



Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 9 September 2021¹

Case C-461/20

**Advania Sverige AB,
Kammarkollegiet
v
Dustin Sverige AB**

(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(1)(d)(ii) – Modification of contracts during their term – Insolvency – Transfer of a framework agreement on the insolvency of the initial contractor – New contractor – Definition of substantial modification of the contract – Exception to the requirement for a new procurement procedure – Conditions)

I. Introduction

1. This case, which relates to Directive 2014/24/EU on public procurement,² concerns one of the exceptions to the requirement for a procurement procedure, that is to say, where the person awarded the contract becomes insolvent while it is being performed. The exception in question appears in Article 72(1)(d)(ii) of the Public Procurement Directive ('the provision at issue').
2. The Court is asked to rule on the conditions for that exception to apply and, specifically, on whether those conditions require the person replacing the initial contractor to take over not only the contract concerned but also at least part of the initial contractor's business.
3. The question has been referred in proceedings between on the one hand, the Kammarkollegiet (Swedish Legal, Financial and Administrative Services Agency) and Advania Sverige AB ('Advania'), which replaced the initial contractor, and, on the other, Dustin Sverige AB ('Dustin'), a company with an interest in the contracts at issue in the main proceedings. Dustin is challenging the transfer to Advania of framework agreements initially awarded to Misco AB, after Misco AB, the original contractor, was declared insolvent, without a reopening to competition in accordance

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; 'the Public Procurement Directive').

with the Public Procurement Directive, where the transfer was not accompanied by the transfer of at least part of Misco's business, that is to say, the part required to perform those framework agreements.

4. It is, in principle, unexpected and extraordinary for an initial successful tenderer to become insolvent and to be replaced by a new contractor, since every precaution is normally taken to ensure that tenderers are solvent. This is nevertheless a problem that contracting authorities do sometimes encounter in the life of a company, as the case in the main proceedings demonstrates, and which the legislature resolved to regulate for the first time in the provision at issue. The Court is invited to consider whether that provision allows a new contractor to be appointed, including by an insolvency administrator, without the contract being reopened to competition and with no obligation on the new contractor to take over part of the business of the initial contractor, without thereby infringing the principles governing public procurement which the Public Procurement Directive is intended to uphold.

5. On completion of my analysis, I will propose that the Court should find that the exception laid down by the provision at issue does not require the new contractor, which is awarded the contract in place of the initial contractor, also to acquire part of the initial contractor's business.

II. Legal context

A. *The Public Procurement Directive*

6. Recitals 107 and 110 of the Public Procurement Directive state:

‘(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 of Justice of the European Union. 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.

...

(110) In line with the principles of equal treatment and transparency, the successful tenderer should not, for instance where a contract is terminated because of deficiencies in the performance, be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract should be able, in particular where the contract has been awarded to more than one undertaking, to undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, takeovers, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all public contracts performed by that tenderer.’

7. Article 18 of that directive, entitled ‘Principles of procurement’, provides in paragraph 1:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. ...’

8. Article 57(4)(b) of that directive provides:

‘Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

...

(b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national laws and regulations.’

9. Article 72 of the Public Procurement Directive, entitled ‘Modification of contracts during their term’, provides 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:

...

(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either:

...

(ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; ...

...

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

...

4. A modification of a contract or a framework agreement during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, 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;
- (b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- (c) the modification extends the scope of the contract or framework agreement considerably;
- (d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1.

...'

B. Swedish law

10. Lagen (2016:1145) om offentlig upphandling (Law (2016:1145) on public procurement, 'the LOU'),³ provided in Chapter 17, Paragraph 13, that a contract or a framework agreement might be modified with one contractor being replaced by another, without a new procurement, if:

- '(1) the new contractor full or partially replaces the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, and
- (2) the circumstance that a new contractor fully or partially replaces the initial contractor did not entail other substantial modifications to the contract or framework agreement.'

11. The referring court has clarified that it is apparent from the second condition that such a replacement of the contractor presupposes that the new service provider is not excluded on the grounds for exclusion laid down by that law and that it meets the qualification conditions established in the original contract.

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

12. The Kammarkollegiet had held a tendering procedure for the supply of computer equipment, in particular computers, monitors and tablets, through a restricted procedure,⁴ in accordance with the LOU.

³ The referring court has indicated that this law has since been repealed.

⁴ That procedure is set out in detail in Article 28 of the Public Procurement Directive.

13. Seventeen candidates, including Advania, demonstrated that they satisfied the necessary conditions. In accordance with the rules governing the restricted procedure,⁵ the Kammarkollegiet had provided that if more than nine candidates qualified to tender, only the highest-placed nine would be invited to submit tenders. Advania was not among those nine.

14. Framework agreements were concluded with six suppliers in various fields. Misco was awarded four framework agreements covering all the fields concerned. Dustin was awarded framework agreements in two of those fields.

