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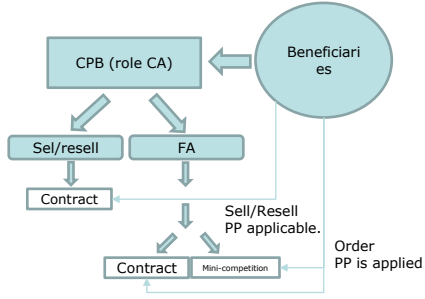
24 January 2024


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1. Exceptions in the directives: FA (1)


- Reg 2(1) defines a central purchasing body (CPB) as a contracting authority which:
 - a) **"acquires goods or services intended for one or more contracting authorities;**
 - b) **awards public contracts intended for one or more contracting authorities;**
 - c) **concludes framework agreements for work, works, goods or services intended for one or more contracting authorities"**
- Purchases may be managed through a CPB
- Authorities are deemed to have complied with the Regulations in so far as the CPB itself has complied





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1. Exceptions in the directives – FA (2)

- ASST valcamonica, C-216/17 dd. 19 dec 2018
- Confirmation in Simonsen & Weel, C-23/20 dd. 17 jun 2021
 - a contracting entity inviting tenders for a framework agreement is obliged to indicate the maximum quantity or value of the supplies or services that may become the subject of subsequent contracts.
 - The contracting entity is bound by the quantity or value indicated, and the framework agreement will no longer have any effect when the quantity or value indicated is reached (before the framework agreement comes to an end).
 - However, the CJEU adds the following key observations:
 - Under Article 72 of the Public Procurement Directive, significant modifications may be made to framework agreements, as long as such modifications are not substantial, provided that there is agreement to do so.
 - The obligation to indicate the maximum quantity or value can be met either in the contract notice or in the specifications, provided that the tenderers have unrestricted and direct access to such information free of charge, ie the tenderers' access to the specifications must not be subject to their prior confirmation of interest to the contracting entity.






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2. Applicability of PP directives (1)

- Applicability of the PP Directive in case of implementing bodies (private entities) that are road concessionaires**
- Background:** The beneficiary Ministry of Infrastructure and Habitation designated 5 implementing bodies (all road concessionaires), which are both private and public sector undertakings. All of them carry out relevant activities for transport under the Utilities Directive (i.e. provision of the infrastructure).
- Issue:** it was assessed on which basis the entities are carrying out the relevant activity for transport to determine whether these private sector undertakings fall under the application of the Utilities Directive.
- Assessment:** it focused on types of these entities to determine the applicability of the Utilities Directive:
 - The entities were not **"contracting authorities"*** in the meaning of the PP Directives as they were not a "public authority" and "bodies governed by public law".
 - It was assessed whether they are **"public undertakings"**:** i.e. whether the entity has autonomy in terms of how it carries out the tasks entrusted to it. Private entities are likely to be subject to public procurement rules if they are funded by the state, have publicly appointed board members or are otherwise subject to management supervision, audit or direction by public authorities. Therefore, organigrams and/or annual reports were verified if the Ministry has control over the implementing bodies.
 - It was verified whether the entities operate **on the basis of special or exclusive rights***** i.e. whether rights were granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria. The beneficiary clarified that granting of road concessions to private entities has been preceded by an international public tender. The granting criteria have included both technical/quality and financial/price factors, adjusted to the specific tender. These tenders have been open and competitive procedures, and subject to the control of the Court of Auditors. Therefore, it was excluded that these entities were granted special rights.
- Conclusion:** As the private undertakings did not fulfill conditions to be considered as any of the defined entities in the Directive, CINEA determined that these private undertakings are falling under the sound financial management principle.

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2. Applicability of PP directives (2)

Which are the questions to be asked?

