

**Case C-728/22**

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

**Date of filing:**

24 November 2022

**Referring court:**

Consiglio di Stato (Italy)

**Date of decision to refer:**

21 November 2022

**Applicants:**

Associazione Nazionale Italiana Bingo – Anib

Play Game Srl

**Defendants:**

Ministero dell’Economia e delle Finanze (Ministry of Economy and Finance)

Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Agency)

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**Subject of the action in the main proceedings**

Appeal against a judgment of the Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio, Italy; ‘the TAR Lazio’) dismissing an appeal brought by certain operators of betting activities relating to bingo. That appeal sought to annul an administrative measure which, pursuant to a statutory provision, imposed a monthly fee on those operators whose concessions had expired and were currently covered by a ‘technical extension’ scheme, pending the conduct of a new tender procedure for the re-award of the concessions by the state.

## **Subject matter and legal basis of the reference**

Pursuant to the second paragraph of Article 267 TFEU, a request is made for the interpretation of certain provisions of European Union law on the freedom of establishment and the freedom to provide services, and in particular of Directive 2014/23/EU, and of the principle of the protection of legitimate expectations, to ascertain whether they preclude national legislation under which once concessions for the pursuit of bingo gaming activities have expired they must be re-awarded by means of a new tender procedure open to all operators in the sector (initially scheduled for 2014, subsequently postponed and still not carried out), obliging in the meantime the outgoing concessionaires to operate under a ‘technical extension’ scheme and to pay the state a monthly fee, subject to various increases, as a condition for being able to participate in the new tender procedure, without the administration being able to suspend or reduce that fee in order to take account of the deterioration in the financial equilibrium of the concessionaires concerned as a result of the COVID-19 pandemic.

## **Questions referred for a preliminary ruling**

1. ‘Must Directive 2014/23/EU on the award of concession contracts, as well as the general principles that follow from the Treaty, namely Articles 15, 16, 20 and 21 of the Charter of Fundamental Rights of the European Union, Article 3 of the Treaty on European Union and Articles 8, 49, 56, 12, 145 and 151 of the Treaty on the Functioning of the European Union, be interpreted as applying to concessions for the operation of the bingo game which were awarded under a selective tender procedure in 2000, expired and were subsequently repeatedly extended in their effects by legislative provisions which entered into force after the Directive had entered into force and the period for transposition thereof had expired?’
2. ‘If the first question is answered in the affirmative, does Directive 2014/23/EU preclude an interpretation or application of domestic legislative provisions, or implementing practices based on those provisions, that would deprive the administration of the discretion to initiate, at the request of the interested parties, an administrative procedure to amend the conditions for the exercise of the concessions, with or without a new tender procedure, depending on whether or not the renegotiation of the contractual balance qualifies as a substantial change, in cases where unforeseen and unforeseeable events not attributable to the parties occur that have a significant impact on the normal conditions of operating risk, for as long as those conditions persist and for the time required to reinstate, where possible, the concessions’ original operating conditions?’
3. ‘Does Directive 89/665/EC, as amended by Directive 2014/23/EU, preclude an interpretation or application of domestic national provisions, or implementing practices based on those provisions, under which the legislature or the public administration may make participation in the procedure for the re-award of

gaming concessions conditional on the concessionaire's membership of the technical extension scheme, including in cases where it is not possible to renegotiate the operating conditions of the concession in order to bring them back into equilibrium as a result of unforeseen and unforeseeable events not attributable to the parties that have a significant impact on the normal conditions of operating risk, for as long as those conditions persist and for the time required to reinstate, where possible, the concessions' original operating conditions?'

4. 'In any event, do Articles 49 and 56 TFEU and the principles of certainty and effectiveness of legal protection, as well as the principle of the protection of legitimate expectations, preclude an interpretation or application of domestic legislative provisions, or implementing practices based on those provisions, that would deprive the administration of the discretion to initiate, at the request of the interested parties, an administrative procedure to amend the conditions for the exercise of the concessions, with or without a new tender procedure, depending on whether or not the renegotiation of the contractual balance qualifies as a substantial change, in cases where unforeseen and unforeseeable events not attributable to the parties occur that have a significant impact on the normal conditions of operating risk, for as long as those conditions persist and for the time required to reinstate, where possible, the concessions' original operating conditions?'