15. By letter of 4 December 2017, Misco requested the Kammarkollegiet to approve the transfer of its four framework agreements to Advania. On 12 December 2017, Misco was declared insolvent. On 18 January 2018, the insolvency administrator signed a contract with Advania for the transfer of the four framework agreements. The transfer was approved by the Kammarkollegiet in February 2018.

16. Following that transfer, Dustin applied to the Förvaltningsrätten i Stockholm (Administrative Court, Stockholm, Sweden) for a declaration of invalidity of Advania's framework agreements with the Kammarkollegiet.

17. That court dismissed the application. It held that Advania had obtained the framework agreements and acquired the branches of Misco's business used for performance of those framework agreements, as Chapter 17, Paragraph 13, of the LOU requires.

18. Dustin appealed against that judgment before the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm, Sweden), which upheld that appeal and declared the four framework agreements between Advania and the Kammarkollegiet invalid. The Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm) found that the Kammarkollegiet had approved the transfer of the framework agreements because of Misco's insolvency. In contrast to the first instance court, however, it held that, with the exception of the framework agreements at issue, Misco had transferred virtually no business to Advania and, therefore, Advania could not be regarded as having fully or partially replaced Misco within the meaning of Chapter 17, Paragraph 13, of the LOU. The referring court noted in particular that only one of Misco's employees had subsequently joined Advania, that the Misco customer list transferred to Advania was not fully updated or relevant and that there was no evidence to prove that Advania had taken on any of Misco's subcontractors.

19. Advania and the Kammarkollegiet appealed against that second instance judgment to the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden). In their appeal, they do not dispute the appeal court's assessment of what was included in the transfer from the insolvency estate. However, they contend that such a transfer satisfies the condition in Chapter 17, Paragraph 13 of the LOU and in the Public Procurement Directive that there must be a whole or partial succession.

20. According to Advania and the Kammarkollegiet, neither the LOU nor the Public Procurement Directive requires that business of a certain nature or scope be transferred to the new contractor in addition to the framework agreements.

⁵ See Article 65 of the Public Procurement Directive, entitled 'Reduction of the number of otherwise qualified candidates to be invited to participate'.

21. Dustin, for its part, is of the view that the expression ‘universal or partial succession into the position of the initial contractor’ in conjunction with the concept of ‘corporate restructuring’ in the provision at issue makes clear that, together with the framework agreement, the new contractor must take over all or part of the original contractor’s business used to perform the contracts at issue.

22. In view of those divergent interpretations, the referring court states that it requires clarification on the scope of the provision at issue and in particular on what meaning is to be given to replacement as a consequence of ‘universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency’.

23. In those circumstances, the Högsta förvaltningsdomstolen (Supreme Administrative Court) stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

‘Does the circumstance that a new contractor has taken over the initial contractor’s rights and obligations under a framework agreement, after the initial contractor has been declared insolvent and the insolvency estate has transferred the agreement, mean that the new contractor will be deemed to have succeeded into the position of the initial contractor under conditions such as those referred to in Article 72(1)(d)(ii) of the Public Procurement Directive?’

24. The request for a preliminary ruling, of 15 September 2020, was received by the Court on 24 September 2020.

25. Written observations have been submitted by Advania, the Kammarkollegiet, Dustin, the Austrian Government and the European Commission.

IV. Analysis

26. With a view to assessing the scope of the provision at issue, I note at the outset, as the Court held in *presstext Nachrichtenagentur*,⁶ that as a rule, a change in the contractual partner is a change to one of the essential terms of the public contract. That premiss is reproduced in Article 72(4)(d) of the Public Procurement Directive.

27. This means that replacement of the initial successful tenderer is in principle a substantial modification of the contract giving rise to a new procurement procedure,⁷ in accordance with the principles of transparency and equal treatment that underlie the requirement for competition between potentially interested candidates from the different Member States.⁸

28. By way of an exception, the provision at issue provides that where the initial successful tenderer is insolvent a replacement may be appointed for that person with no new procurement procedure.

⁶ Judgment of 19 June 2008 (C-454/06, EU:C:2008:351; ‘the *presstext* judgment’; paragraph 40). I will examine the consequences of that judgment in greater detail in points 70 to 78 of this Opinion.

⁷ See, to that effect, the *presstext* judgment, paragraph 47, and Article 72(1)(e) of the Public Procurement Directive.

⁸ See judgment of 7 September 2016, *Finn Frogne* (C-549/14, EU:C:2016:634, paragraph 28). Those principles and the requirement for competition are set out in Article 18 of the Public Procurement Directive.

29. The question arises of the precise circumstances in which that exception applies and, in particular, whether the person replacing the original contractor must take over at least part of the business of the initial successful tenderer.

30. Two divergent interpretations of the provision at issue have been put before the Court.

31. According to one interpretation, advocated by the Kammarkollegiet, Advania and the Austrian Government, the provision at issue must be interpreted as meaning that where the initial contractor is replaced, following its insolvency, the new contractor does not have to take over part of the initial contractor's business alongside the transfer of the contract. They consider that if the terms at issue had to be interpreted as requiring some type of business transfer, the application of the provision would be severely limited.

