

Case C-155/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

22 February 2019

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

17 January 2019

Appellants:

F.I.G.C. — Federazione Italiana Giuoco Calcio

Consorzio Ge.Se.Av. s.c. a r.l.

Respondent:

De Vellis Servizi Globali s.r.l.

Intervening parties:

Consorzio Ge.Se.Av. s.c. a r.l., Comitato Olimpico Nazionale Italiano — C.O.N.I.

F.I.G.C. — Federazione Italiana Giuoco Calcio

Subject-matter of the main proceedings

Two appeals, lodged by the Federazione Italiana Giuoco Calcio (the Italian Football Federation, ‘the FIGC’) and Consorzio Ge.Se.Av. s.c. a r.l. (‘Consorzio Ge.Se.Av.’), respectively against judgment No 4101/2018 of the Tribunale Amministrativo Regionale per il Lazio — sede di Roma (Lazio — Rome Regional Administrative Court) concerning the negotiated multiple procedure, opened by the FIGC, for the award of the contract for portorage services for the team accompanying the national football squads, and at the FIGC’s store, for a period of three years.

Subject-matter and legal basis of the reference

The possibility of classifying the national sports federations, and in particular the FIGC, as bodies governed by public law within the meaning of Article 2(1)(4) of Directive 2014/24/EU and Article 3(1)(d) of the Codice (italiano) dei contratti pubblici ((Italian) Code on public contracts), and whether, therefore, the FIGC is required to apply the rules on public and open tendering (that is to say the rules on advertising invitations to tender) in respect of the award of services contracts, in which case it would be subject to the jurisdiction of the administrative courts as regards appeals against decisions awarding such contracts, pursuant to Article 133(1)(e)(1) of the Codice del processo amministrativo (Code of Administrative Procedure).

Questions referred

First question

- On the basis of the characteristics of national sports law, can the *Federazione calcistica italiana* (Italian Football Federation, ‘FIGC’) be classified as a *body governed by public law* in so far as it was established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character?

- In particular, is the requirement relating to the purpose of the body satisfied in respect of the *Federation*, even in the absence of a formal act establishing a public authority and despite its membership base, on account of its incorporation into a sector (sports) organised in accordance with models of a public-law nature and the fact that it is required to comply with the principles and rules drawn up by the *Comitato olimpico nazionale italiano* (Italian National Olympic Committee, ‘the CONI’) and international sporting bodies, as a result of the recognition, for sporting purposes, of the national public entity?

- Furthermore, can this requirement arise in relation to a sports *federation* such as the *Federazione italiana giuoco calcio*, which has the ability to fund itself, in respect of an activity of no significance in the context of public law, such as that at issue in this case, or must the requirement that the application of the rules on public and open tendering be ensured in any event, where such an entity awards any type of contract to third parties, be regarded as taking precedence?

Second question

- On the basis of the legal relationship between the *CONI* and the *FIGC* (*Federazione Italiana Giuoco Calcio*), does the former have a dominant influence over the latter in the light of the legal powers relating to recognition of the undertaking for sporting purposes, approval of annual budgets, supervision of the management and proper functioning of the bodies, and placing the entity into receivership?

- On the other hand, are those powers insufficient to meet the requirement relating to the *dominant public influence* of a *body governed by public law* on account of the significant participation of the presidents and representatives of the sports federations in the key bodies of the *Olympic Committee*?

Provisions of EU law relied on

Directive 2014/24/EU, in particular Article 2(1)(4)(a), (b) and (c).

Provisions of national law relied on

Decreto legislativo 18 aprile 2016, n. 50 ('Codice dei contratti pubblici') (Legislative Decree No 50 of 18 April 2016 ('Code on public contracts')), in particular: Article 3(1)(d) which establishes the concept of a body governed by public law; Article 3(1)(d)(2) on the requirement relating to legal personality; Article 3(1)(d)(1) relating to the element of purpose; and Article 3(1)(d)(3) on the requirement relating to dominant public influence.

Decreto legislativo 2 luglio 2010, n. 104 (Legislative Decree No 104 of 2 July 2010), in particular: Article 133(1)(e)(1); Article 133(1)(z), under which exclusive jurisdiction for the following is conferred on the administrative courts: '*disputes concerning decisions of the Italian National Olympic Committee or sports federations and not reserved to judicial bodies in sport and excluding those relating to property relationships between clubs, associations and athletes*'; and Article 133(1)(z-septies).

Decreto legislativo 23 luglio 1999, n. 242, legge di riordino del Comitato olimpico nazionale (Legislative Decree No 242 of 23 July 1999, the law reorganising the National Olympic Committee), in particular: Articles 1 and 2, Articles 4 to 8, Article 13, Article 15.