- Regarding the applicable directive
 - **Utilities: Energy, Tpt (railroad, water)**
 - **BUT: roads → Classical Dir.**



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2. Applicability of PP directives (3)

When Utilities?: ECJ, C-521/18 dd. 28th of Oct 2020

- In particular, the Court of Justice underlined that, pursuant to Article 13(1) of the Utilities Directive, this directive shall apply to “activities relating to the provision of” postal services (namely services consisting of the clearance, sorting, routing and delivery of postal items), mail service management services and services concerning postal items such as direct mail bearing no address.
- This wording is similar to that which is used in Article 6(1) of the former version of the Utilities Directive, namely Directive 2004/17 (repealed by Directive 2014/25).
- In this regard, the Court of Justice observed that it had already ruled that Directive 2004/17 applied not only to contracts awarded in the sphere of one of the activities expressly listed therein (such as postal services), but also to contracts which, even though they were different in nature and could as such normally fall within the scope of the general public procurement directive, were used “in the exercise of activities defined in” the Utilities Directive. The Court inferred from this that where a contract awarded by a contracting entity was **“connected with an activity”** which that entity carried out in the utilities sectors listed in the Utilities Directive, in the sense that that contract was “awarded in connection with and for the exercise of” activities in one of those sectors, the contract was subject to the procedures laid down in that directive.





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3. Influence Sound financial management on PP

- Aviation companies → activity not subject to PP
 - **Only applicable if state owned companies and activity of general purpose**
 - **If no PP → sound financial management**
 - First question: are there any internal rules on procurement?
If so, where these internal rules applied or not? Is there any motivation?
 - Second question: which are the underlying documents proving the expenditures (if any)?
Are they in accordance with the grant agreement conditions: Article II.27.2 GA related to document retention.
Is there any incoherency? Article II.9.1 GA (sound financial management)
Do these documents form sufficient proof for the expenditure (declared costs)?






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4. Essential Security Interests – Art. 24 (2) Util Dir. – (1)

- **Article 24 (2) of the Utilities Directive.**
 - **(1) Security & Defence directive 2009/81/EU**
 - Goods and Services (and related works) related to Security and Defence
 - Dir similar to the Utilities directive with the exception of specific security of supply rules and rules on access from third countries
 - **(2) Exception based on national interest → puts Dir aside**
 - **(2) Exception based on art. 346 TFEU → puts treaty aside**






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4. Essential Security Interests – Art. 24 (2) Util Dir. – (2)

- Points of interest: C187/16 (Cons. 75 a.f.):
 - It is for the Member States to define their essential security interests and to define the security measures necessary for the protection of the **public** security of that Member State (see, by analogy, judgment of 16 October 2003, Commission v Belgium, C-252/01, EU:C:2003:547, paragraph 30).
 - Nevertheless, it should also be noted that measures adopted by the Member States in connection with the legitimate requirements of national interest are not excluded in their entirety from the application of EU law solely because they are taken, inter alia, in the interests of **public** security (see, to that effect, judgment of 8 April 2008, Commission v Italy, C-337/05, EU:C:2008:203, paragraph 42 and the case-law cited).
 - Moreover, the derogations at issue in the present action must, in accordance with the settled case-law relating to derogations from fundamental freedoms, be interpreted strictly (see, by analogy, as regards Article 346(1)(b) TFEU, judgment of 7 June 2012, Insinööritoimisto Instiimi, C-615/10, EU:C:2012:324, paragraph 35 and the case-law cited).
 - Furthermore, even though the article afford the Member States discretion in deciding the measures considered to be necessary for the protection of their essential security interests, those articles cannot, however, be construed as conferring on Member States the power to derogate from the provisions of the FEU Treaty simply by invoking those interests. A Member State which wishes to avail itself of those derogations must show that such derogation is necessary in order to protect its essential security interests. Such a requirement also applies to the extent that that Member State relies, in addition, on Article 346(1)(a) TFEU (see, by analogy, judgment of 4 September 2014, Schiebel Aircraft, C-474/12, EU:C:2014:2139, paragraph 34).
 - Accordingly, a Member State which wishes to avail itself of those derogations must establish that the protection of such interests could not have been attained within a competitive tendering procedure as provided for by Directives 92/50 and 2004/18 (see, by analogy, judgment of 8 April 2008, Commission v Italy, C-337/05, EU:C:2008:203, paragraph 53).