32. The second interpretation, advocated by Dustin and the Commission, presupposes in contrast that the new contractor takes over at least part of the business of the initial contractor. Dustin is of the view that almost free rein would otherwise be given to trade in agreements that have been put out to tender.

33. According to Dustin and the Commission, in order to avoid jeopardising the principles of equal treatment and transparency and, accordingly, the objective of ensuring competition, the substantive identity of the initial successful tenderer must be preserved, that is to say, the assets used to perform the framework agreement, or at least a part of those assets, must be transferred to the person replacing the initial contractor, in order to ensure continued identity between that person and the initial contractor. The Commission recognises that this may be impossible where the business of the initial contractor is completely wound up. In such a situation it would then be necessary, according to the Commission, in order to ensure equal treatment between the initial tenderers, for the contracting authority to look as a matter of priority to those tenderers, perhaps in the order in which they were ranked on conclusion of the original procurement procedure.

34. The stakes are high. The Court is invited to define the margin of manoeuvre available to a contracting authority to replace the initial successful tenderer where it becomes insolvent.

35. To my mind, the wording of the provision at issue is not amenable to an interpretation such as that proposed by Dustin and the Commission. I will attempt below to demonstrate that the provision must be understood in line with the first interpretation, relying on its wording (section A), its internal and external context, that is to say, on the provisions that frame it and the *travaux préparatoires* (section B), and on the objectives pursued by the legislature (section C).

A. The wording of the provision at issue

36. I note, first of all, that according to the wording of Article 72(1) of the Public Procurement Directive, framework agreements may be modified with no new procurement procedure in five situations listed in subparagraphs (a) to (e) of that article. Article 72(1)(d)(ii), which the Court is asked to interpret, expressly mentions the insolvency of the initial contractor as one of the situations in which a framework agreement may be awarded to a new contractor without holding a new procurement procedure, even though that change constitutes a substantial modification of the contract.

37. Under the provision at issue, application of the exception in question is subject to several conditions, but they do not expressly include the transfer of part of the initial contractor's business.

38. There are three conditions, as follows.

- The new contractor must be an economic operator that *fulfils the criteria for qualitative selection*. It is common ground that this condition is satisfied where, as in the case in the main proceedings, the new contractor, in this instance Advania, was among the undertakings considered eligible to tender.⁹
- Replacement by the new contractor does not entail *other substantial modifications to the contract*. This condition likewise does not seem to give rise to any uncertainty in the case in the main proceedings as set out by the referring court.
- Replacement by the new contractor *is not aimed at circumventing the application of the Public Procurement Directive*. The replacement must not be a stratagem by means of which the contracting authority selects the contractor of its choice without calling for competition between the candidates interested in the contract. I will return to that last condition, which aims to prevent circumvention of the procurement rules laid down by the directive.¹⁰ I would nevertheless clarify at the outset that the referring court has not suggested that the appointment of the new contractor in the case in the main proceedings was aimed at avoiding application of those rules.

39. Dustin and the Commission maintain, however, that the requirement that at least part of the initial contractor's business be transferred flows implicitly from the terms of the provision at issue themselves, according to which the initial contractor is replaced by another economic operator '*as a consequence of ... universal or partial succession*' into the position of the initial contractor, following *corporate restructuring*, including takeover, merger, acquisition or insolvency'.¹¹

40. I note that the terms used vary slightly from one language version of the provision at issue to another. The English- and French-language versions of the provision use the expression 'universal or partial succession', whereas the Swedish-language version of the provision at issue states that another economic operator 'replaces [the initial service provider] in full or in part'.

41. In the present context, however, I believe those expressions are broadly equivalent.

42. It has become clear – to my mind quite correctly – from the emphasis that all the parties that have submitted observations to the Court have laid on the notion of 'succession', that the new contractor succeeds universally or partially into the position of the initial contractor. The English-language version further highlights that consideration by specifying that the replacement takes place '*as a consequence of*' a universal or partial succession.¹²

⁹ See point 13 of this Opinion.

¹⁰ See points 84 and 86 and 87 of this Opinion.

¹¹ Emphasis added.

¹² The English-language version reads: '*as a consequence of universal or partial succession into the position of the initial contractor*'.

43. This implies that the new contractor takes over all or part of the assets of the initial contractor. I would emphasise nevertheless that the concept of ‘part’ is not defined in the provision at issue. The part may be smaller or larger depending on the event giving rise to the succession.¹³ On a literal reading of those terms, it can therefore be considered that the new contractor may take over only a public contract or a framework agreement.

