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In case no. 1742-20, **Karlstad municipality** and **JCDecaux Sverige AB** (Appellants) v. **Clear Channel Sverige AB** (Respondent), the Supreme Administrative Court delivered the following judgment on 11 November 2020.

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## RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court rejects the appeals.

### BACKGROUND

1. The effectiveness of a contract which has been entered into between a contracting authority and an economic operator may be reviewed by administrative courts following an application by an economic operator who believes that it has incurred or can incur a loss. In the event the contract is a supplemental contract which involves a substantial modification of an existing contract, it may entail an illegal direct award of a contract. In such cases, the court shall, as a main rule, decide that the supplemental contract is ineffective, as a consequence of which any consideration shall be returned.
2. Karlstad municipality and JCDecaux Sverige AB entered into a service concession contract in September 1991. According to the contract, the company undertakes to provide bus shelters, city information columns and other installations to the municipality in exchange for the sole right to grant the right to advertise on these installations. The contracting parties have since modified the contents and term of the contract by means of several supplemental contracts. Through a supplemental contract of January 2018, they agreed that the contract would cover, *inter alia*, additional bus shelters and that the term of the contract would be extended by twelve years.
3. Clear Channel Sverige AB applied in February 2018 to the Administrative Court in Karlstad for a review of the effectiveness of the supplemental contract. The

company stated that the supplemental contract contains a substantial modification of the service concession contract and, consequently, constituted an illegal direct award of a contract. The municipality and JCDecaux were of the opinion that the case should be dismissed and stated that, in May 2018, they had reached an agreement according to which the supplemental contract would no longer apply and that the supplemental contract had not yet been executed in any respect. The administrative court was of the opinion that the examination in the case did not unilaterally indicate that the agreement constituted termination of the contract and that there were ambiguities regarding whether the contract, in any case, had been performed in part. Accordingly, the administrative court did not find cause to dismiss the case but declared the supplemental contract ineffective in a judgment of June 2019.

4. The Administrative Court of Appeal in Gothenburg rejected the appeals brought by the municipality and JCDecaux. The administrative court of appeal noted that there had been an illegal direct award of a contract for which there are special remedies such as ineffectiveness and the application for a procurement fine. According to the court, the parties could not, in a case such as the current one, dispose of the process in such a manner that, by terminating the agreement, they avoided a decision to determine ineffective the contract which had been entered into in derogation of the procurement law legislation.

### **CLAIMS, ETC.**

5. *Karlstad municipality* claims that the Supreme Administrative Court shall set aside the rulings of the lower courts and dismiss the case and states the following.
6. The agreement between the municipality and JCDecaux entails that the supplemental contract has ceased. No consideration has been exchanged between them. Accordingly, their civil law relationship is the same as it was prior to entering into the supplemental contract. The procurement law legal consequences which may be realised through ineffectiveness have already been achieved

through the agreement. It is not possible to determine ineffective a legal relationship which no longer exists. Clear Channel suffers no legal detriment in conjunction with a decision to dismiss and has no legitimate legal interest in that the supplemental contract, which has already been terminated, is determined ineffective. A judgment from an administrative court will lack legal force in any damages proceedings.

7. *JCDecaux Sverige AB* claims that the Supreme Administrative Court, by way of amendment to the rulings of the lower courts, is to dismiss the case or, in the alternative, reject or disallow the application for review. The company states the following.
  8. The purpose of the provisions regarding ineffectiveness is to restore the contracting authority's acquisition needs so that a correct procurement can take place in the event the needs persist. Since the contract already ceased to apply and no consideration had been exchanged, there are no acquisition needs to be restored and no transactions to be cancelled. Clear Channel has no legal interest in obtaining adjudication of its action and will not suffer any legal detriment in the event its action is dismissed.
  9. *Clear Channel Sverige AB* is of the opinion that the appeals are to be rejected and states the following.
10. The fact that a contract has been cancelled cannot entail that the purpose of the application for review of the effectiveness of the contract is moot even if a determination of ineffectiveness in certain cases has no particularly great practical effect. The principle regarding the right to effective review suggests that it is not possible for a contracting authority to create an impediment to review after carrying out an illegal direct award of a contract and thereby avoid sanctions such as a procurement fine and damages for costs of counsel.

## **REASONS FOR THE RULING**

### **The question in the case**

11. The question in the case is whether the purpose of an application for review of the effectiveness of a contract has become moot when the contract has been terminated by the contracting parties without any exchange of consideration.