Statuto del CONI (Statute of the CONI), in particular: Article 22; Article 23 on the tasks of the national sports federations, that is to say '*the admission and affiliation of clubs, sports associations and individual members; removal for any reason and changes to provisions on admission or affiliation; monitoring of the proper conduct of competitions and professional sporting championships; the use of public support; the prevention and combating of doping: activities relating to Olympic and high-level training, and the training of technicians; the use and management of public sports facilities*'.

Legge 16 febbraio 1942, n. 426 (Law No 426 of 16 February 1942), in particular Article 5 thereof, which classified the federations as bodies of the CONI.

Decreto-legge 19 agosto 2003, n. 220 (Decree-Law No 220 of 19 August 2003), in particular Article 1(1): '*The Republic recognises and promotes the autonomy of the national rules of sport as a constituent part of the international rules of sport overseen by the International Olympic Committee*'; Article 1(2): '*The relationship*

between the rules of sport and the Republic's legal rules shall be governed by the principle of autonomy, except in cases of relevance [to the latter] of personal rights associated with sport'; and Article 3, as amended by Article 1(647) of legge 30 dicembre 2018, n. 145, sulla ripartizione della giurisdizione tra il giudice amministrativo e il giudice sportivo (Law No 145 of 30 December 2018 on the division of jurisdiction between administrative courts and sports tribunals).

Succinct presentation of the facts and the main proceedings

- 1 By an action brought before the Tribunale Amministrativo Regionale per il Lazio (Lazio Regional Administrative Court), the company De Vellis Servizi Globali s.r.l. ('De Vellis Servizi Globali') challenged the decisions concerning the negotiated multiple procedure, opened by the FIGC, for the award of the contract for portage services for the team accompanying the national football squads and at the federal store in Rome for a period of three years, for which that company had been invited to tender. It challenged the manner in which the tendering procedure was conducted, alleging infringement of the advertising rules down in the Code on public contracts, and challenged the award of the contract to Consorzio GE.SE.AV.
- 2 By judgment No 4101/2018, the Regional Administrative Court allowed the action brought by De Vellis Servizi Globali and annulled the award of the contract to Consorzio GE.SE.AV. In particular, in that judgment the Regional Administrative Court categorised the FIGC as a body governed by public law, dismissed the objection alleging lack of jurisdiction raised by the defendants, and annulled the decisions in the tendering procedure, as requested by De Vellis Servizi Globali.
- 3 The FIGC and Consorzio GE.SE.AV lodged separate appeals against that judgment.

The essential arguments of the parties to the main proceedings

- 4 Both the appellants challenge the finding that the dispute falls within the jurisdiction of the administrative courts and that the FIGC can be classified as a body governed by public law. As regards the substance, they challenge the fact that the action brought by De Vellis Servizi Globali was upheld at first instance.
- 5 In particular, the FIGC disputes the finding that it is subject to the dominant influence of the CONI, arguing that, on the contrary, the relationship is the other way around since the FIGC sits on the council and board of the CONI, that is to say the highest bodies thereof. In support of its arguments, the FIGC recalls the question referred for a preliminary ruling to the Court of Justice by the Corte dei Conti (Court of Auditors) in its judgment of 10 October 2017. The FIGC also challenges the finding that the powers which the CONI has over it are the same as the supervision laid down for a body governed by public law and notes that the

approval of the FIGC's annual budget by the CONI is limited to verifying the use made of public support which, for the FIGC, is minor.

Succinct presentation of the reasons for the request for a preliminary ruling

- 6 In the Italian system the task of organising and developing national sport is entrusted to a public entity, the CONI, which has legal personality under public law and is subject to the supervision of the *Ministro per i beni e le attività culturali* (Minister for Cultural Heritage and Activities), pursuant to Legislative Decree No 242/1999. The CONI also comprises the confederation of the various national sports federations, each of which is competent for a sport and the organisation of competitions related to it. They are by nature associations with legal personality under private law, subject, on a residual basis, to the Civil Code. Furthermore, even though they are classified as private associations, the sports federations perform tasks in the context of public law and cannot operate for profit.

