

Case C-437/21**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:**

16 July 2021

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

21 April 2021

Appellant:

Liberty Lines SpA

Respondent:

Ministero delle Infrastrutture e dei Trasporti

Subject matter of the main proceedings

Appeal against a judgment of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio; 'the TAR Lazio'), which dismissed the action brought by the company Liberty Lines seeking annulment of the decision by which the Ministero delle Infrastrutture e dei Trasporti (Italian Ministry of Infrastructure and Transport), upon the expiry of its contract with Liberty Lines, awarded the maritime connection service covered by that contract to another company without issuing the appropriate invitation to tender.

Subject matter and legal basis of the reference

An interpretation of the principles of EU law on the free movement of services and the protection of competition, in particular Articles 101, 102, 106 and 107 TFEU, Regulation (EEC) No 3577/92 and Directive 2014/25/EU, is sought pursuant to Article 267 TFEU.

Question referred for a preliminary ruling

‘Does [European Union] law, and in particular the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts, preclude a legal provision such as Article 47(11-*bis*) of decreto legge n. 50 del 24 aprile 2017 (Decree-Law No 50 of 24 April 2017), converted into legge 21 giugno 2017, n. 96 (Law No 96 of 21 June 2017), which:

- treats high-speed maritime passenger transport between the ports of Messina and Reggio Calabria as equivalent to rail transport by sea between the Italian mainland and Sicily, as provided for in Article 2(e) of decreto del Ministero dei trasporti e della navigazione n. 138 T del 31 ottobre 2000 (Decree No 138 T of the Italian Ministry of Transport and Navigation of 31 October 2000), or at least allows them to be treated as equivalent by law;

- reserves or appears capable of reserving for Rete ferroviaria italiana SpA the rail connection service by sea between Sicily and the Italian mainland, even where this involves the use of high-speed vessels?’

Provisions of European Union law relied on

Articles 101, 102, 106 and 107 TFEU.

Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7).

Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1).

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243): recital 7.

Judgment of the Court of Justice of 24 October 2019 in Case C-515/18.

Provisions of national law relied on

Decreto legge del 24 aprile 2017, n. 50, disposizioni urgenti in materia finanziaria, iniziative a favore degli enti territoriali, ulteriori interventi per le zone colpite da eventi sismici e misure per lo sviluppo (Decree-Law No 50 of 24 April 2017 containing urgent provisions on finance, local authority initiatives, additional measures for areas affected by seismic events and development measures) (*Gazzetta ufficiale della Repubblica italiana* No 95 of 24 April 2017 – Ordinary

Supplement No 20), converted, with amendments, into legge del 21 giugno 2017, n. 96 (Law No 96 of 21 June 2017); in particular Article 47(11-*bis*): ‘In order to improve the flexibility of passenger rail connections between Sicily and the Italian mainland, the rail connection service by sea referred to in Article 2(1)(e) of Decree No 138 T of the Italian Ministry of Transport and Navigation of 31 October 2000 can also be provided using high-speed vessels according to an operating model based on the rail transport service to and from Sicily, particularly on the outbound and inbound routes, Messina-Villa San Giovanni and Messina-Reggio Calabria, to be implemented within the framework of the resources provided under current legislation for the Programme Contract (services) between the Italian Government and the company Rete Ferroviaria Italiana SpA and without prejudice to the services established therein.’

Decreto del Ministero dei Trasporti e della Navigazione, del 31 ottobre 2000, n. 138 T, recante rilascio a Ferrovie dello Stato – Società Trasporti e Servizi per Azioni la concessione ai fini della gestione dell’infrastruttura ferroviaria nazionale (Decree No 138 T of the Italian Ministry of Transport and Navigation of 31 October 2000, awarding Ferrovie dello Stato – Società Trasporti e Servizi per Azioni the operating concession for the national rail infrastructure). In particular Article 2(e), which specifies that the concession included ‘the rail connection by sea between the Italian mainland and Sicily and Sardinia, respectively’.