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4. Essential Security Interests – Art. 24 (2) Util Dir. – (3)

- **Action brought on 28 September 2021 – European Commission v Republic of Poland (Case C-601/21)**
- **Parties** Applicant: European Commission (represented by: A. Stobiecka-Kuik, G. Wils and P. Ondrůšek, acting as Agents) / Defendant: Republic of Poland
- **Form of order sought** → The applicant claims that the Court should: declare that, by adding exemptions, relating to the production of certain documents, printed matter and stamps and markings, which are not provided for in Directive 2014/24/EU on **public procurement**,¹ the Republic of Poland has failed to fulfil its obligations under Article 1(1) and (3) and Article 15(2) and (3) of Directive 2014/24/EU, read in conjunction with Article 346(1)(a) TFEU; order the Republic of Poland to pay the costs.
- **Pleas in law and main arguments**
- In transposing Directive 2014/24, Poland exempted the production of a wide range of documents, printed matter and stamps and markings from the scope of the procedures provided for in that directive. The exemptions introduced by Poland concern **public** documents (such as, for instance, national ID cards, passport documents and sailors' service record books); excise stamps, legal markings and vehicle inspection stickers; ballot papers and holographic markings placed on voting rights certificates; microprocessors with software used for the management of **public** documents; and IT systems and databases essential for the use of **public** documents. According to the Commission, the introduction of those exemptions amounts to infringement of Directive 2014/24, since the scope of that directive has been limited in a manner that is not justified by the provisions of Directive 2014/24 or Article 346 TFEU. The Commission relies on the judgment of the Court of Justice in Case C-187/16, Commission v Austria, as an important precedent in that regard.
- In the context of the pre-litigation procedure, Poland has argued that there is a need to protect the security of official documents. While agreeing that there is a need to guarantee the security and authenticity of those documents, the Commission considers that Poland has not demonstrated that the required protection, including protection against falsification or protection connected with the provisions on the protection of personal data, cannot be realised in the context of the **public procurement** procedure provided for in Directive 2014/24

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5. Rental Scheme for electric cars (1)

C-486/21 SHARENGO, 10.11.22

- City of Ljubljana engaged firm to establish and operate scheme for hire and sharing of electric vehicles
- ECJ held:
 - **this was a services concession**
 - **operator would pay for new vehicles, creation of parking spaces and charging stations (est. cost €14.5m)**
 - **not a supply contract, as City did not acquire vehicles for its own benefit**
 - **operator's revenue = fees to be paid by users**
 - **risk of operating service was transferred to operator**
 - **City did not protect operator against risk of losses**




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6. Scheme Farming Advisory Services (1)

C-9/17 MARIA TIRKKONEN, 01.03.18

- Rural Affairs Agency invited applications for “framework agreement” to provide advice to farmers
- Agency admitted all applicants who were qualified and experienced in relevant field and who passed an examination → Supreme Court of Finland referred question to ECJ
- ECJ ruled scheme was not a public contract:
 - **no need to apply PP Directive because Agency does not grant contractual exclusivity to any bidder(s)**
 - **Agency admits all candidates who satisfy its suitability requirements: no selection among them**
 - **decisive factor: CA did not compare tenders using award criteria**

• **C-410/14 Falk, 02.06.16:** German scheme to acquire medicines not a public contract, as accessible to any supplier meeting conditions




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7. Lease of a new building/land exemption (1)

C-537/19 COMMISSION v AUSTRIA, 22.04.21

- Directive 2014/24 applies to public works contracts, i.e. contract for execution, design or realisation of works per specified requirements
- But Art.10(a) excludes acquisition or rental of land or buildings
- Austrian CA entered into "lease" for new office, not yet built
- CA laid down specifications for building, e.g.
 - lifts to go from basement car park to top floor
 - building to meet "gold level" of Austria certification system
 - floors have specified height and load-bearing force
 - air conditioning units to be built into ceiling
 - building to meet standards on energy-saving and environmental impact
- Commission argued this was a public works contract
 - CA had an influence on design and planning of the works
 - went beyond usual requirements of a tenant
 - similar to ECJ ruling in [C-213/13 Pizzarotti](#)




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7. Lease of a new building/land exemption (2)

