

Case C-472/19

Request for a preliminary ruling

Date lodged:

20 June 2019

Referring court:

Conseil d'État (France)

Date of the decision to refer:

14 June 2019

Applicant:

Vert Marine SAS

Defendant:

Premier ministre

Ministre de l'Économie et des Finances

CONSEIL D'ÉTAT

acting

in its judicial capacity

[...]

Having regard to the following procedure:

By an application and a reply, lodged on 20 March and 26 September 2018 at the secretariat of the judicial section of the Conseil d'État (Council of State, France), Vert Marine requests that the Conseil d'État:

- 1) annul as ultra vires the rejection implied by the lack of response from the Premier ministre (Prime Minister, France) to its request for the repeal of Articles 19 and 23 of décret n° 2016-86 du 1er février 2016 relatif aux contrats de concession (Decree No 2016-86 of 1 February 2016 on concession contracts);

2) order the Premier ministre (Prime Minister) to repeal those provisions and to replace them with provisions which make it possible to ensure that that decree complies with EU law within a period of three months following the notification of the decision to be delivered;

[...]

It submits that the regulatory provisions the repeal of which it has requested:

- [...] [consideration of national constitutional law]
- implement a system of mandatory exclusions from tendering which are incompatible with Article 38 of Directive 2014/23/EU of 26 February 2014 on the award of concession contracts. **[Or. 2]**

By a statement of defence, lodged on 26 July 2018, the Premier ministre (Prime Minister) declares that he endorses the observations submitted by the ministre de l'économie et des finances (Minister for the Economy and Finance).

By a statement of defence, lodged on 27 July 2018, the ministre de l'économie et des finances (Minister for the Economy and Finance) contends that the action should be dismissed. He submits that the application is inadmissible since Vert Marine has no interest in bringing proceedings and the pleas raised by the applicant are unfounded.

[...]

Having regard to:

- the Treaty on the Functioning of the European Union;
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014;
- the code de la commande publique (Public Procurement Code);
- the code pénal (Criminal Code);
- the code de procédure pénal (Code of Criminal Procedure);
- Order No 2016-65 of 29 January 2016;
- Decree No 2018-1075 of 3 December 2018;

[...]

Whereas:

1. The competent authority, which has received a request for the repeal of an unlawful provision, must comply with that request, whether that provision has been unlawful since the date it was signed, or whether it is unlawful as a result of factual or legal circumstances which occurred after that date. Where, subsequent to the bringing of an action against the refusal to repeal those regulatory provisions, the authority which adopted the provision at issue expressly or implicitly repeals it, the dispute arising from that refusal to repeal the provisions becomes devoid of purpose. The situation is different, however, where that same authority reproduces, in a new regulation, the provisions it has repealed, without amending them or by making only editorial amendments to them.
2. Section II of Article 19 of the décret du 1^{er} février 2016 relatif aux contrats de concession (Decree of 1 February 2016 on concession contracts) provides that each candidate for the award of a concession contract must produce all of the documents showing that he is not subject to any of the exclusions from the procedure for procurement by concession contracts laid down in Articles 39, 40 and 42 of the Order of 29 January 2016 on concession contracts. Section II of Article 23 of that decree adds, in its second subparagraph, that inadmissible applications are to be eliminated, stipulating that, inter alia, **[Or. 3]** ‘an application submitted by a candidate who is unable to take part in the procurement procedure pursuant to Articles 39, 40, 42 and 44 of the Order of 29 January 2016 shall be inadmissible’.
3. Although it is clear from the documents before the court that Articles 19 and 23 of the décret du 1^{er} février 2016 relatif aux contrats de concession (Decree of 1 February 2016 on concession contracts) were repealed by the décret du 3 décembre 2018 portant partie réglementaire du code de la commande publique (Decree of 3 December 2018 on the regulatory part of the Public Procurement Code), those provisions have been reproduced, receiving only editorial amendments, in Articles R. 3123-16 to R. 3123-21 of the code de la commande publique (Public Procurement Code). Therefore, the claims for their repeal have not become devoid of purpose and must be regarded as being directed against those latter articles.

Admissibility of the application:

4. It is clear from the documents before the court that Vert Marine specialises in the delegated management of sports and leisure facilities and that the core part of its business stems from the use of concession contracts with public authorities. This therefore shows an interest which gives it standing to institute proceedings on the ground of misuse of powers against the refusal to repeal the regulatory provisions at issue in so far as they do not provide for a compliance mechanism to enable an economic operator that is a candidate for the award of a concession contract to avoid the exclusions from tendering provided for in the event of a conviction for certain offences.
5. [...]. [considerations of national procedural law]

The substantive legality of the regulatory provisions at issue:

6. Vert Marine submits that Articles 19 and 23 of the Decree of 1 February 2016, the provisions of which have been reproduced in the code de la commande publique (Public Procurement Code), are unlawful in so far as they apply Article 39 of the Order of 29 January 2016, which is incompatible with the objectives of Article 38 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.
7. Contrary to the submissions of the ministre de l'économie et des finances (Minister for the Economy and Finance) in the defence, such a plea may rightly be raised since Articles 19 and 23 of the decree, which list the documents to show that the [Or. 4] candidate is not subject to any exclusions from tendering, must be regarded as having been adopted for the purposes of Article 39 of the order.
8. Article 38 of Directive 2014/23/EU lays down compulsory or optional grounds for excluding economic operators from concession award procedures. Paragraph 4 thereof sets out the offences in respect of which the conviction of an economic operator necessarily results in exclusion from participating in concession award procedures. However, in accordance with Article 38(9), *'Any economic operator that is in one of the situations referred to in paragraphs 4 and 7 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of the relevant ground for exclusion. If such evidence is considered to be sufficient, the economic operator concerned shall not be excluded from the procedure. / For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator concerned shall receive a statement of the reasons for that decision. / An economic operator which has been excluded by a final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective'*.