44. In contrast, the concept of ‘part’ does not mean that only part of a contract or framework agreement may be transferred because that would constitute a significant change to the contract or framework agreement and would infringe the requirement that there must be no other ‘substantial modifications’. Reducing the scope of a framework agreement is, in my view, clearly capable of modifying the economic balance of the contract in favour of the contractor in a manner which was not provided for in the initial framework agreement and, therefore, of constituting a ‘substantial modification’ within the meaning of Article 72(4)(b) of the Public Procurement Directive.

45. The new contractor that replaces the initial successful tenderer, by succeeding into its position, must therefore take over the framework agreement or public contract in its entirety. In other words, the new contractor must accept all the rights and obligations under that contract.¹⁴

46. As specified in the remaining part of the provision at issue, the event giving rise to the succession must be a corporate restructuring, which can take various forms. The legislature lists four of these by way of example and therefore non-exhaustively. I note, as does the Commission, that the first three examples given, that is to say, takeover, merger and acquisition, have something in common. In all three cases, the operations referred to involve continuation of the undertaking concerned, that is to say, the continued existence of its business and the material and human resources necessary for that business.

47. In the case of insolvency, in contrast, mentioned as the fourth example, the undertaking does not necessarily continue to exist. Many situations are possible. The undertaking may indeed continue to be operated in its entirety, but it may also be wound up and its assets sold, if necessary, one by one. In the latter situation, a framework agreement constituting one of the undertaking’s assets may be transferred separately to a third party which does not take over any other asset of the undertaking concerned.

48. I therefore see nothing, in the wording of the provision at issue alone, to suggest that, where the initial contractor becomes insolvent, in addition to the transfer of a framework agreement awarded to it, part of the other assets it possessed must be transferred to the new contractor.

49. I therefore do not share the Commission’s view that because the first three examples involve the business of the initial successful bidder remaining in place and because, according to the terms of the provision, insolvency is placed on the same footing as those examples, by implication the initial contractor’s underlying business must also continue fully or at least partially. According to that institution, the legislature did not envisage a situation in which the initial contractor’s business is completely wound up.

¹³ See points 46 and 47 of this Opinion.

¹⁴ I note that this aspect is not disputed. Dustin emphasises that part only of the framework agreement cannot be transferred to the new contractor.

50. To my mind, since the wording of the Public Procurement Directive does not expressly limit the scope of the concept of ‘insolvency’, that term cannot be understood in so restricted a manner as the Commission proposes.

51. That construction is in my view, corroborated by the context of the provision at issue.

B. The context of the provision at issue

52. To my mind the *travaux préparatoires* demonstrate that insolvency is not an example of restructuring similar to takeover, merger and acquisition and thereby requiring the new contractor to be substantively identical¹⁵ to the initial contractor and, therefore, to preserve the part of its business that the initial contractor had assigned to performance of the public contract at issue. On the contrary, it emerges from the *travaux préparatoires* that from the outset the legislature envisaged insolvency in a broad sense, as a situation distinct from takeover, merger or acquisition.

53. I note first of all that in its green paper on public procurement¹⁶ the Commission invited stakeholders to give their views specifically on changes affecting the successful tenderer where its status changes as a result of incidents impacting on the capacity to execute the contract, such as bankruptcy. The Commission emphasised that there should be a discussion to ascertain whether EU-level instruments were needed to help contracting authorities address those situations in an appropriate manner. It also asked the stakeholders whether EU law should make provision for the explicit obligation or right of contracting authorities to change supplier or to terminate the contract in certain circumstances and whether it should also lay down specific procedures on how the new supplier should be chosen.¹⁷

54. The Commission envisaged inter alia replacing the initial contractor, where it becomes insolvent, using a simplified procedure; mandating the second best of the original tender procedure; or reopening competition only between the tenderers having participated in the original procedure, provided that the former procedure did not take place too long ago.¹⁸

55. In its original proposal for a directive,¹⁹ which took into consideration the observations received on its green paper, the Commission proposed that the exception to the requirement for a public procurement procedure should apply in the case of corporate restructuring or insolvency.²⁰ The Commission therefore clearly distinguished between the two situations, and in the preamble to its proposal for a directive specified the types of situation envisaged, termed ‘structural changes’, that is to say, internal reorganisations, mergers and acquisitions, and insolvency.²¹

¹⁵ The concept of ‘substantive identity’ between economic operators is used in the context of verifying that the tenders submitted by tenderers comply with the rules and is a corollary of the concept of ‘legal identity’. The preselected economic operators must be legally and substantively identical to those who submit tenders (see judgments of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraph 40, and of 11 July 2019, *Telecom Italia*, C-697/17, EU:C:2019:599, paragraph 34). I would emphasise however that this requirement obtains at the procurement stage rather than at the contract performance stage.

¹⁶ Commission Green Paper of 27 January 2011 on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market (COM(2011) 15 final; ‘the green paper’).

¹⁷ See the green paper, question 41.

¹⁸ See page 27 and footnote 61 of the green paper.

¹⁹ Proposal for a Directive of the European Parliament and of the Council on public procurement (COM(2011) 896 final; ‘the proposal for a directive’).

