

Case C-835/19

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:

18 November 2019

Referring court:

Consiglio di Stato (Council of State, Italy)

Date of the decision to refer:

13 June 2019

Applicant and appellant:

Autostrada Torino Ivrea Valle d’Aosta — Ativa SpA

Defendants and respondents:

Presidenza del Consiglio dei Ministri

Ministero delle Infrastrutture e dei Trasporti

Ministero dell’Economia and delle Finanze

Intervening parties:

Autorità di bacino del Po

Regione Piemonte

Subject matter of the main proceedings

Appeals before the Consiglio di Stato (Council of State, Italy) against the judgments issued by the Tribunale amministrativo regionale (TAR) per il Piemonte (Regional Administrative Court, Piedmont; ‘the TAR’) dismissing the actions brought by the company Autostrada Torino Ivrea Valle d’Aosta — Ativa SpA (‘Ativa’) in relation to two measures enacted by the Ministero delle Infrastrutture e dei Trasporti (the Ministry of Infrastructure and Transport; ‘the Ministry’), which did not accept two project-financing proposals submitted by Ativa relating specifically to motorway concessions.

Subject matter and legal basis of the reference

The referring court is uncertain whether the Italian legislation governing the award of motorway concessions, which currently excludes the use of project financing — which is a special award procedure intended for the execution of public works, usually without public financing — is compatible with Directive 2014/23, and in particular with the principle enshrined in recital 68 and Article 30 of that directive, whereby contracting authorities should be allowed considerable flexibility in establishing and organising the procedure leading to the choice of concessionaire.

Question referred

With regard to the award of concessions, does [EU] law, in particular the principles laid down in Directive [2014/23], specifically freedom of choice as regards award procedures in accordance with the principles of transparency and [equal] treatment, as referred to in recital 68 and Article 30 of the directive, preclude the application of the provisions laid down in Article 178(8-bis) of d.lgs. 18 aprile 2016, n. 50 (Legislative Decree No 50 of 18 April 2016), which unconditionally prohibit the award by administrative authorities of motorway concessions in respect of concessions that have expired or are due to expire, using the procedures laid down in Article 183 [of the decree], which governs project financing?

Provisions of EU law cited

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts ('Directive 2014/23').

Provisions of national law cited

The referring court has cited certain legislative measures relating to motorway concessions and project financing and, in particular, the following provisions:

Decreto legislativo 12 aprile 2006, n. 163 (Legislative Decree No 163 of 12 April 2006) ('the previous Public Procurement Code'), and in particular Article 153(19), laying down the rules governing project financing through private initiative. The award procedure covered by that provision can be broken down into two stages: (a) the preliminary stage — to approve the preliminary project proposal submitted by the tendering contractor to be used as the basis for any subsequent tender procedure — in which the authority is required to assess in the exercise of its discretion whether the proposal is in line with the public interest; (b) the stage involving the launch, with a corresponding call for tenders, and conduct of the public tender procedure, under which the approved project is submitted and in which the contractor is classified as promoter and enjoys a pre-emptive right.

Subparagraph 2-ter Article 8-duodecies of Decreto legge 4 aprile 2008, n. 59 (Decree-Law No 59 of 4 April 2008), which expressly recognised the possibility of awarding concession and management contracts and solely management contracts in the road and motorway sector using the project-financing procedures laid down in Article 153 of the previous Public Procurement Code.

Legislative Decree No 50 of 18 April 2016 ('the new Public Procurement Code'), which repealed the previous Public Procurement Code, in particular:

- Article 178(1), which prohibits the extension of motorway concessions, and Article 178(8-bis), introduced by d.lgs. 19 aprile 2017, n. 56 (Legislative Decree No 56 of 19 April 2017), according to which 'Administrative authorities may not renew motorway concessions that have expired or are due to expire using the procedures described in Article 183';
- Article 183, laying down the rules on project financing of the new Public Procurement Code. Paragraph 19 of that text contains a new provision, compared to the rules previously applicable, in that, during the preliminary stage, the authorities are no longer required to assess whether the proposal is in the public interest but, rather, whether it is feasible;
- Article 216(1), which lays down, in particular, that the abovementioned legislative decree applies to procedures and contracts for which notices launching the procedure for the selection of a contractor are to be published after the date on which the decree enters into force, and, in the case of contracts where no notice is published, to procedures and contracts in relation to which candidates have not yet been asked to submit tenders on the date when the new code enters into force;
- Article 216(23), which provides that preliminary projects relating to the execution of public works or public interest works in relation to concession proposals under Article 153 of the previous Public Procurement Code for which a declaration of public interest has already been made but which have not yet been approved on the date of entry into force of the code 'shall be subject to an assessment of economic and financial feasibility and to approval by the administrative authorities in accordance with the provisions of this code.'

Outline of the facts and the main proceedings

- 1 Ativa, the concessionaire for the operation of a section of motorway in Piedmont on the basis of several concessions, the most recent of which expired in 2016, submitted a project-financing proposal on 25 September 2015 for the concession for the operation of a section of motorway.
- 2 By decision of 29 July 2016, the Ministry rejected Ativa's proposal, on the grounds, inter alia, that motorway operation concessions could not be subject to

project financing and that the proposal did not comply with the requirements, in terms of form and content, set out in Article 153 of the previous Public Procurement Code. That code requires that tenders submit simply a preliminary plan of the works to be executed, to be used as the basis for the subsequent tender procedure, and not a final, in-depth plan such as that submitted by the applicant.

- 3 Ativa brought an action before the Piedmont TAR, requesting that the court annul the abovementioned decision and declare that the Ministry had an obligation to give a decision on the public interest and/or feasibility of the applicant's proposal and, therefore, requesting that the court order the public authorities cited in the action to assess the public interest and/or feasibility of that proposal. The action not only challenged the grounds set out in the decision concerning the excessive level of detail of the proposal, but also alleged breach of the three-month time-limit (from the date on which the proposal was submitted) by which the authorities were required to assess the proposal, and incorrect application to the present case of Article 183 of the new Public Procurement Code, which was not in force when the proposal was submitted but did apply when the measure being challenged was adopted.
- 4 By judgment of 31 August 2018, the TAR dismissed the action, on the one hand holding that the breach of the three-month time-limit did not of itself alone mean that the decision being challenged was unlawful and, on the other hand confirming that the proposal submitted by Ativa was ineligible, as it provided a greater level of detail than the preliminary level requested.
- 5 On 20 September 2016, Ativa submitted a further project-financing proposal relating to the same concession. That proposal was rejected by decision of 22 May 2017, which confirmed the grounds set out with reference to the first proposal and added that the second proposal was not in line with Article 178(8-bis) of Legislative Decree No 50/2016, which prohibits the use of project financing for the purposes of awarding motorway concessions in respect of concessions that have expired or are due to expire. The Piedmont TAR dismissed the action brought by Ativa against that decision, on grounds similar to those applied in the first judgment.
- 6 Ativa appealed against the two judgments of the TAR before the Council of State, the referring court.

The essential arguments of the parties to the main proceedings

- 7 In the action against the TAR's first judgment, Ativa alleges that the Ministry had indicated an intention not to assess its proposal and to arrange for the company Anas SpA to take over the motorway concessions by means of an in-house award. The Ministry was therefore seeking to prevent a situation where the legal provisions relating to project financing, in particular, the pre-emptive right granted to the promoter in relation to a project-financing proposal (a right that the Ministry believes, without reason, to be harmful to competition) could be invoked

by the concessionaires when the concession was about to expire. Furthermore, according to Ativa, the decision to award the concession for the operation of motorways to Anas by means of an in-house award and the intention to prevent the motorway concessionaires from using the project-financing procedure, despite the fact that this procedure was in line with competition requirements, is contradictory and unlawful. Lastly, in its appeal, Ativa reiterated the grounds put forward in its original action.

