

Case C-721/19

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:

23 September 2019

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

20 June 2019

Appellant:

Sisal SpA

Respondents:

Agenzia delle Dogane e dei Monopoli

Ministero dell'Economia and delle Finanze

Subject matter of the action in the main proceedings

Extension of the concession for the management of national instant lotteries — Presumed incompatibility with EU law

Subject matter and legal basis of the reference

Right of establishment and freedom to provide services, as well as the EU-law principles of legal certainty, non-discrimination, transparency, impartiality, freedom of competition, proportionality, legitimate expectations and consistency — Articles 49 et seq., 56 et seq. and 267 TFEU — Articles 3 and 43 of Directive 2014/23/EU

Questions referred

‘(1) Is EU law, and in particular the right of establishment and freedom to provide services (Articles 49 et seq. and 56 et seq. TFEU), the [EU-law] principles of legal certainty, non-discrimination, transparency and impartiality, freedom of competition, proportionality, legitimate expectations and consistency, and — where deemed applicable — Articles 3 and 43 of Directive 2014/23/EU, to be interpreted as precluding a provision such as that contained in Article 20(1) of Decreto Legge (Decree-Law) No 148 of 16 October 2017 and in the subsequent implementing legislation, which provides that “1. Pursuant to Article 21(3) and (4) of decreto-legge 1° luglio 2009, n. 78 (Decree-Law No 78 of 1 July 2009), converted with amendments by legge 3 agosto 2009, n. 102 (Law No 102 of 3 August 2009), the Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Agency, Italy) shall authorise the continuation of the existing concession for the collection, including by remote means, of national instant lottery receipts for the period envisaged in Article 4(1) of the concession contract, so as to guarantee additional and increased government revenue of EUR 50 million for 2017 and EUR 750 million for 2018”, in a situation in which:

- Article 21(1) of Decree-Law No 78 of 1 July 2009, converted with amendments by Law No 102 of 3 July 2009, provided for the concessions in question to be granted as a rule to more than one entity selected by means of open, competitive and non-discriminatory procedures;
- Article 21(4) of the abovementioned Decree provided that the concessions referred to in paragraph 1 may be renewed no more than once;
- the [appellant company] did not participate in the call for tenders held in 2010;
- the concession in question was originally with a sole concessionaire following a public invitation to tender in which a single tender was submitted;
- the continuation of the existing concession would have the practical effect of continuing the concession exclusively with that sole concessionaire, rather than renewing it with several entities, without another call for tenders being held?

(2) Is EU law, and in particular the right of establishment and freedom to provide services (Articles 49 et seq. and 56 et seq. TFEU), the [EU-law] principles of legal certainty, non-discrimination, transparency and impartiality, freedom of competition, proportionality, legitimate expectations and consistency, and — where deemed applicable — Articles 3 and 43 of Directive 2014/23/EU, to be interpreted as precluding a provision such as that contained in Article 20(1) of Decree-Law No 148 of 16 October 2017, which, under Article 21(3) and (4) of Decree-Law No 78 of 1 July 2009, converted with amendments by Law No 102 of 3 August 2009, provides that “the Customs and Monopolies Agency shall authorise the continuation of the existing concession for the collection, including by remote means, of national instant lottery receipts for the period envisaged in Article 4(1) of the concession contract, so as to guarantee additional and

increased government revenue of EUR 50 million for 2017 and EUR 750 million for 2018”, providing for this:

- by extending the sole existing concession, rather than renewing the multiple concessions provided for in Article 21(4) of Decree-Law No 78 of 1 July 2009, converted with amendments by Law No 102 of 3 July 2009, and without issuing a new call for tenders;

- prior to the expiry of the concession: Decree-Law No 148/2017 entered into force on 16 October 2017, that is to say, on the same date as the publication in the *Gazzetta ufficiale della Repubblica italiana*, whereas the concession would have expired on 30 September 2019;

- to guarantee additional and increased government revenue of EUR 50 million for 2017 and EUR 750 million for 2018, thus changing certain aspects relating to the method and date of payment of the concession fee, as well as potentially the overall amount of the payment due with regard to its onerousness, particularly with the change in payment terms, which are accelerated compared with those envisaged by the original concession, taking into account — according to the [appellant’s] submissions — the objective and well-known fact of the value of time in financial terms?