Article 38(10) provides: *'By law, regulation or administrative provision and having regard for Union law, Member States shall specify the implementing conditions for this Article. They shall in particular, determine the maximum period of exclusion if no measures as specified in paragraph 9 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 4*

and three years from the date of the relevant event in the cases referred to in paragraph 7’.

Those provisions are clarified by recital 71 of the directive, in accordance with which: *‘Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the concession award procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities or contracting entities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task’.* [Or. 5]

9. Under Article 39 of the ordonnance du 29 janvier 2016 relative aux contrats de concession (Order of 29 January 2016 on concession contracts), now reproduced in Article L. 3123-1 of the code de la commande publique (Public Procurement Code): *‘The following shall be excluded from the procedure for procurement by concession contracts: / (1) Persons who have been the subject of a conviction by final judgment for one of the offences listed in Articles 222-34 to 222-40, 373-7, 373-3, 374-7, 324-1, 324-5, 324-6, 421-1 to 421-2-4, 421-5, 432-10, 432-11, 432-12 to 432-16, 433-1, 433-2, 434-9, 434-9-1, 435-3, 435-4, 435-9, 435-10, 441-1 to 441-7, 441-9, 445-1 to 445-2-1 or 450-1 of the code pénal (Criminal Code), Articles 1741 to 1743, 1746 or 1747 of the code général des impôts (General Tax Code), and, in respect of concession contracts which are not defence or security concession contracts, Articles 225-4-1 and 225-4-7 of the code pénal (Criminal Code), or for concealing such offences, and for equivalent offences provided for in the legislation of another Member State of the European Union. / A conviction by final judgment for one of those offences or for concealing one of those offences from a member of the managerial, administrative, management or supervisory board or from a natural person who has the powers of representation, decision or control of a legal person shall lead to that legal person being excluded from the procedure for procurement by concession contracts, so long as that natural person performs those duties. / Exclusion from the procedure for procurement by concession contracts pursuant to point 1 shall apply for a period of five years from the date of delivery of the sentence ...’.*

10. Vert Marine submits that the French law is contrary to the objectives of the Directive of 26 February 2014 since neither the provisions of national law cited in the preceding paragraph nor any other provision provide for the possibility, for an operator that has been convicted by final judgment of one of the offences listed and that, therefore, in accordance with Article 39(1) of the Order of 29 January 2016, is excluded from procedures for procurement by concession contracts for a period of five years, to implement specific measures intended to demonstrate its reliability to a contracting authority.
11. The response to that plea depends on whether the Directive of 26 February 2014 must be interpreted as strictly precluding the legislation of a Member State from not giving an economic operator that falls under a ground for exclusion such as those set out in Article 39(1) of the Order of 29 January 2016 the opportunity to provide evidence to the effect that the measures it has taken are sufficient to demonstrate its reliability to the contracting authority despite the existence of that ground for exclusion, even if this concerns offences of specific gravity that the legislature intended to suppress, with the aim of promoting accountability in public procurement, in order to ensure that candidates are exemplary.
12. Moreover, the ministre de l'économie et des finances (Minister for the Economy and Finance) submits, in the defence, that French law contains various mechanisms, such as release – which enables the ordinary court of law to release, fully in or in part, a person from any prohibition, disqualification or incapacity as a result of a criminal conviction –, judicial rehabilitation – which enables any incapacity or disqualification resulting from a conviction to be erased – and the removal of any mention of the conviction from Bulletin No 2 of the criminal record, as provided for in Article 132-21 and Article 133-12 of the code pénal (Criminal Code) and Article 775-1 of the code de procédure pénal (Code of Criminal Procedure), and that the directive leaves it to the Member States to decide whether to allow the individual contracting authorities or contracting entities to assess the relevance of compliance measures or to entrust other authorities on a central or decentralised level with those tasks. The response to the plea raised in the application therefore also depends on whether such mechanisms, implemented by [Or. 6] a judicial authority, may be regarded as adequate compliance mechanisms, which presupposes determining whether a judicial authority may be regarded as an authority on a central or decentralised level, within the meaning of recital 71 of the directive, and whether the conditions for granting judicial measures such as those provided for in French law may enable them to be treated in the same way as compliance mechanisms in accordance with the directive.
13. Those questions are decisive for the outcome of the dispute before the Conseil d'État and present serious difficulties. Accordingly, they must be referred to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union and, pending a ruling by the Court of Justice, the proceedings brought by Vert Marine must be stayed.

DECIDES:

Article 1: The proceedings brought by Vert Marine shall be stayed pending a ruling by the Court of Justice of the European Union on the following questions:

1. Must Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts be interpreted as precluding the legislation of a Member State, with an objective of promoting accountability in public procurement, from not giving an economic operator that has been convicted by final judgment of an offence of specific gravity, and that, on that ground, is the subject of a measure prohibiting it from participating in a procedure for procurement by a concession contract for a period of five years, the opportunity of providing evidence to the effect that the measures it has taken are sufficient to demonstrate its reliability despite the existence of that ground for exclusion?

2. If Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 allows the Member States to entrust authorities other than the contracting authority concerned with the responsibility of assessing the compliance mechanism for operators, does that power enable that authority to entrust the courts with that mechanism? If so, can mechanisms such as the provisions of French law on release, judicial rehabilitation and the removal of any mention of the conviction from Bulletin No 2 of the criminal record be treated in the same way as compliance mechanisms in accordance with the directive?

[...] [**Or. 7**] [...] [procedural information]

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