- 8 In the action brought against the TAR's second judgment, Ativa also asserts that Article 178(8-bis) of the new Public Procurement Code does not apply to its second project-financing proposal (either), because that provision was introduced after the proposal was submitted. On the basis of Article 11 of the general provisions constituting the introduction to the Civil Code and the *tempus regit actum* principle [according to which an act is governed by the law in effect when the act occurs], the proposal is therefore to be governed by the rules in force on the date it was submitted. Moreover, the abovementioned provision is also in direct conflict with the rules governing concessions and public-private partnership relationships laid down by Directive 2014/23. In particular, the principle that there should be free choice in determining the procedure that the national legislature is required to implement should be taken into account, whereby 'contracting authorities and contracting entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire' (recital 68), so that they can choose the procedure most consistent with the requirements to be met, in accordance with the provisions of Articles 30 and 37(6) of the Directive. However, it is alleged that the provision being challenged makes the system unnecessarily inflexible and represents an unjustified limitation on the freedom that should be afforded to the administrative authorities concerned, precluding their use of project-financing procedures.
- 9 The respondents assert that Article 178(8-bis) applies *ratione temporis* to this case, partly in consideration of the fact that it is intended to affect concessions that 'have expired or are due to expire' and, therefore, the legislature specifically intended it to apply to situations such as that under consideration, with a view to greater opening up to competition and to avoid further consolidation of the position of previous operators holding concessions due to expire and awarded without tender procedures. The respondents cite the case-law to the effect that the legality of an administrative measure must be determined in the light of the legal and factual situation as it stood at the time it was adopted.
- 10 On the basis of these arguments, the respondents assert that the rules laid down in the new Public Procurement Code also apply to the first proposal formulated by Ativa, before the new Code entered into force, because the case being examined here relates to a stage of the procedure preparatory to the public tender procedure, took place after that Code entered into force. That approach is confirmed by Article 216(23) of that code, under which preliminary plans in relation to concession proposals under Article 153 of the previous Public Procurement Code not yet approved on the date of entry into force of the new code are to subject to

an assessment of economic and financial feasibility and to approval by the administrative authority in accordance with the provisions of the new code.

- 11 The respondents also contest the arguments made by Ativa in relation to the alleged conflict between Article 178(8-bis) of the new Public Procurement Code and EU law. In their opinion, the purpose of the prohibition contained in that code is to seek opening up to competition in order to permit broader application of the principles of EU law that protect competition and the market, including the prohibition on extending all concessions, including motorway concessions (Article 178(1), final sentence, of that code) and, therefore, the obligation to instigate public procedures also for motorway concessions that have ‘expired or are due to expire’.

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

- 12 The referring court agrees with the interpretation by the respondents in rules governing the application *ratione temporis* of the new Public Procurement Code and, specifically, Article 178(8-bis) thereof. In that regard, the referring court notes that the administrative authorities can only comply with the law in force at the time when its stated intent is implemented. Thus, unless the law itself provides otherwise, the legal position that exists on the date when the application is submitted is not binding on the authorities, and the application will be assessed by applying the legislation in force at the time when the procedure is concluded.
- 13 The transitional rules laid down in Article 216 of the new Public Procurement Code implement the above principles. Paragraph 1 of that article states that the activities associated with a public tender procedure for the selection of a contractor are entirely governed by the rules in force at the time when the procedure is initiated, which means the date of publication of the tender notices launching the procedure (or, in the case of procurement contracts where no notices are published, the date on which the invitations to submit bids are sent). Paragraph 23 of that article states that preliminary plans submitted under the previous Public Procurement Code which have not yet been approved are to be subject to an assessment of economic and financial feasibility and to approval by the administrative authority in accordance with the provisions of the new Public Procurement Code.
- 14 If a preliminary plan for a concession proposal submitted under the previous code had not yet been approved when the new law entered into force, there is therefore no option other than — where appropriate — to apply the approval procedure in accordance with the rules of the new code. The subsequent tender procedure under which the proposal will undergo the feasibility analysis, once approved, must apply the provisions of the new Public Procurement Code, including the prohibition laid down in Article 178(8-bis). That provision therefore applies in this case.