(3) Is EU law, and in particular the right of establishment and freedom to provide services (Articles 49 et seq. and 56 et seq. TFEU), the [EU-law] principles of legal certainty, non-discrimination, transparency and impartiality, freedom of competition, proportionality, legitimate expectations and consistency, and — where deemed applicable — Articles 3 and 43 of Directive 2014/23/EU, to be interpreted as precluding a provision such as that contained in the legislation implementing the aforementioned Decree, and in particular in Customs and Monopolies Agency Notice No 0133677 of 1 December 2017, which, in accordance with the provisions of Article 20(1) of Decree-Law No 148 of 16 October 2017, and on the basis of the provisions of the first paragraph of Article 4 of the concession agreement for the management of instant lotteries, which provides for the renewal of the same no more than once, changes the expiry date of the concession to 30 September 2028 — without prejudice to the provisions of Article 4 regarding the division of the concession period into two periods of five and four years respectively (therefore, once the first period of five years commencing on 1 October 2019 has expired, the continuation for the next four years until the expiry date of 30 September 2028 is contingent on a positive appraisal of the management performance by the Customs and Monopolies Agency, to be indicated by 30 March 2024) — and requires the company to arrange payment of EUR 50 million by 15 December 2017, EUR 300 million by 30 April 2018 and EUR 450 million by 31 October 2018;

- providing for this before the original expiry date of the concession (Customs and Monopolies Agency Notice No 0133677 was issued on 1 December 2017, whereas the concession contract would have expired on 30 September 2019);

- thereby ensuring [...] the advance payment of EUR 800 million (EUR 50 million by 15 December 2017, EUR 300 million by 30 April 2018 and EUR 450 million by 31 October 2018) prior to that expiry date (30 September 2019);

- thereby [...] potentially changing the overall amount of the payment due, with regard to its onerousness, taking into account — according to the [appellant's] submissions — the objective and well-known fact of the value of time in financial terms?

(4) Is EU law, and in particular the right of establishment and freedom to provide services (Articles 49 et seq. and 56 et seq. TFEU), the principles of legal certainty, non-discrimination, transparency and impartiality, freedom of competition, proportionality, legitimate expectations and consistency, and — where deemed applicable — Articles 3 and 43 of Directive 2014/23/EU, to be interpreted as precluding such a provision, even if the operators in the sector currently interested in entering the market [...] did not participate in the call for tenders originally held to award the concession which was due to expire and which was continued with the outgoing concessionaire on the new contractual terms described, or does [...] any restriction on access to the market [...] apply only if they actually participated in the original call for tenders?

Provisions of EU law cited

Articles 49 et seq. and 56 et seq. TFEU — Articles 3 and 43 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

Reference is also made to the judgment of the Court of Justice of 19 December 2018, *Stanley International Betting and Stanleybet Malta*, C-375/17, EU:C:2018:1026.

Provisions of national law cited

Decree-Law No 78 of 1 July 2009, converted, with amendments, by Law No 102 of 3 July 2009 ('the Anti-Crisis Decree'), Article 21: 'Granting of gaming concessions':

'1. In order to protect the overriding public interest in the collection of gaming receipts, where those activities are awarded to entities outside the public administration, the management of those activities shall always be entrusted by a concession awarded, in compliance with EU and national principles and rules, to more than one entity as a rule, selected through open, competitive and non-discriminatory procedures. Accordingly, in order to ensure maximum competitiveness, cost-effectiveness and geographical coverage of the collection of national instant and deferred lottery receipts, in anticipation of the forthcoming expiry of the current concession for the exercise of this form of gaming, within

30 days of the date of entry into force of this Decree, the Ministero dell'Economia e delle Finanze — Amministrazione autonoma dei monopoli di Stato (Ministry of Economy and Finance — Autonomous Administration of State Monopolies, Italy) shall commence the necessary procedures to award the concession in a timely fashion, including the remote collection of lottery receipts, to the most qualified national and EU gaming operators, limited to a maximum of four satisfying the criteria required in terms of moral, technical and economic reliability;

[...]

4. The concessions referred to in paragraph 1, which may be renewed no more than once, shall have a maximum term of nine years, divided into two periods of five and four years respectively. The continuation of the concession for the second period shall be subject to the positive appraisal of the management performance by the awarding authority, to be indicated during the first six months of the fifth year of the concession.'

