

**Amendments to a contract not governed by directives: Comments in the context of *Fastned Deutschland and Tesla Germany***

International Conference

20 years of Poland in the EU – challenges and opportunities for the Polish public procurement system

26 September 2024

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# The Facts of the Case (1)

**German Government and  
Autobahn GmbH des Bundes  
(Federal Motorway Company)**



**Die  
Autobahn**

**Concession contracts**

**for construction and operation of motorway service  
stations (refuelling and recreational facilities)**

**Autobahn Tank und Rast GmbH  
(private concessionaire)**



# History of Concession Contracts / Privatisation:

- Tank & Rast (**concessionaire**) was **originally government-owned**
- **Concessions** were awarded as **inhouse contracts** (although in view of planned privatization) from 1996 to 1998
- **After concessions were awarded**, Tank & Rast was **privatized** to private investors in 1998
- Privatisation by way of **informal competitive procedure** (i.e., **no formal EU procedure**)

# The Facts of the Case (cont.)

- **Original** concession contracts envisaged only **fossil refuelling facilities**
- **2021 German law** requires concessionaires to set up **electric fast-charging points** at their facilities, unless this conflicts with German public procurement law.
- In 2022, Autobahn GmbH and concessionaires agreed on **amendment to concession contracts** to include set-up and operation of **electric fast-charging points**
- Amendment was published ex-post in EU OJ. Based on article 72 (1) (c) of Directive 2024/24 (modification due to unforeseeable circumstances)

# The Facts of the Case (cont.)

- Fastned Deutschland and Tesla Germany filed joint **application for annulment** of the amendment.
- Argument: Amendment is **substantial modification** of concession contracts which requires formal tender procedure.
- **Background:** Fastned and Tesla are interested in setting up their own fast-charging infrastructure.

# Public Procurement Board (= first instance) decision:

- Applicants failed in first instance (VK Bund 15 June 2022, case VK 2-54/22):
  - Claim for annulment was admissible under German procurement review law. Applicants were also entitled to apply jointly, notwithstanding that they are competitors.
  - Claim was however considered without merit :
    - Modification was **not substantial** in the sense of article 72 (4) of Directive 2024/24, because “refuelling” in the original contracts had to be read in a functional way which also included electric recharging
    - Even if amendment was substantial, it was **justified by article 72 (1) (c)** of the Directive (unforeseeable circumstances)
    - Lack of formal EU tender procedure for privatisation in 1998 was immaterial because the focus of the concessions was on services; **service concessions having been exempt** from EU tendering in 1998.

# Court of Appeal Request for ECJ Preliminary Ruling:

- Düsseldorf Court of Appeals (= second and final instance) took different view (ruling of 16 June 2023, case VII-Verg 29/22, English translation available on Curia website)
- The court considered that the claim **may have merits**:
  - Modification is **substantial** in the sense of article 72 (4) of directive 2024/24
  - Amendment **would** however be **justified under article 72 (1) (c)** of Directive 2024/24
  - Court finds it **doubtful**, however, if article 72 (1) (c) of the Directive applies to modifications of **contracts which were originally awarded on an inhouse-basis if inhouse conditions no longer persist** at the time of the modification

# Court of Appeal Request for ECJ Preliminary Ruling: (cont)

- Court of Appeals' reasons for doubts :
  - **Wording** of Article 72 and recital 109 refers to “new procurement procedure” and “initial procurement procedure”, which suggests that rules on modification only apply to contracts which had originally been awarded by a (formal) procurement procedure.
  - However, the Court finds **ECJ case law ambiguous**:
    - In **Presstext** (C-454//06) and **Commission / Italy** (C-526/17 re motorway concession) the ECJ had applied its principles on modifications to contracts which had not been formally tendered because they were awarded before EU rules had come into force
    - On the other hand, in **City of Lerici** (C-719/20) the ECJ had not accepted replacement of contractor after takeover based on Article 72 (1) (d) for a contract which had originally been awarded inhouse, where the new contractor was private.
- Whether original award of the concession or the privatisation had been lawful was immaterial because the 6-month deadline for challenging those acts had long passed



# Comments

It is submitted that a distinction should be made:

- The **general principle** that **substantial modification** is equivalent to **new contract** (codified in Article 72 (1) (e) and (4) of the Directive) always applies, regardless of when and how the contract was awarded.
  - As a result, even if original contract was lawfully made without tendering (because rules were not yet in force, or due to inhouse privilege), such „**grandfathering**“ will generally **not survive a substantial modification**.
  - This is in line with *Presstext* (C-454//06) and *Commission / Italy* (C-526/17) as well as *City of Lerici* (C-719/20).
  - In *City of Lerici* (C-719/20, para. 58), in particular, the court referred to the principles of equal treatment and of transparency (i.e. **basic treaty principles**) to explain the illegality of substantial modifications of concessions.

# Comments (cont.)

On the other hand:

- The **special cases of allowed changes** in Article 72 (1) (b) to (d) are **limited to contracts** which were originally **properly tendered**:
  - These cases are **exemptions** from the general prohibition of substantial modifications.
  - Purpose is to give flexibility for circumstances that were unforeseeable in „preparation of the initial award“ (Recital 109 of the Directive)
  - Provisions suggest that they are meant to **preserve the fruits of the initial (proper) procedure**. Such privilege is undeserved if contract was never formally tendered.
  - In ***City of Lerici*** (C-719/20, para. 41) ECJ limited application of Article 72 (1) (d) to cases where new contractor **continues the performance** of the contract **in accordance with the requirements of the Directive**, including (inter alia) **equal treatment and effective competition**.
  - ECJ also referred to Article 72 (4) and its reference to the „**initial procedure**“ (para. 42)

# Comments (cont)

## Conclusion:

- Good reasons to expect that ECJ will **decline application** of Article 72 (1) (c) to Autobahn GmbH concession contracts.
  - Since concession contracts were not tendered, a substantial modification based on Article 72 (1) (c) would not be in line with „**continuing the performance** of the contract **in accordance with the requirements of the Directive**“.

## Additional note:

- It is **puzzling** that Düsseldorf court found it **immaterial** whether original contracting or privatisation were in **breach of procurement laws**.
- It is submitted that contracts that were **illegally awarded cannot benefit from the privileges** for substantial modifications conferred by Article 72 (1) (b) to (d).
- **Time limits** for competitors' legal challenges **do not cure the breach**.

# Questions?

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