C-537/19 COMMISSION v AUSTRIA, 22.04.21

- had not exercised "decisive influence" over design
- decisive influence arises if CA lays down requirements for structure of building
 - e.g. regarding its size, external walls and load-bearing walls
 - but not usually if specifications relate only to interior fittings
- here, main features of building already decided when CA identified site and started to negotiate lease
- CA's specifications did not go beyond what a tenant of a new office building might normally require
- Suggests CA may specify detailed requirements without turning land deal into a works contract




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Recent case law/relevant cases

Selection




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8. Rights NON-EU Operators under Dir C-266/22 QINGDAO SIFANG, AG 11.05.23

- Contract in Romania for 20 new electric trains
- CA excluded QS because its head office is in China
- AG's Opinion:
 - Art. 25 of D2014/25 requires CAs to give equal treatment to non- EU economic operators if they are established in signatories to GPA or other international agreements
 - operators established in non-signatory third countries do not fall under Directive 2014/24
 - China is not a signatory
 - thus, operators from China do not enjoy rights provided for by Directive and cannot invoke a breach of EU law principles




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9. Exclusion due to doubts over solvency

C-101/18 IDI v ARCADIS, 28.03.19



- Contract for project management services
- CA provisionally awarded contract to a consortium
- Lead member of consortium then applied to a court, seeking an arrangement with its creditors
- CA excluded consortium due to concerns over its solvency
- ECJ held:
 - exclusion was permitted under EU law
 - by filing application, firm acknowledges financial difficulty, jeopardizing its financial stability
 - made no difference that it had reserved right to present a plan providing for continuation of its business

GROUNDINGS of EXCLUSION

Mandatory grounds include (in last 5 years):
 conviction for serious criminal offence (corruption, fraud, etc.)
 non-payment of taxes or social security contributions

Discretionary grounds include (in last 3 years):
 breaches of EU environmental, social or labour laws
 bankruptcy or insolvency
 grave professional misconduct
 agreements aimed at distorting competition
 conflict of interest
 serious misrepresentation in supplying selection data
 poor performance of a prior public contract

Any exclusion must be proportionate
 CA must take into account evidence of "self-cleaning" by bidder

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10. Exclusion of 2 Bidders owned by same entity (1)

C-416/21 LANDKREIS, 15.09.22

- 2 entities owned by same person bid for a bus transport contract
- CA excluded both bidders on basis of Art. 57(4)(d) of D2014/24: "plausible indications that economic operators have entered into agreements aimed at distorting competition"
- No breach of EU competition law (Art.101 TFEU) as the 2 bidders belonged to same "economic unit"
- CJEU held:
 - exclusion ground 57(4)(d) covers agreements that breach Art. 101 TFEU but may also cover other agreements
 - principle of equal treatment allows exclusion of bidders who belong to same economic unit and whose tenders (although submitted separately) are not autonomous or independent
 - principle would be infringed if related bidders were allowed to submit coordinated tenders




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10. Exclusion of 2 Bidders owned by same entity (2)

C-531/16 VSA VILNIUS v ECOSERVICE, 17.05.18

- Contract for waste management in Lithuania
- Bidders A and B were subsidiaries of Ecoservice and had same persons on their Boards of Directors
- CA awarded contract to bidder B
- VSA Vilnius complained; Supreme Court referred questions to ECJ
- ECJ held:
 - if CA has evidence that tenders may not be autonomous and independent, it is obliged to investigate
 - if tenders are found not to be autonomous and independent, the contract cannot be awarded to those tenderers
 - related bidders submitting separate offers in same procedure are not obliged to disclose the links between them, unless a law or tender condition expressly requires this




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11. Exclusion of Bidder for bad past performance (1)

C-267/18 DELTA v CNAIR 03.10.19

- Tender for public road-works contract in Romania
- bidder Delta had a previous public contract terminated early, due to its use of an unauthorised sub-contractor
- CA discovered this fact via a public register
- CA decided to exclude Delta
- ECJ ruled:
 - failure to disclose sub-contractor on previous contract was a serious deficiency (breach of trust)
 - this *may* justify exclusion from subsequent public contracts
 - but authority awarding new contract has to carry out its own assessment of bidder's reliability
 - Delta should have disclosed its past misconduct