- 7 On the one hand, there is profound interpenetration of the bodies of the CONI and the sports federations: the presidents of the latter sit on the National Council of the CONI, whilst representatives of the sports federations sit on the National Board, the body responsible for overall guidance of the CONI's administrative and management activities. On other hand, the CONI has, however, a series of powers over the sports federations. First of all, the latter are recognised, for sporting purposes, by the CONI's National Council and the relevant annual budgets are approved by its National Board (Article 15(3) and (5) respectively of Legislative Decree No 242/1999). Furthermore, the sports federations '*carry on sporting activities in accordance with the decisions and guidance of the IOC [International Olympic Committee], the international federations and the CONI, also having regard to the significance of certain types of activity in the context of public law*' (Article 15(1) of Legislative Decree No 242/1999) and have autonomy over statutes and regulations, which is nonetheless to be exercised '*in accordance with the national and international rules on sport*' (see that paragraph 1), and '*in compliance with the core principles of the National Council*' (Article 22 of the CONI's Statute). As regards their general activities, the sports federations are subject to the CONI's power of supervision concerning their '*proper functioning*', and that supervision can also result in receivership where there are serious management irregularities and infringements of the rules of sport or where it is impossible to guarantee the '*proper launch and conduct of sporting events*' (Article 23(3) of the CONI's Statute). Lastly, as regards the conduct of activities '*of significance in the context of public law*' identified in Article 23 of the CONI's Statute, the sports federations '*shall comply with the guidance and checks of the CONI and operate in accordance with the principles of impartiality and transparency*', even though that significance in the context of public law '*does not alter the ordinary private-law regime governing individual decisions and the associated personal rights*' (Article 23(1-bis) of the Statute).

- 8 As regards jurisdiction in sporting matters, it should be pointed out that *‘[t]he relationship between the rules of sport and the Republic’s rules of law shall be governed by the principle of autonomy, except in cases of relevance [to the latter] of personal rights associated with rules of sport’* (Decree-Law No 220/2003, Article 1(2)). In particular, the Italian legislature recently took action on the relationship between sports tribunals and State courts in the sense that it limited the autonomy of the former to the benefit of the latter. The power to rule on disputes *‘concerning decisions to admit to or exclude from professional competitions professional clubs or sports associations, or howsoever affecting participation in professional competitions’* is *‘in any event’* reserved to the State courts [Article 3(1) of Decree-Law No 220/2003 and Article 133(1) (*z-septies*) of Legislative Decree No 104/2010].
- 9 The referring court asks whether the sports federations, and in particular the FIGC, can be classified as bodies governed by public law which are therefore subject to the rules on public and open tendering relating to the award of public service contracts. It also highlights the cross-border interest of the present dispute which relates not only to the contract for services at issue, but more generally the contractual activity of the Italian sports associations and that of the FIGC in particular.
- 10 In the view of the referring court, it is clear that the FIGC satisfies the requirement relating to legal personality under Article 2(1)(4)(b) of Directive 2014/24/EU, whereas it is disputed whether the other two requirements for the existence of a *body governed by public law*, that is to say the element relating to purpose (whether the *federation* is established *‘for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character’* within the meaning of Article 2[1][4](a) of Directive 2014/24/EU) and the requirement relating to *‘dominant public influence’* ([whether] the management of the FIGC is *‘subject to management supervision’* by the CONI, pursuant to Article 2[1][4](c) of Directive 2014/24/EU) are met.
- 11 In that regard, the Consiglio di Stato (Council of State) states that the FIGC, unlike other sports federations, does not obtain most of its funding from the CONI and, given football’s capacity to mobilise major financial resources, is by contrast able to fund itself. Furthermore, not more than half its bodies are appointed by the CONI.
- 12 First, as regards the requirement relating to purpose, the Council of State notes that the concept of *‘established specifically’* and the functional link with the *‘general interest’* relate to a decision in the exercise of public powers, that is to say a law or a judgment, which, in the case of the sports federations, does not appear to exist, in so far as under Article 15(2) of Legislative Decree No 242/1999 they are associations with legal personality under private law, subject, on a residual basis, to the Civil Code. In the view of the Council of State, the Italian legislature considered that the organisation of the individual sports and the competitions relating to them are an expression of civil society, of which the State

merely recognises the established structures, in accordance with the procedures for recognising legal persons under private law, on the basis of requirements entirely predefined by law, in respect of which the court having jurisdiction can only rule on whether or not they are met, without assessing the interests with the view to purposes of general interest being pursued. In support of this stance, the Council of State points out that the '*significance in the context of public law*' of the activities which the sports federations carry on to safeguard the general interests attributed institutionally to the CONI '*does not alter the ordinary private-law regime governing individual decisions and the associated personal rights*' (Article 23(1-*bis*) of the CONI Statute). That provision of the statute is connected with the general autonomy of entities established by law and is an immediate consequence of their separate existence from the State.