- 15 In the light of that conclusion, the referring court considers it necessary to give due consideration to the complaint raised by Ativa relating to the alleged conflict between Article 178(8-bis) of the new Public Procurement Code and EU law. The court notes first of all that Article 178, paragraph 1 of which imposes the prohibition on extending motorway concessions, is a provision that is not immediately supported by Directive 2014/23. Rather, it represents the implementation of a provision of the enabling law, whereby public tender procedures for the award of new motorway concessions should be initiated not less than 24 months before the existing concessions expire, entailing a review of the motorway concession system, and in particular the introduction of a prohibition on extension clauses.
- 16 It does not appear unequivocally possible to interpret the prohibition laid down in Article 178(8-bis), introduced by Legislative Decree No 56/2017 and relating specifically to the award of motorway concessions that 'have expired or are due to expire' strictly as a transitional rule — contrary to the position asserted by the respondents, who refer to the prohibition to concessions that 'have expired or are due to expire' on the entry into force of the new Public Procurement Code. The wording of paragraph 8-bis seems to establish a general prohibition on awarding motorway concessions using a project-financing procedure if the infrastructure is already subject to a concession, and could therefore be understood, broadly, as a provision to be applied not only in a transitional situation but also at the end of the transition period, such as the case of a new concession to be awarded to replace a concessionaire whose concession has expired. There is therefore an interpretation dilemma as regards the conditions under which that provision is applicable and the associated limits. Both interpretation options seem to correspond to the purpose of the prohibition, which the respondents identify as the need to prevent a situation where the prohibition on extending motorway concessions is circumvented if the tendering contractor is the outgoing concessionaire, as is the case here.
- 17 In general terms, project financing must comply with the principles of public competitive tendering, in order to protect competition and ensure equal treatment of potential interested parties. The initial stage of identifying the promoter, whose proposal was previously assessed in terms of whether it was in line with public interests and is now assessed on the basis of feasibility, is characterised by enormous discretion on the part of the administrative authorities. That stage does not involve the selection of the best bid on the basis of pre-established technical and financial criteria but, rather, assessment of the preliminary feasibility of a project proposal. The concession will be awarded, however, following the subsequent tender procedure, on the basis of the criterion of the most economically advantageous tender. That stage is separate from the previous stage and must be implemented strictly in accordance with the rules on competitive tendering, subject only to the advantage represented by the pre-emptive right enjoyed by the promoter under predetermined conditions.
- 18 Such an advantage does not appear to be in conflict with the EU law principles of transparency and equal treatment, provided that, as noted by the Advocate General

in the Opinion in Case C-412/04, all the participants are aware of the advantages (invitation to take part in a negotiated procedure and pre-emptive right for the promoter) and of the selection criteria, as is currently guaranteed by the procedure laid down in Article 183(15) of the new Public Procurement Code.

- 19 The referring court considers that this therefore seems to exclude a situation where a project-financing proposal for the award of a concession could be construed as an ‘extension’ of the previous concession. Moreover, if that were the case, it would be difficult to understand why the prohibition must be limited to motorway concessions. That prohibition is unconditional and abstract, preventing the administrative authorities in any and all cases from using project financing for concessions of this type, and not only for motorway concessions that had expired or were due to expire on the date of entry into force of the new Public Procurement Code, but also for motorway concessions that will expire under the regular rules.
- 20 The referring court therefore considers that the question raised by Ativa as regards the conflict between that provision and the principles laid down in Directive 2014/23 is legitimate, in particular the principle set out in recital 68 that contracting authorities and contracting entities should be allowed considerable flexibility to define and organise the procedure leading to the choice of concessionaire, and in Article 30, which recognises the freedom to organise the procedure leading to the choice of concessionaire. That principle can also apply to the freedom to choose the type of procedure for the award of the concession, subject to compliance with the principles of transparency and equal treatment. In the light of the above considerations, the referring court has decided to stay the proceedings and to refer the question set out above to the Court of Justice of the European Union for a preliminary ruling.