### **Legislation, etc.**

12. The Act on Public Procurement of Concessions (2016:1147) is applicable in the case.
13. According to Chapter 16, section 13, first paragraph, the court shall make a determination whether a contract which has been entered into between a contracting authority or entity and an economic operator is ineffective where the contract has been entered into without prior publication in accordance with Chapter 8, sections 1 or 2 or Chapter 15, section 5.
14. According to Chapter 16, section 20, first paragraph, a contracting authority or entity which has not complied with the provisions of the Act shall compensate the loss thereby incurred by an economic operator. According to section 21, the action for damages shall be brought before a general court within a period of one year of the date on which the contract was entered into between the contracting authority or entity and the economic operator or has been determined ineffective in accordance with section 13 through a decision which has become legally binding. In the event an action is not timely brought, the right to damages is forfeited.
15. Chapter 17 contains provisions regarding procurement fines. Section 1 (3), and section 7, first paragraph provide that, when an application for a procurement fine is based upon a contracting authority or entity entering into a contract with an economic operator without prior publication in accordance with Chapter 8,

sections 1 or 2 or Chapter 15, section 5 and one or more economic operators have applied for review of the effectiveness of the contract within the periods set forth in Chapter 16, section 17, the application may not be made before such period has expired and all decisions based on the review have become legally binding. The application must be received by the administrative court within six months of the date on which all decisions based on the review have become legally binding.

### **The Court's assessment**

16. Clear Channel maintains its request for a determination of ineffectiveness of the supplemental contract between Karlstad municipality and JCDecaux notwithstanding that Karlstad municipality and JCDecaux agreed that the contract will cease to apply without having been implemented in any respect. The question is whether Clear Channel nonetheless may have a legitimate interest in an adjudication of the application. Clear Channel has stated that the review of the effectiveness of the supplemental contract is material to the questions of procurement fine and damages for cost of counsel.
17. The review of the effectiveness of a contract, procurement fine and damages are legal remedies in the procurement area. The European Court of Justice has established that it is for the Member States to ensure that the effectiveness of the remedies directives are not undermined when determining the detailed procedural rules governing the remedies intended to protect the rights conferred by EU law on candidates and tenderers harmed by decisions of contracting authorities (see *Hochtief*, C-300/17, EU:C:2018:635, paragraph 38, and case law stated therein).
18. An application for a procurement fine pertaining to an illegal direct award of a contract need not be preceded by review of the effectiveness of the contract entered into, but it is only required that the contracting authority or entity has entered into a contract with the economic operator which is binding according to civil law (Government Bill 2009/10:180, pp. 189 and 367 f.). In the event one or more economic operators have applied for review of the effectiveness of the

contract, however, an application for a procurement fine may not be made before all decisions based on the review have become legally binding. The purpose of this is to avoid parallel proceedings (see, *ibid.*, Government Bill, pp. 207 f. and 371 f.). A decision to dismiss a case regarding review due to the fact that the purpose of the application is moot thus does not affect the possibilities to apply for a procurement fine. Accordingly, there is no cause to examine the question regarding the effectiveness of the cancelled contract for this particular reason.

19. Questions regarding damages are determined by general courts. According to the case law of the Supreme Court, the cost incurred by a tenderer in successfully pursuing review proceedings may constitute a compensable loss under certain circumstances (see case NJA 2018, p. 1127, sections 28–32, and the case law stated therein).
20. The right to damages is forfeited if the action is not brought before a general court within one year of the date on which the contract was entered into or was determined ineffective through a ruling which has become legally binding. In the event an administrative court dismisses the case without a trial on the merits, there is a risk that the period of time in which to bring the action for damages will expire. This could entail that the economic operator, in such cases, is deprived of the right to an effective legal remedy.
21. The relevant supplemental contract was entered into in January 2018. When Clear Channel applied for review of the effectiveness of the contract, the supplemental contract was still in force. The period within which to bring an action for damages based on the date on which the contract was entered into expired in January 2019. The administrative court issued judgment in June 2019. Clear Channel's only possibility to bring a claim in damages was thereby that the application for review of the effectiveness of the contract was granted and that the period of time for the action for damages was thus calculated from the date on which the decision regarding the determination of ineffectiveness became legally binding. Against this background and since damages is one of the legal remedies in the

procurement area, Clear Channel is deemed to have a legitimate interest in obtaining an adjudication of the application. Accordingly, the case will not be dismissed.

22. The Supreme Administrative Court concurs with the assessment by the lower courts that the supplemental contract which was concluded between the municipality and JCDecaux constitutes an illegal direct award of a contract and, thus, that it is to be determined ineffective. Accordingly, the appeals are rejected.
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Justices Helena Jäderblom, Thomas Bull, Mahmut Baran, Leif Gäverth and Marie Jönsson have participated in the ruling.

Judge Referee: Jack Hillerström-Forsyth.