- 13 In that respect, the Council of State points out that there is, however, an element of uncertainty. Although autonomous, the sports federations are nonetheless required by law to pursue objectives in the public interest laid down in law, which form the basis for their establishment and are the source of their public authority. The activities of '*significance in the context of public law*' entrusted to the sports federations under Article 23 of the Statute of the CONI are of general relevance, connected with the organisation of sport at national level, which is attributed institutionally to the CONI. They are activities which appear to cover the entire field of operation of the sports federations and the very reasons for their establishment. Every other activity, including the portage service for the national football squads at issue in the main proceedings, appears instrumental as regards the aforementioned tasks of '*significance in the context of public law*', to the point of being subsumed within them. Therefore, in the view of the Council of State, the formal classification *in law* does not determine whether or not public character is attributed to a person established by that law. Also from the point of view of EU law, the status of the *body governed by public law*, in the field of public contracts, is independent of any *private* nature of the person awarding a contract and, through the requirement relating to purpose under discussion, requires that consideration be given to the actual substance of its powers. In that regard, the referring court recalls the principle laid down by the Court of Justice in the judgment of 15 January 1998, *Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck*, C-44/96, ECLI:EU:C:1998:4, in which it ruled that an undertaking having special and exclusive rights, to which national law attributed tasks in the public interest, must be considered a body governed by public law even where those tasks constitute only part of the activities of the undertaking which, in other respects, operates on the market.
- 14 In support of that second interpretation, the Council of State observes that sports federations, in performing those tasks, are required to comply with the '*decisions and guidance of the IOC, the international federations and the CONI*' and that, in carrying on the activities of '*significance in the context of public law*', they are required to comply with the '*the guidance and checks of the CONI*' and observe the public-law principles of '*impartiality and transparency*' for purposes in the general interest. In that respect, the Council of State also recalls the powers of

supervision which the CONI has over the sports federations, which are comparable to the relationship between bodies within a legal person governed by public law (approval of the annual budget, supervision of management and compliance with the rules on sport, and receivership of the federal entity). Lastly, the Council of State observes that sports federations are, before being recognised as associations governed by private law, subject to recognition ‘*for sporting purposes*’ by the CONI. Therefore, recognition for sporting purposes could be compared to the establishment, provided for when applying the requirement relating to purpose, of a body governed by public law.

- 15 Consequently, the Council of State finds that, although classified *in law* as associations governed by private law and organised according to a model based on freedom as to the objective pursued, the sports federations have in fact an institutional nature determined by law or decision of the authority (or the international sports bodies), not only as regards the essential structure but also the main areas of action and the methods by which that action is to be carried out, with the consequent removal or reduction of the organisational scope and freedom inherent in private autonomy.
- 16 However, the Council of State considers that, whilst it could be held, on the one hand, that the provisions under examination simply serve overall to ensure the proper performance of the tasks of significance in the context of public law entrusted to the sports federations on the basis of an exhaustive list, it could be held, on the other, as regards the remaining activities, including the activity serving to award the contract for the portage services, that a general status of entity governed by private law remains, with no obligation to meet needs in the general interest or observe the principles of impartiality and transparency. This could apply especially to the FIGC on account of its ability to fund itself in the sense that the requirements relating to compliance with the rules on public and open tendering might not apply to it. In that respect, the Council of State recalls the abovementioned judgment in Case C-44/96, in which the Court of Justice ruled that a company in which the company on which special and inclusive rights were conferred has a holding is not a body governed by public law on the ground that the general interests met by the company in which the holding is held were commercial in nature. Consequently, the Council of State considers that it is necessary to establish whether the relationship between the CONI and the sports federations, as defined in law, rather than on the basis of the relationship of control between bodies or similar, draws all the activities of the sports federations into the public-law sphere of the CONI and whether this could apply in particular to the FIGC given the prevalence of its own resources over funding from the CONI.
- 17 Secondly, as regards the requirement relating to the dominant public influence of the CONI, by virtue of its powers over the sports federations, the Council of State observes that there is a great deal of uncertainty in that regard, primarily on account of the interpenetration of the relevant bodies expressed in the composition of the National Council and Board of the CONI and the fact that the CONI’s

power of supervision relates to the *'proper functioning'* of the sports federations in general. Consequently, contrary to the FIGC's contention, the Council of State finds that that supervision is not limited merely to monitoring that public resources are properly managed, when approving the annual budget, and can include placing a sports federation in receivership. In that regard, the Council of State observes that the power to place in receivership is provided for also where a sports federation is unable to ensure the *'proper launch and conduct of sporting events'*, that is to say in respect of that activity of a sports federation in which the public interest in the organisation of sport is particularly relevant. In addition, a further cause of uncertainty is the fact that, notwithstanding the abovementioned composition of the main bodies of the CONI, the relevant associated bodies must fulfil the official obligations attaching to them and that the CONI, in turn, is subject to supervision by the Minister for Cultural Heritage and Activities who *'can order the dissolution of the national board and the removal of the president of the CONI for serious and persistent failure to comply with the law and the rules, for serious administrative irregularities, for failure to perform functions, for serious administrative deficiencies such as to compromise the normal functioning of the entity, or for making it impossible for the bodies of the entity to function'*, pursuant to Article 13 of Law No 242/1999.

WORKING DOCUMENT