²⁰ See the proposal for a directive, Article 72(3).

²¹ See recital 47 of the proposal for a directive.

56. The fact that the final wording of the provision at issue does not expressly draw that distinction and that the legislature chose to list examples of possible situations does not in my view mean that it placed insolvency, on the one hand, and takeovers, mergers and acquisitions, on the other, on the same footing in respect of the transfer of business to a new contractor.

57. My assessment is borne out by the meaning of the expression ‘restructuring operations’ which is not confined to situations in which the business of the undertaking concerned remains in place.²²

58. I therefore consider that the legislature intended to specify the types of situation envisaged in the provision at issue itself rather than only in the preamble to the Public Procurement Directive, as previously proposed, but did not thereby intend to suggest that they all have similar characteristics as regards any taking over of the business of the initial contractor for performance of the public contract.

59. The internal context of the provision at issue within the Public Procurement Directive in my view supports that interpretation.

60. The provision at issue forms part of Article 72 of that directive, entitled ‘Modification of contracts during their term’, which in its various paragraphs carefully describes the exceptions to the obligation to follow the procurement procedure rules and the conditions for them to apply. Paragraphs 1 and 2 list the situations in which contracts and framework agreements may be modified with no new procurement procedure and paragraph 5 further emphasises that a new procurement procedure is required where there are modifications other than those contained in those two paragraphs. Paragraph 4 specifies what constitutes a substantial modification of a contract or framework agreement, emphasising that the appointment of a new contractor constitutes a substantial modification *unless* the situation is, inter alia, one of those referred to in Article 72(1)(d) and therefore, in particular, in a situation of insolvency as specified in the provision at issue.

61. For each situation envisaged, Article 72 indicates the circumstances in which the exceptions to the requirement for procurement procedures apply. As I have already noted, those circumstances do not mention that at least part of the initial contractor’s business must be transferred to the new contractor where the initial contractor is insolvent.

62. Since it is an exception to the general rule that there must be a public procurement procedure, the concept of ‘insolvency’ in the provision at issue must of course be interpreted strictly. That interpretation may not however render the exception ineffective. It would do so,²³ in my view, if the term ‘insolvency’ was limited to situations in which the undertaking concerned can continue to operate, at least in part, rather than being understood in its usual broader sense. I would emphasise here that the term ‘insolvency’ is widely used and is in my view capable of including all the instances of insolvency referred to in Article 57(4)(b) of the Public Procurement Directive.²⁴

63. I also do not believe that application of the insolvency exception is subject to any condition other than the three referred to in the provision at issue and set out in point 38 of this Opinion.

²² As can be seen from the opinion of the Conseil d’État (Council of State, France) (Finance Section) of 8 July 2000 (Cession de contrats – No 141654), a restructuring operation may be the consequence of the person originally awarded the public contract ceasing to exist.

²³ On how the effectiveness of the provision at issue might be compromised, see also points 92 to 94 of this Opinion.

²⁴ See point 8 of this Opinion.

64. Recital 110 of that directive supports that view, stating as it does that, in the event of ‘certain structural changes’ to the successful tenderer during the performance of the contract, including insolvency, a new procedure is not automatically necessary. The very general expression ‘certain structural changes’ has the effect that ‘corporate restructuring’ is understood in a particularly broad sense. The examples given encompass incidents and events likely to affect the very structure of a company and vary from purely internal restructuring to insolvency, by way of company takeovers.

65. My proposed interpretation of the provision at issue, to the effect that the wording and context of that provision do not imply that part of the initial contractor’s business must be transferred to the new contractor in order for the exception based on the insolvency of the initial contractor to apply, is further corroborated by the objectives of the Public Procurement Directive.

C. The objectives of the Public Procurement Directive

66. The objectives pursued by the legislature are apparent from the explanatory memorandum of the proposal for a directive.

67. While confirming the objective of ensuring competition between candidates in all the Member States and, to that end, reaffirming the principles of transparency and equal treatment, the legislature sought, first, to have regard to other objectives²⁵ and, second, to introduce a degree of flexibility and simplification in application of the rules.²⁶ The proposal for a directive also underscores the intention of reducing formalities and responding pragmatically to the actual problems encountered by contracting authorities and tenderers, in the light of the Court’s case-law.

68. As academic commentators have highlighted,²⁷ whereas the public procurement directives previously focused on the rules applicable to *public procurement* and, in particular, to calls for competition between candidates *before* the procurement in the strict sense, the Public Procurement Directive²⁸ also addresses the *performance of public contracts* and, therefore, the phase *subsequent* to procurement, which includes any modification of the contracts during their performance.

69. In that respect, the Public Procurement Directive takes full account of and codifies the Court’s case-law. Nevertheless, as I will demonstrate, it went much further. It is helpful to examine that case-law and how it is reflected in the directive in order to gauge the innovations in the directive.