5. 'Do Articles 49 and 56 TFEU and the principles of certainty and effectiveness of legal protection, as well as the principle of the protection of legitimate expectations, preclude an interpretation or application of domestic national provisions, or implementing practices based on those provisions, under which the legislature or the public administration may make participation in the procedure for the re-award of gaming concessions conditional on the concessionaire's membership of the technical extension scheme, including in cases where it is not possible to renegotiate the operating conditions of the concession in order to bring them back into equilibrium as a result of unforeseen and unforeseeable events not attributable to the parties that have a significant impact on the normal conditions of operating risk, for as long as those conditions persist and for the time required to reinstate, where possible, the concessions' original operating conditions?'

6. 'More generally, do Articles 49 and 56 TFEU and the principles of certainty and effectiveness of legal protection, as well as the principle of the protection of legitimate expectations, preclude national legislation such as that at issue in the main proceedings, which imposes upon bingo hall operators the payment of an onerous technical extension fee on a monthly basis that is not provided for in the original concession documents, the amount of which is identical for all types of operator and is amended from time to time by the legislature without any proven relationship to the characteristics or performance of individual concession relationships?'

### **Provisions of EU law invoked**

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

Article 49 TFEU – freedom of establishment within the European Union

Article 56 TFEU – freedom to provide services

Principle of protection of legitimate expectations

Articles 15, 16, 20 and 21 of the Charter of Fundamental Rights of the European Union (hereinafter, ‘the Charter’)

Article 3 TEU

Articles 8, 12, 145 and 151 TFEU.

### **Provisions of national law relied on**

Article 1, paragraphs 636-638, of Law No 147 of 27 December 2013 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità per il 2014) (Law laying down rules for the preparation of the annual and multiannual State budget (2014 Stability Law)), hereinafter: ‘Law No 147/2013’), including subsequent amendments and additions, and in particular those introduced by Law No 208 of 28 December 2015 (hereinafter: ‘Law No 208/2015’) and Law No 205 of 27 December 2017 (hereinafter: ‘Law No 205/2017’).

Article 165 of Legislative Decree No 50 of 18 April 2016 (hereinafter: ‘Public Contracts Code’).

### **Brief description of the facts and procedure**

- 1 In Italy, the organisation of the game of bingo is a matter for the state alone, which regulated it for the first time by Decree No 29 of the Minister for Finance of 31 January 2000. The Decree stipulated that the conduct of the relevant gaming activities was to be entrusted to holders of concessions awarded by means of a selective procedure. The state has entrusted the management of this sector to the Agenzia delle dogane e dei monopoli (Customs and Monopolies Agency, Italy; hereinafter: ‘the ADM’).
- 2 Initially, the duration of the concessions was set at six years, after which the concessions could be renewed once, and no fee was to be paid to the state. The reason given for not imposing fees was the fact that the operators’ activity in any event produced a direct economic benefit for the state, consisting in the so-called ‘fiscal levy’ imposed on the receipts obtained by the concessionaires from the sale of gaming cards.