Decree-Law No 148 of 16 October 2017, 'Urgent provisions in financial matters and for non-deferrable expenditure', converted into Law No 172 of 4 December 2017 ('the Tax Decree'), Article 20: 'Financial provisions', paragraph 1: for the text, see the first question referred for a preliminary ruling.

Outline of the facts and the main proceedings

- 1 By an agreement concluded on 14 October 2003 with the Amministrazione Autonoma dei Monopoli di Stato (Autonomous Administration of State Monopolies), now the Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Agency) ('the ADM'), the concession for the management of national instant ('scratch and win') lotteries was awarded for a period of six years until 31 May 2010 to the temporary consortium Lottomatica, now Consorzio Lotterie Nazionali.
- 2 Decree-Law No 78/2009, which fully regulated the sector, limited the maximum concession term to nine years, potentially renewable no more than once following a positive appraisal of the management carried out.
- 3 By a call for tenders held in 2010 — in which the appellant did not participate — the concession was awarded exclusively to Lotterie Nazionali for the period from 1 October 2010 to 30 September 2019.
- 4 Subsequently, by way of Decree-Law No 148/2017, the existing concession was allowed to continue until 30 September 2028 without a new call for tenders being issued.
- 5 The appellant — like other companies active in the sector (see Case C-722/19) — challenged the respondent authority's decision to extend the concession under the new provisions before the Tribunale amministrativo regionale del Lazio (Regional

Administrative Court of Lazio; ‘the TAR Lazio’). The appellant complained that that decision amounted to a renewal of the contract, contrary to the procedures established by EU law. The appellant pointed out that the contested provision would allow the concession to be continued with the outgoing concessionaire on different terms, resulting in a substantive novation of the concession, which was not envisaged in the rules in force at the time of the previous tender. This, it argued, was at variance with EU principles and rules on concessions, the right of establishment and the freedom to provide services, and the principles of non-discrimination, proportionality, transparency and impartiality of the public administration. The TAR Lazio rejected the application by its judgment of 4 October 2018, against which the appellant has appealed to the referring court.

The essential arguments of the parties to the main proceedings

- 6 According to the appellant company, neither Article 21(4) of Decree-Law No 78/2009, nor the 2010 call for tenders, nor the concession agreement signed with the successful tenderer, established a system whereby the instant lottery concession would continue automatically with the successful tenderer, but merely provided for the optional and potential renewal of the concession at the administrative discretion of the awarding entity. Decree-Law No 78/2009 expresses a marked preference for the ‘*multi-providing* model’ for the management of instant lotteries (in other words, with the participation of several concessionaires, rather than just one). The scope of the 2017 provision is new, contrary to EU law, since it amounts to a measure contrary to freedom of enterprise, a restriction of the freedom to provide services and freedom of establishment, and a breach of competition and equal treatment between operators. It also perpetuates a service monopoly for the benefit of a sole provider (Lotterie Nazionali), prohibiting any other operators from offering the same service in Italy.
- 7 Furthermore, the appellant argues, there are no overriding reasons in the general interest capable of justifying special rules for instant lotteries. The reasons expressly set out in Article 20(1) of Decree-Law No 148/2017 — namely ‘to guarantee additional and increased government revenue of EUR 50 million for 2017 and EUR 750 million for 2018’ — certainly cannot be construed as such. Moreover, the ways in which this revenue is generated alters the original terms of the concession, since the planned instalments of EUR 50 million and EUR 750 million do not correspond to the initial instalments of EUR 500 million and EUR 300 million.
- 8 In addition to the previous complaints, the appellant company adds that the contested decision was not properly investigated beforehand; the reasons were inadequate — namely to raise substantial funds quickly through better management of the service in question (a kind of trade-off between the renewal of the concession and the sum of money provided for in Article 20); it conferred an undue advantage on one operator (the outgoing concessionaire) compared with other competitors in the market; it preceded the normal expiry date of the

concession by some two years, preventing any market investigation prior to the identification of the operators concerned, or alternative but equally competitive award procedures; it set the one-off amount to be paid as the price of the renewal by the authority as the same amount (EUR 800 million) used as the auction base price in the 2009 tender, notwithstanding the interest expressed in the award by other operators.