²⁵ Including protection of the environment and promoting innovation, employment and social inclusion (paragraph 1 of the explanatory memorandum of the proposal for a directive).

²⁶ See the explanatory memorandum of the proposal for a directive.

²⁷ See, among others, Treumer, S., ‘Contract changes and the duty to retender under the new EU public procurement Directive’, *Public Procurement Law Review*, 2014, 3, p. 148.

²⁸ Those observations apply likewise to 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).

70. The *presstext* judgment²⁹ is decisive here. The case that gave rise to that judgment concerned an amendment to a public contract during its currency and turned specifically on the identity of the successful tenderer. The Court noted that the existing directive did not address the matter,³⁰ even though it did contain a number of pertinent indications.

71. The Court noted that Directive 92/50 sought to ensure both transparency of procedures and equal treatment of tenderers, in order to pursue the principal objective of opening up to competition in all the Member States.³¹ It inferred that amendments to the provisions of a public contract during its currency constitute a new award of a contract when they are materially different in character from the original contract. The Court made clear what should be understood by a ‘material amendment’, stating that it includes an amendment which introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.³²

72. The Court accordingly found that, as a rule, ‘the substitution of a new contractual partner’ for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract.³³

73. The *presstext* judgment specifies the situations in which certain changes to the successful tenderer nevertheless do not constitute a fundamental amendment.

74. That is so where, as in the case giving rise to that judgment, the successful tenderer’s business is transferred to one of its subsidiaries – which is wholly owned by it, which it directs and for which it is jointly and severally liable – and where there is no change in the overall service performed. An arrangement of that nature is merely an ‘internal reorganisation’ of the contracting partner which does not modify in any fundamental manner the terms of the initial contract.³⁴

75. That is also so where the successful tenderer is a legal person established as a public company listed on a stock exchange. The Court stated that it in fact follows from the very nature of such a company that the composition of its shareholders is liable to change at any time. As a rule, such a situation therefore does not affect the validity of the award of a public contract to such a company.³⁵

76. The Court added that the same finding applies to legal persons established as limited liability registered cooperatives, as in the case that gave rise to the *presstext* judgment. Any changes to the composition of the shareholders in such a cooperative will not, as a rule, result in a material amendment to the contract awarded to it.³⁶

²⁹ See point 26 of this Opinion.

³⁰ See paragraph 30 of the *presstext* judgment. This concerned 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).

³¹ See paragraphs 31 and 34 of the *presstext* judgment.

³² See paragraph 35 of the *presstext* judgment.

³³ See paragraph 40 of the *presstext* judgment.

³⁴ See paragraph 45 of the *presstext* judgment.

³⁵ See paragraph 51 of the *presstext* judgment.

³⁶ See paragraph 52 of the *presstext* judgment.

77. The Public Procurement Directive fully reflects those considerations, in the provision at issue on the one hand and in its preamble, in recitals 107 and 110, on the other. Recital 107 expressly refers to the Court's case-law and recital 110 mentions purely internal reorganisations as well as takeovers, mergers and acquisitions, which involve a change of shareholders or partners and, therefore, of owners.

78. I would nevertheless note that the Public Procurement Directive does not merely take into account the guidance in the *presstext* judgment but addresses other types of situation.

79. Whereas the Court identified the situations in which a change affecting the successful tenderer does not constitute a 'material amendment' and, therefore, does not give rise to a new public procurement procedure, in the provision at issue the Public Procurement Directive also specifies the situations where a change relating to the successful tenderer, while it would normally constitute a 'substantial modification', nevertheless likewise does not require a reopening of competition.

80. This applies, *inter alia*, to takeovers, mergers and acquisitions, provided the conditions listed in the provision at issue are satisfied.

81. In particular, for the purposes relevant to the Court in this case, the Public Procurement Directive specifically makes provision for insolvency, which had not yet been put before it.

82. Inclusion of that situation is novel compared with both the EU public procurement legislation and the case-law existing on the date on which the Public Procurement Directive was adopted. It addresses a practical problem encountered in the performance of public contracts.

83. This is the problem of ensuring that where the contracting authority is faced with a successful tenderer which is no longer able to perform the public contract because it is insolvent, a person can be appointed to replace it without a new procurement procedure causing excessive delay or disproportionately increasing the cost of the contract. The provision at issue seeks to address the problem by providing a solution that is in the interests of both the contracting authority and the successful tenderer and its creditors. The problem created by the insolvency is no less considerable where the insolvent undertaking continues to exist in part than where it is wound up entirely. A person must be found to replace it in any event. By not expressly differentiating between those situations, the legislature therefore appears to have sought to respond pragmatically to all those situations while upholding the principles governing public procurement enshrined in Article 18(1) of the Public Procurement Directive, in particular the prohibition on the contracting authority artificially narrowing competition by excluding the application of the directive.

