. In both cases, the Directives allow for the modification of contracts or concessions during their term, without a new contract or concession award procedure, when three conditions are fulfilled:

- a) the need for modification has been brought about by circumstances which a diligent contracting authority or contracting entity could not foresee;
- b) the modification does not alter the overall nature of the contract or concession;
- c) any increase in value resulting from the modification of the contract or

concession is not, in principle, higher than 50% of the value of the initial contract or concession.

### 3 Preliminary ruling given

#### a) *On the relevance of the change of status of the concessionaire*

The judgment recalls that, according to its case law on Article 72(1)(d)(ii) of Directive 2014/23, the replacement of an in-house operator by an operator not having this status requires a new award procedure (CJEU, Fourth Chamber, 12 May 2022, *Comune de Lerici*, C-719/20) and states that this “requirement [...] must be regarded as also applying to concessions”.

However, the Court adds that that is not the case with a modification such as the modification at issue in the main proceedings, which, since “it concerned the construction, maintenance and operation of fast-charging operational infrastructure in the service areas concerned, relates not to the loss by the concessionaire, in 1998, of its status as an in-house entity, but to the subject matter of the concession, and which therefore does not come within the scope of Article 43(1)(d) of Directive 2014/23”.

For these modifications, the Court points out that, as regards the objective of Article 43(1)(c) of Directive 2014/23, it is apparent from recitals thereof that that provision is intended “to give contracting authorities a certain degree of flexibility in order to be able to adapt a concession during

its term to external circumstances which they could not foresee at the time of the award of that concession, in particular where the operation of that concession extends over a longer period”. In that context, to exclude from the scope of that provision cases where a concession was initially awarded to an in-house entity and where the concessionaire no longer has that status on the date of the modification of the subject matter of that concession would, according to the judgment, unjustifiably restrict that flexibility on a ground which is not apparent from either the wording or the context of that provision.

Accordingly, the Court answers the question referred for a preliminary ruling by stating that, if the conditions laid down in Article 43(1)(c) of Directive 2014/23 are satisfied, “a concession may be modified without a new award procedure, including where that concession was awarded, without a competitive tendering procedure, to an in-house entity and the modification of that concession is carried out on a date on which the concessionaire no longer has the status of an in-house entity”.

#### b) *On the possibility of judicial review of the lawfulness of the initial award of a concession in an action for annulment of a modification of that concession*

Both the operator and the European Commission, in the written observations submitted to the Court, argued that the application of Article 43(1)(b) of Directive 2014/23/EU (‘Modification

of contracts during their term') depends on the lawfulness of the initial award of the concession. They therefore argued that this award could be subject to review as an indirect part of the dispute on the lawfulness of the modification.

However, the Court denies that Member States are required to ensure that judicial review in the context of an

limits is compatible with the fundamental right to effective judicial protection and, in principle, meets the requirement of effectiveness arising under Directive 89/665".

This doctrine is consistent with previous case law of the Court of Justice of the European Union. As a single exception, the Court has accepted the right to bring an action relating to

the lawfulness of the tender procedure to be open, after the expiry of the period prescribed by national law, to "reasonably well-informed and normally diligent tenderers who could understand the tender conditions only when the contracting authority, after evaluating

the tenders, provided exhaustive information relating to the reasons for its decision" (Judgment of 12 March 2015, Case C-538/13).

c) *On when a modification of a concession is a "need" within the meaning of Article 43(1)(c) of Directive 2014/23*

The judgment states that, contrary to the point of view that the referring court appears to take, the 'need for' a modification of a concession cannot be regarded as having been 'brought about' merely because its contractual terms do not cover the situation resulting from unforeseeable circumstances which have arisen: those circumstances must also require the initial concession to be adapted in order to ensure that the proper per-

## *The replacement of an in-house operator by an operator not having this status requires a new award procedure*

action brought after the expiry of any time limit laid down by national law pursuant to Directive 89/665/EEC relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23.

The judgment argues that the setting of reasonable time limits for bringing proceedings, outside of which any actions will be time-barred, such as those laid down by German law in application of Article 2f of Directive 89/665, "is intended to ensure, in the interests of legal certainty, that, after those time limits have expired, it is no longer possible to challenge a decision of the contracting authority or to raise an irregularity in the award procedure. The setting of those time

formance of the obligations arising from it may continue.

The Court also recalls that the other two conditions laid down in Article 43(1)(c) must be cumulatively fulfilled: not alter the global nature of the concession and to respect the monetary limit.

In the event that, following this examination, the court concludes that these conditions are not satisfied, it

must examine whether the modification could be covered by Article 43(1)(b) of the Directive. To that end, it must verify that “the works or services covered by the modification at issue in the main proceedings could not, from an economic and technical point of view, and without causing significant inconvenience or duplication of costs for the contracting authority, be the subject of a separate concession awarded following a competitive tendering procedure”.