- 9 In response, the ADM and Lotterie Nazionali counter that Article 21(4) of Decree-Law No 78/2009 provided for the renewal of the instant lotteries concession no more than once; the tender specifications, in full accordance with that Article 21, vested this power in the ADM for a further nine years; the relevant clause was included in the contract specifications; the renewal option was not contested by any of the other operators concerned; in 2010, the concession was awarded to Lotterie Nazionali, the only suitable operator which submitted a bid at the time; the appellant, as well as the others which challenged the contested decision, did not participate in that call for tenders; in July 2017, Lotterie Nazionali applied to the ADM for renewal of the concession; on 1 December 2017, ADM invited Lotterie Nazionali to continue managing instant lotteries under Article 20(1) of Decree-Law No 148/2017; the invitation was preceded by a review of the concessionaire's performance and the expediency of continuing the relationship, with an investigation carried out at both legislative and administrative level (in particular, the awarding entity verified the successful management performance and fulfilment of the obligations regarding the IT system, ticket production, network of sales outlets, payout on winning tickets and collection of tax receipts from tickets sold); in December 2017, Lotterie Nazionali accepted the invitation and paid the government the first EUR 50 million, followed by a further EUR 750 million in 2018, in accordance with the payment schedule drawn up by the awarding entity; there is an overriding public interest in continuing the relationship with the outgoing concessionaire in order to fulfil the obligations and in view of the estimated amount of revenue, the complex relationships with sales outlets and the vast number of customers interested in instant lotteries; there was no novation of the contractual relationship since the title and object remained unchanged; the Court of Justice, by its judgment [of 19 December 2018] in Case C-375/17, established, albeit in a different gaming sector, that Articles 49 and 56 TFEU must be interpreted as not precluding a sole concessionaire model.

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

- 10 The referring court begins by pointing out that Decree-Law No 78/2009 introduced extensive regulation of the sector and that the appellant did not participate in the call for tenders subsequently issued in 2010. Despite this, that company might have had a reasonable and legitimate expectation that the system established by the abovementioned Decree-Law would continue, choosing not to participate in that particular tender and simply counting on the possibility of renewal of the concession — a renewal which appeared to depend on the exercise of a discretionary power vested in the authority concerned. According to the

appellant, that discretionary power lapsed with Decree-Law No 148/2017, which entered into force two years before the expiry of the previous concession.

- 11 The continuation of the relationship, established in compliance with the new legislation, has retained the same legal basis and contractual subject matter, but involved, before the normal expiry date, and contrary to the rules set for the previous call for tenders, a change to some of the payment terms: three instalments of EUR 50 million by 15 December 2017, EUR 300 million by 30 April 2018 and EUR 450 million by 31 October 2018, instead of two; the timing of the payment (which preceded the concession expiry date); and potentially the payment amount in terms of its onerousness (payment of the same nominal amount of EUR 800 million, but in advance).
- 12 The appellant's complaint does not concern the basis for awarding the concession (to a sole concessionaire or to several concessionaires) for the management of instant lotteries, but the fact that, in practice, before the normal expiry date and under new contractual terms, essentially comparable to a renewal or extension with novation of the relationship, the award system devised by the legislature in 2009, which was based on the principle of tendering and the possibility of renewal of the awarded concession, was overturned by the legislature in 2017, with provisions that might raise doubts about the introduction of a restriction of access to the market by other operators in the sector, competitors of the outgoing concessionaire, since the continuation of the relationship is the subject of a precise and unconditional legal obligation, introduced for the first time in 2017. The reason for the incompatibility with EU law thus resides in the fact that the 2017 legislature, revising the 2009 rules with a legislative act, according to the appellant removed all administrative discretion as to whether to continue the concession or to hold a new tender, obliging the awarding entity, before the normal expiry of the concession and under different economic conditions, not originally envisaged, to offer the outgoing concessionaire the option of continuing the relationship solely for the purposes of public finances; this regardless of the actual participation of the current appellant in the 2010 call for tenders, since this operator could not claim a legitimate interest in renewing the tender, but rather a legitimate interest in the exercise of a discretionary power by the awarding authority. It is for these reasons that the appellant company is relying on the protection of subjective situations under EU law and alleging the infringement of EU principles and rights, in particular Articles 49 et seq. and 56 et seq. TFEU, the principles of non-discrimination, transparency, proportionality and freedom of competition, and Articles 3 and 43 of Directive 2014/23/EU.
- 13 Lastly, the Consiglio di Stato (Council of State) explains that its decision to refer the matter to the Court of Justice for a preliminary ruling stems from the fact that the reasons for the potential infringement of EU law are not immediate, sufficiently clear, precise and unconditional.