Succinct presentation of the facts and the procedure in the main proceedings

- 1 Following an invitation to tender issued by the Ministero delle Infrastrutture e dei Trasporti (Italian Ministry of Infrastructure and Transport), Liberty Lines was awarded the high-speed maritime passenger connection service between the ports of Messina and Reggio Calabria, in the Strait of Messina, from 1 October 2015 to 30 September 2018. On 14 September 2018, Liberty Lines notified the competent ministry of its interest in extending the service concession for one year, an option provided for in the original contract. However, that notification had not been answered when, with effect from 1 October 2018, the maritime connection service in question was awarded to the company Blufferries, wholly owned by Rete Ferroviaria Italiana (RFI), which was already responsible for providing the same service on the Messina-Villa San Giovanni route.
- 2 Having asked in vain to see the case documents, on 10 October 2018 Liberty Lines brought an action against the competent ministry before the TAR Lazio for annulment of the presumed award of the service to Blufferries. Liberty Lines justified its claim on the grounds that awarding the service directly (without a tendering procedure) was unlawful since there was no emergency situation – any urgency being due to the fact that the same administration had failed to organise a Community tendering procedure in time.
- 3 On 8 November 2018, the Italian Ministry of Infrastructure and Transport sent two documents to Liberty Lines. The first, memorandum No 31344 of

26 September 2018, addressed to RFI, stated that: ‘Given the provisions of Article 47(11-*bis*) of Decree-Law No 50 of 24 April 2017, ... it has been decided that the flexibility of passenger rail connections between Sicily and the Italian mainland, which is a fundamental condition of that legal provision, can be ensured by including that connection in the Programme Contract (services) between the State and Rete Ferroviaria Italiana SpA’ and, accordingly, RFI was invited to ‘provide, from 1 October 2017, in accordance with the abovementioned provisions, high-speed maritime passenger services between the ports of Messina and Reggio Calabria’.

- 4 The second document was RFI’s reply to that memorandum, dated 8 October 2018, in which the company affirmed in particular that ‘in order to maintain a continuous service on the Reggio Calabria-Messina route from 1 January 2019, it is requested that the Ministry convene a special meeting as soon as possible to discuss the issues arising from the continuous award of the service in question ..., in addition to the funding arrangements for the service, which will in the meantime be provided by updating the Programme Contract’.
- 5 After being sent those two documents, Liberty Lines submitted further complaints in support of its action before the Regional Administrative Court, alleging – as far as EU law is concerned – infringement of the rules protecting competition and the free market. Nevertheless, the TAR Lazio dismissed Liberty Lines’ action, affirming that Directive 2014/25/EU and Regulation No 1370/2007 allowed public service contracts for rail transport to be awarded directly, without a tendering procedure.

The essential arguments of the parties in the main proceedings

- 6 Liberty Lines has lodged various complaints before the Consiglio di Stato (Council of State, Italy) against the judgment of the TAR Lazio. Of these, the following are particularly relevant: (1) the TAR Lazio had not taken account of the fact that Blufferies, using hydrofoils for its service, was unable to transport rail wagons, and therefore could not meet the condition that had to be met in order for its services to be considered strictly related to rail services and thus qualify for special treatment; (2) the reference to recital 7 of Directive 2014/25/EU was unjustified, both because it lacked any binding legal force, and because it applied to different circumstances, namely those in which the Member State decided to provide the railway service itself; (3) equally unjustified was the reference to the judgment of the Court of Justice of 24 October 2019 in Case C-515/18, given that that case concerned the direct award of a public service contract for the transport of passengers by rail, whereas this case involved the high-speed transport of passengers by hydrofoil; (4) the contract was awarded without a call for tenders and without any of the checks which are necessary to ensure that recourse to such a procedure is appropriate; (5) Liberty Lines insists that the emergency situation was artificially created by the administration; (6) the memorandum with which RFI replied to the Ministry disproved the fact that the change of contractor would

take place without additional costs, and there was no evidence that the original contract could not be extended owing to a lack of funds; (7) certain aspects of the case were clearly contrary to EU rules governing tendering procedures and protecting equal treatment, free competition, transparency, publicity and proportionality.

- 7 The Italian Ministry of Infrastructure and Transport and RFI reject all of the applicant's complaints.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 8 In making its request for a preliminary ruling, the referring court expresses strong doubts as to the compatibility with EU law of Article 47(11-*bis*) of Decree-Law No 50/17 – the main legal provision in the present case – on the following three grounds in particular: (1) that legal provision unjustifiably blocks market access and prevents the rules on public procurement from applying to the award of the high-speed maritime passenger transport service between the ports of Messina and Reggio Calabria, contrary to Regulation No 3577/92; (2) indeed it seems to confer on RFI (the company set up by the concession holder Ferrovie dello Stato – Società Trasporti e Servizi per Azioni to manage the national rail infrastructure), a special or exclusive right to operate the high-speed maritime passenger service between the ports of Messina and Reggio Calabria; (3) it also appears to confer a State aid measure on RFI, distorting or threatening to distort competition, especially since the provision in question is not limited to the time needed to secure the funding necessary to issue the public invitation to tender for the award of the contract.