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11. Exclusion of Bidder for bad past performance (2)

C-682/21 HSC BALTIC, 26.01.23

- Works contract in Lithuania awarded to 5-party consortium
- All 5 firms jointly and severally liable for proper performance
- Contract terminated early after lead party became insolvent and abandoned building site
- All 5 parties automatically put on blacklist of unreliable suppliers
- ECJ held:
 - unlawful for all 5 members to be automatically black-listed
 - contrary to EU principle of proportionality
 - CA must first assess any evidence put forward
 - firm must have opportunity to show that deficiencies which led to early termination were unrelated to its individual conduct
 - if firm not at fault, no need for self-cleaning measures
 - firm must have right to appeal against its entry on blacklist

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12. Requirement to hold national licence at time of bidding

C-06/20 INNOVE, 20.05.21

- Estonian contract to provide food aid to poor people
- CA required bidders to have an establishment and hold an activity licence in Estonia at time of bidding
- ECJ held:
 - this was disproportionate and contrary to principle of mutual recognition of qualifications
 - unfairly excluded foreign firms from bidding
 - bidder must be able to prove its suitability by means of licence or trade register in its home Member State
 - non-Estonian suppliers could be required to obtain a licence in Estonia if and when they won the contract
- N.B. C-436/20 ASADE, 14.7.22: ECJ held: a national rule cannot require bidders to be established, at time of submitting bid, in locality where the services are to be provided




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13. European Single Procurement Document

C-631/21 TAXI HORN, 10.11.22

- ESPD = self-declaration that economic operator meets selection criteria and is not within an exclusion ground
- Joint entity (a partnership) tendered for school bus contract in NL
- 2 partners were jointly and severally liable for contract performance
- Could joint entity submit just one ESPD?
- ECJ held:
 - joint entity must supply only its own ESPD if it bids on an individual basis and if it can perform contract using only its own personnel and materials
 - however, if joint entity intends to use resources of third parties (including its parents) to perform contract, then it must submit ESPDs for itself and for each of those third parties
 - makes no difference whether JV is permanent or temporary




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Recent case law/relevant cases

Submitting and awarding issues






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14. Vagueness of award criteria

C-54/21 ANTEA POLSKA, 17.11.22

- Contract for environmental management of rivers in Poland
- 3 award criteria: price (40%), project development design (42%) and description of manner of performance of contract (18%)
- Were latter 2 criteria too broad and vague?
- ECJ held:
 - such criteria are permitted, provided they are accompanied by indications enabling CA to make a specific and objective assessment of tenders submitted
 - such indications may include sub-criteria
 - criteria must allow for a sufficiently concrete comparative assessment of level of service offered by each tenderer
 - must not confer an unrestricted freedom of choice on CA
 - up to national court to decide whether these conditions met

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15. Evaluating experience of bidder team at award stage

C-601/13 AMBISIG, 26.03.15

- Portuguese contract for consultancy services
- Award criteria included experience and qualifications of bidder's team
- ECJ ruled:
 - such criteria are lawful, provided they relate to individuals put forward to perform contract
 - for “services of an intellectual nature”, abilities and experience of individual team members are decisive for evaluating quality of tenders
 - clarifies earlier ruling in C-532/06 Lianakis
- N.B. Art 67(2)(b) of Directive 2014/24: award criteria may include “organisation, qualification and experience of staff assigned to perform contract, where quality of these staff can have a significant impact on the level of performance”






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16. Duty to verify abnormally low tender

C-669/20: VERIDOS, 15.09.22

- Bulgarian public contract for issue of national identity cards
- Veridos claimed that winning tender was abnormally low
- Bulgarian law requires tender to be verified if price is <20% lower than the mean of all other tenders
- Not possible to calculate here, as only 2 tenders
- ECJ held:
 - if tender appears to be abnormally low, CA must require bidder to explain its price or costs [=*Art.69 of D2014/24*]
 - CA must assess whether tender abnormally low even if only 2 tenders: impossibility of applying national test is irrelevant
 - up to CA to identify whether any tenders “appear suspect”
 - comparison with other tenders is useful but not sole criterion
 - if tender appears “genuine”, CA does not have to investigate further