- 3 In order to ensure compliance with the European principle of competition in the award of new concessions or in the re-award of concessions that have expired, the Italian legislature decided to organise, following an alignment of the timing of most of the concessions that had expired or were about to expire in the years 2013 and 2014, a single tender procedure open to participation by all operators in the sector, which was initially scheduled to take place by 31 December 2014. The legislature established that, in the meantime, the outgoing concessionaires (i.e. those with concessions that were expiring) should operate under a 'technical extension' scheme, paying a monthly fee of EUR 2 800 to the state, and that this constituted a condition for being able to participate in the future tender, thus introducing the principle of fee-paying concessions (Article 1, paragraphs 636-638 of Law No 147/2013).
- 4 In 2015, as the initial deadline for conducting the tender had expired, the legislature moved it to 31 December 2016 and extended the technical extension scheme to cover the concessions expiring in 2015 and 2016, at the same time raising the monthly fee to EUR 5 000 and prohibiting the transfer of the premises for the entire period of the technical extension (Law No 209/2015).
- 5 In 2017, as the deadline for conducting the tender had again expired, the legislature moved it to 30 September 2018 and extended the technical extension scheme to cover concessions expiring in 2017 and 2018, at the same time raising the monthly fee to EUR 7 500 (Law No 205/2017).
- 6 By subsequent legislative measures, the legislature further extended the technical extension scheme until 2023, suspended the payment of the fee during the period of closure of commercial enterprises due to the COVID-19 pandemic in 2020, deferring the amounts due and, finally, set 31 March 2023 as the deadline for issuing a new tender procedure. To date, no such invitation to tender has been issued.
- 7 The applicants manage gaming and betting activities relating to bingo under concessions which have expired and are operating under a technical extension scheme. They consider that they are experiencing very serious financial difficulties, both in relation to the effects of the COVID 19 pandemic and as a result of the application of the legislation described above which has, among other things, made the concession subject to the payment of fees by imposing a mandatory payment of a monthly fee. They submitted to the ADM a request for the immediate suspension of the fee until the initial conditions of economic and financial balance were reinstated, as well as, in any case, a request for the fees due to be recalibrated on the basis of their actual ability to pay.
- 8 In particular, the applicants asked the ADM to disapply the above-mentioned legal provisions, which the applicants argue are contrary to Articles 15, 16, 20 and 21 of the Charter, Article 3 TEU and Articles 8, 49, 56, 12, 145 and 151 TFEU.

- 9 By a memorandum of 18 November 2020, the ADM rejected the request, on the grounds that it could not change the effects of a legal order by an administrative measure.
- 10 The applicants first brought an action against that refusal before the Regional Administrative Court, Lazio. That court, having taken into account judgment No 49/2021 of the Corte costituzionale (Constitutional Court), which had declared certain doubts as to the constitutionality of Law No 205/2017 to be unfounded, dismissed the action.
- 11 Subsequently, they appealed to the referring court. In particular, the applicants allege that the legal provisions implemented by the ADM in the contested decision are illegal, in terms of both national constitutional law and European Union law.
- 12 They argue that the fact that the technical extension fee has been introduced by a legal provision cannot justify a practice that deprives the ADM of the discretionary power to adopt administrative acts aimed at rebalancing the concessions' economic and financial operating conditions when these are affected by unforeseeable events. In this regard, the measures temporarily suspending the payment of this fee introduced by the legislature during the period of closure of gaming premises due to the COVID-19 pandemic were, according to the applicants, insufficient, since the obligation to pay was not removed but merely postponed, and since after reopening activity was significantly reduced while operating costs increased.
- 13 Moreover, the applicants contend that Article 165 of the Public Contracts Code (which transposed Article 43 of Directive 2014/23/EU into Italian law) has been infringed, in terms of the failure to renegotiate the economic balance of the concession, which – although by its nature it entails a transfer of operating risk to the concessionaire, which receives most of its revenue from the sale of services on the market – does not exclude the possibility of taking into account, under certain conditions, the effects of exceptional operating conditions and of modifying the existing relationship between principal and concessionaire.

#### **Brief description of the grounds for the preliminary reference**

- 14 The referring court states that, of the two possible referrals envisaged by the applicants – referral to the Court of Justice of the European Union (hereinafter, also: the 'Court') or to the Constitutional Court – priority must be given to the former, since it is the court of last instance and since the interpretation of Union law is relevant to the ruling on the dispute.
- 15 **First**, the referring court observes that the applicants submitted evidence showing that the conditions for the operation of the concessions, in particular the sustainability of the operating costs, were seriously compromised following the COVID-19 pandemic, whereas the Constitutional Court had ruled, in Judgment

No 49/2021 on which the TAR Lazio relied, on data from the year 2019, that is to say, prior to the health crisis.