84. Indeed, I note first of all in that respect that, where the initial successful tenderer becomes insolvent, the framework agreement has already been opened to competition³⁷ and that the tender accepted can no longer be substantially modified. As the provision at issue expressly states, if other substantial modifications are made, apart from a change of contracting partner, one of the three conditions laid down in the provision at issue³⁸ is not fulfilled and there must be a new procurement procedure.

³⁷ Treumer, S., 'Regulations of contract changes leading to a duty to retender the contract: the European Commission's proposals of December 2011', (*Public Procurement Law Review*, 2012, 5, 135-166) states that the 'public procurement rules have fulfilled their function'.

³⁸ See the second condition referred to in point 38 of this Opinion.

85. Next, the insolvency of a successful tenderer, although not a rare occurrence, is an extraordinary situation which, in the normal course, is neither foreseen by the contracting authority or the initial successful tenderer nor desirable. Economic and financial standing is one of the three selection criteria for candidates laid down in Article 58 of the Public Procurement Directive. Moreover, an economic operator's insolvency within the meaning of Article 57(4)(b) of that directive is a ground – which may be facultative or mandatory depending on national law – for exclusion from participating in a procurement procedure.

86. The fact that insolvency is an extraordinary situation as a rule means that the replacement of a successful tenderer by a new contracting partner will not be a manoeuvre by the contracting authority aimed at excluding application of the Public Procurement Directive. The likelihood of such a manoeuvre is even less where an insolvency administrator has been appointed, as in the case in the main proceedings, representing not the interests of the contracting authority but those of the creditors of the successful tenderer, and acting under the supervision of a court.

87. It is in any event for the national court to verify that the persons concerned have not engaged in a manoeuvre of that kind. It is incumbent on the national court to verify, in particular, that the selection criteria, such as that relating to the financial standing of the successful tenderer, have in fact been examined. The date on which the insolvency occurs, especially if it is soon after the date on which the contract is concluded, may be circumstantial evidence that compliance with this qualitative criterion was not properly verified. In respect of a case such as that at issue in the main proceedings, I note that the Court has not been given any specific information on this matter, but that the referring court has not in any way suggested that the parties concerned intended to circumvent the application of the Public Procurement Directive.

88. Last, I note that, where an insolvency administrator has been appointed to administer the assets of the insolvent successful tenderer, it is for that administrator in the first place, not the contracting authority, to select the new contractor. According to Article 1(2) of the Public Procurement Directive, on the scope of application of the directive, procurement is defined as the acquisition by means of a public contract of supplies or services by a contracting authority from economic operators *chosen* by those contracting authorities. If the contracting authority has not chosen an economic operator, therefore, public procurement is not required under the Public Procurement Directive, even if it is necessary for the contracting authority to approve the contracting partner.

89. Since these are contracts involving mutual obligations of the new contractor and the contracting authority, that approval is needed, under the contract law of the Member States, even though it is not laid down in the Public Procurement Directive. The contracting authority may even have been consulted and have participated in some negotiation prior to the appointment of the new contractor, as appears to have occurred in the case in the main proceedings.³⁹ To my mind, that fact is not sufficient to regard the contracting authority as having 'chosen' the contracting partner within the meaning of the Public Procurement Directive.⁴⁰

³⁹ See point 15 of this Opinion.

⁴⁰ Sue Arrowsmith is of the view, however, that if the contracting authority remains able to have an influence in determining the contracting partner for reasons not relating to its technical or financial capability, it does choose the contracting partner and that choice must be subject to a procurement procedure. See, *The law of Public and Utilities procurement: Regulations in the EU and UK*, Sweet and Maxwell, 3rd edition, 2014, point 6-290.

90. The fact that a new contracting partner can be appointed without a new procurement procedure where the initial contractor becomes insolvent clearly introduces a considerable margin of manoeuvre in relation to public procurement. However, I believe that such leeway both reflects the intention of the legislature and upholds the principles enshrined in Article 18(1) of the Public Procurement Directive, provided the three conditions for the exception to apply, set out in point 38 of this Opinion, are satisfied.

91. The argument put forward by Dustin and the Commission to the effect that the new contractor may only be appointed without a new procurement procedure if it takes over at least the part of the initial contractor's business used for performance of the contract, besides the fact that it is not expressly laid down by the legislature and, to my mind, goes beyond the meaning of the provision at issue, creates more problems than it solves.

92. I note, first, that an obligation to take over part of the business of the initial contractor would significantly reduce the scope of the insolvency exception, since in many cases the undertaking is completely wound up. It is moreover unclear what proportion of the business activities of the initial contractor would have to be transferred for the exception to apply.