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17. Failure to meet minimum technical score

C-546/16 MONTE V MUSIKENE, 20.09.18

- Italian authority used open procedure to award supply contract
- 2 main award criteria: technical 50% and price 50%
- Technical proposal had to meet minimum threshold of 35 out of 50
- If not met, tender excluded before financial evaluation
- ECJ held:
 - this methodology is permitted under Directive 2014/24
 - authorities are free to determine minimum level of technical quality that tenders must provide
 - if technical needs not met, no obligation to consider price
 - irrelevant that Directive does not provide for successive stages in an open procedure




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Recent case law/relevant cases

Modification of contract




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CHANGE TO *EXISTING* CONTRACT MAY REQUIRE A NEW TENDER

- Per ECJ in [C-454/06 Pressetext](#), amendments during term of an existing public contract constitute a new award when they
 - render contract “materially different in character” and
 - demonstrate parties’ intention to “re-negotiate essential terms”
- An amendment “may be regarded as material” when it:
 - would have allowed for admission of different bidders or selection of a different bid in original competition
 - changes economic balance in favour of the contractor, in way not foreseen in terms of initial contract
 - extends contract scope considerably to encompass new services
- Principles now codified in Art. 72 of Directive 2014/24/EU or 89 of Dir 2014/25/EU




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18. 18-year extension of motorway concession (1)

C-549/14 COMMISSION V ITALY, 18.09.19

- In 1999, Italian roads authority granted concession to construct and operate new motorway
- Contract said concession would expire on 31 October 2028
- In 2009, new contract extended term to 31 December 2046
- Commission brought infringement action v Italy
- ECJ ruled:
 - Italy had infringed EU Directive 2004/18
 - extension by 18+ years was a substantial modification
 - it gave concessionaire much more time to exploit concession by charging M-way users
 - rejected Italy's argument that extension necessary to maintain economic balance of initial concession




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19. Renewal of Italian Lottery Concession (2)

C-721/19 SISAL, 02.09.21

- In 2009, Italy awarded lottery concession for 9 years (2010-2019), renewable once for another 9 years (2020-2028)
- In 2017, Italy extended the concession until 2028
- ECJ held:
 - extension was permissible, as it implemented a renewal clause contained in initial contract of 2009
 - made no difference that concession was awarded to a single operator, whereas national law allowed it to be awarded to up to 4 operators
 - change to timing of fee payable by concessionaire was not a substantial modification
 - a firm may appeal against renewal decision, even if it did not bid for initial concession, provided it can show an interest in being awarded concession at time of its renewal






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20. Major reduction in scope = new PP

C-549/14 FINN FROGNE, 07.09.16

- Telecoms contract for emergency services in Denmark
- Awarded to Terma in 2008; worth EUR 40-70 million
- Difficulties and delays in performance → dispute in 2010
- Under settlement agreement, contract scope reduced to EUR 11m
- Danish Supreme Court referred question to ECJ
- ECJ ruled:
 - settlement gave rise to new tendering obligation (per *Pressetext*)
 - reduction in scope was a material change, as it brought contract within reach of smaller suppliers
 - makes no difference that change is part of a dispute settlement
 - unpredictable nature of contract is not a defence



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20. Change of supplier after insolvency

C-461/20 ADVANIA, 03.02.22

- Swedish awarded contract for computer equipment
- Chosen supplier was later declared insolvent
- Insolvency administrator agreed to transfer contract to Advania
- Advania applied but was not shortlisted in initial competition
- ECJ ruled:
 - Advania was permitted to take over contract from insolvent firm
 - Art.72(1)(d)(ii) of Directive 2014/24 allows “succession” by new supplier into position of initial contractor following a corporate restructuring or insolvency
 - 3 conditions:
 - (i) new supplier must fulfil CA's initial selection criteria,
 - (ii) change must not entail other substantial modifications and
 - (iii) change must not be aimed at circumventing Directive

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