- 16 Furthermore, although the reopening of gaming premises (which took place progressively from May 2021) and the temporary suspension of the obligation to pay the fee, accompanied by the payment in instalments of the amounts due (without setting them at zero), enabled the activities to survive, those measures alone were not capable of improving the situation of the bingo concessionaires operating under the technical extension scheme.
- 17 **Secondly**, the referring court indicates that, since these concessions were awarded by tender in 2000, then expired and were repeatedly extended by legal provisions, the last of which dated back to 2017, it should be possible to apply Directive 2014/23/EU. In that regard, the referring court recalls the Court's case-law according to which, although *'the EU legislation applicable to a concession contract is, as a rule, that in force when the contracting entity chooses the type of procedure to be followed'* and *'a directive is not applicable if the period prescribed for its transposition expired after that point in time'*, the fact remains that *'the EU legislation in the light of which that modification must be assessed is that in force at the date of that amendment. The Court has stated in that context that the fact that the original concession contract was concluded prior to the adoption of EU rules on the matter is therefore without consequence in that regard'* (judgment of the Court of Justice of 2 September 2021, *Sisal and Others*, C-721/19 and C-722/19, EU:C:2021:672, paragraphs 24 and 28, and the case-law cited therein).
- 18 Moreover, should the Court consider that the Directive carried out not only an approximation of the legislation but an exhaustive harmonisation, *'a national measure in a sphere which has been the subject of full harmonisation ... must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty'* (judgment of the Court of Justice of 2 September 2021, *Sisal and Others*, C-721/19 and C-722/19, EU:C:2021:672, paragraph 32 and the case-law cited therein).
- 19 The referring court considers, in particular, that Article 43 of Directive 2014/23/EU, read in the light of the definition of 'concession' in Article 5 and the principles set out in recitals 75 and 76 to that Directive, is applicable. Pursuant to that provision, modifications of existing concessions may take place exceptionally, in particular where they are provided for in the initial contract and the continuation of the concessionary relationship is impractical for economic or technical reasons.
- 20 This rule has been transposed into national law, primarily by Article 165 of the Public Contracts Code, pursuant to which, since concessions by definition entail the transfer of operating risk to the concessionaire, which is remunerated by receiving the majority of operating revenue, in order to preserve the economic and financial balance of the concession the operating conditions must remain normal.

If they do not, the concession may provide for various adjustments, including in the form of public contributions.

- 21 The referring court has doubts as to whether the following can be considered compatible with Directive 2014/23/EU:
- (a) on the one hand, the ADM’s interpretation of the Italian laws on bingo concessions, according to which the administration does not have the power to adopt, at the request of the interested parties, measures modifying the concessions’ operating conditions, with or without a new tender procedure (depending on whether or not the renegotiation of the contractual balance is considered a ‘substantial modification’), in cases where unforeseen events occur that cannot be attributed to the parties and that significantly affect normal operating risk conditions;
  - (b) on the other hand, the national laws that have provided for the technical extension of concessions which have expired pending the organisation of a new tender procedure, making that extension, and the very possibility of participating in the future tender procedure, subject to the payment of a monthly fee, which has over time been increased significantly. That fee, moreover, is fixed in an abstract manner, without any specific assessment of the economic conditions of individual concessions, potentially distorting the overall balance of the concession.
- 22 **Thirdly**, and finally, in the event that the Court considers that Directive 2014/23/EU does not apply, the referring court declares that it has doubts as to whether the national practice and provisions referred to in the preceding paragraph are compatible with the general principles enshrined in Articles 15, 16, 20 and 21 of the Charter, Article 3 TEU and Articles 8, 49, 56, 12, 145 and 151 TFEU, and in particular with the principles of freedom of establishment, freedom to provide services and the protection of legitimate expectations. In that regard, it refers to the interpretation of those general principles by the Court in its judgment of 2 September 2021 (*Sisal and Others*, C-721/19 and C-722/19, EU:C:2021:672).
- 23 In that regard, even were it to be granted that the introduction of the scheme for the technical extension of the concessions at issue is justified by the need to align the expiry dates of existing concessions in order to implement the provisions of European Union law under which public concessions must be awarded again, after their expiry, by open competitive tender procedures, such a scheme is, in the applicants’ view, contrary to Articles 49 and 56 TFEU, since it introduces restrictions on the freedom of establishment and the freedom to provide services which, as specifically developed and repeated, give rise to doubts as to their real necessity, appropriateness, proportionality and usefulness in relation to the objective pursued.