93. Second, such an obligation could make the work of the insolvency administrator particularly difficult. It could even conflict with the powers granted to an insolvency administrator under national insolvency law to negotiate in the interests of creditors.⁴¹

94. In that respect I share the view of the Austrian Government according to which it may or may not be common to transfer public contracts or framework agreements only, depending on the business sector. When a construction undertaking becomes insolvent, for example, the transfer of certain large construction sites may involve the transfer of material and personnel. In contrast, the same does not necessarily apply to computer services or the supply of computer equipment. I also note, in common with that government, that an undertaking that has become insolvent is sometimes able to continue operating, provided it transfers a public contract. Ruling out that option would not only render it impossible to replace the contractor, but could also jeopardise attainment of the objectives of the insolvency procedure of preserving the existing undertaking to the extent possible in the interests of creditors.

95. Third, requiring a transfer of assets in order to prevent a party from circumventing the competition rules would not only be an onerous solution but is also arguably unnecessary, since the transfer of a public contract is in any event subject to the condition contained in the provision at issue that it must not be a means of circumventing the application of the Public Procurement Directive.

96. Fourth, I will examine the specific issues raised by the Commission's argument that there is no obligation on the insolvency administrator to look to the initial tenderers in the event that the business of the initial successful tenderer completely ceases to exist.

⁴¹ It can be seen from the case file that the national law in Sweden and in Austria lays down such powers. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141 p. 19) recognises, in recital 22, that the Member States have widely differing substantive laws in the field of insolvency. In that respect, see also Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (OJ 2019 L 172 p. 18), in particular recitals 1, 4, 7, 8 and 12.

97. According to the Commission the legislature did not intend to provide for the situation in which the initial contractor's business is completely wound up.⁴² That institution nevertheless concedes that such a situation may occur⁴³ and that a public contract may be its only remaining asset.

98. In such circumstances, the Commission is of the view that the provision at issue may be interpreted as meaning that the exception to the requirement to hold a new procurement procedure does apply, provided the public contract is offered to all the initial tenderers that satisfy the selection criteria, on a non-discriminatory and equivalent basis, for example by approaching them in their order of ranking.⁴⁴

99. I emphasise, nevertheless, first, that the provision at issue contains no such requirement, which appears to be contrary to the intention of the legislature. Indeed, as I stated in points 53 and 54 of this Opinion, during the *travaux préparatoires* the Commission had envisaged that a specific procedure could apply in the event of bankruptcy and provided in particular that the contracting authority would revert to the original tenderers. Ultimately, the Public Procurement Directive did not take up that proposal and did not replace it with any other. I infer from this that the legislature clearly rejected any such obligation to contact the original tenderers.

100. Second, an obligation to offer the public contract or framework agreement to the original tenderers in their order of ranking would imply that it would have to be awarded to the first of them to accept it. However, that approach overlooks the need for the new contractor to be approved by the contracting authority.⁴⁵ A former tenderer, even if it is ranked first after the initial successful tenderer, does not have an automatic right to be awarded the contract in those circumstances.

101. Third, if the insolvency administrator is bound to look to the initial tenderers, it might be deprived of the ability to seek the most advantageous person to take over the contract, in the interests of the creditors. To my mind, nothing in the Public Procurement Directive suggests that the EU legislature intended to restrict in that way any powers conferred on insolvency administrators by national law.⁴⁶

102. I therefore cannot concur with the Commission's view.

103. By contrast, as can be seen from the foregoing assessment, I am of the view that, provided the three conditions laid down in the provision at issue and set out in point 38 of this Opinion are satisfied, an interpretation of that provision as meaning that the previously awarded framework agreement or public contract alone may be transferred to a new contractor, with no requirement to carry out a new procurement procedure and without the new contractor being obliged to take

⁴² See point 49 of this Opinion.

⁴³ See point 33 of this Opinion.

⁴⁴ The Commission states that Italian law appears to have adopted a solution of that nature. I would point out that in their commentaries on the Italian legislation transposing Directive 2014/24, Marion Comba and Sara Richetto state that, in Article 110 D Lgs 50/2016, the Member State included an *option* for the contracting authority to turn to the initial tenderers in their order of ranking (see, Treumer, S. and Comba, M., *Modernising Public Procurement – The approach of EU member States*, Elgar, 2018, Chapter 7, p. 149).

⁴⁵ See point 89 of this Opinion.

⁴⁶ For clarification, this does not mean that merely any financial difficulty affecting the initial successful tenderer can lead to a replacement being appointed with no new tendering procedure in accordance with the Public Procurement Directive. A formal insolvency procedure must also have been commenced, as in the case in the main proceedings.

over another business of the initial contractor, addresses an actual problem in the life of a company while upholding the principles that govern public procurement enshrined in Article 18(1) of the Public Procurement Directive.

V. Conclusion

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

Article 72(1)(d)(ii) of Directive 2014/21/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 the fact that a new contractor has taken over the initial contractor's rights and obligations under a framework agreement after the initial contractor has been declared insolvent and the insolvency estate has transferred the agreement means that the new contractor must be deemed to have succeeded in full or in part into the position of the initial contractor within the meaning of that provision. That transfer is not required to be accompanied by a transfer to the new contractor of part of the initial contractor's business used to perform the framework agreement.