

Case C-515/18

Request for a preliminary ruling

Date lodged:

6 August 2018

Referring court:

Tribunale Amministrativo Regionale per la Sardegna (Italy)

Date of the decision to refer:

4 July 2018

Applicant:

Autorità Garante della Concorrenza e del Mercato

Defendant:

Regione autonoma della Sardegna

Other party to the proceedings:

Trenitalia SpA

[...]

[...]

Tribunale Amministrativo Regionale per la Sardegna

(Regional Administrative Court for Sardinia)

[...]

[...]

ORDER

in the proceedings [...] brought by

Autorità Garante della Concorrenza e del Mercato [...]

v

Regione Autonoma della Sardegna [...]

Other party:

Trenitalia S.p.A. [...]

seeking the annulment of

- Executive Decision No 406 of 17 July 2017 on **[Or. 2]** the direct award to Trenitalia S.p.A. of public rail transport services in the Region of Sardinia for the period from 1 January 2017 to 31 December 2025;

- Decision No 31/4 of the Regional Executive Committee of Sardinia of 27 June 2017 authorising the conclusion of the nine-year public rail transport service contract between the Region of Sardinia and Trenitalia.

[...] [*procedural matters*]

1. By the present action, brought by it under Article 21-bis of Law No 287 of 10 October 1990, the Autorità Garante della Concorrenza e del Mercato (the Italian Competition Authority; ‘the Authority’) seeks annulment [...] [of the two regional measures referred to above].

2. The Authority notes, as a preliminary remark, that it received information from an undertaking operating in the passenger transport sector relating to defects in the procedure initiated by the Region of Sardinia for the direct award of the contract for the regional rail services.

3. That procedure had been initiated by the prior information notice, published on 29 December 2015, in accordance with Article 7(2) of **[Or. 3]** Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007. Following publication of the notice, the regional authority received, in addition to the proposal from Trenitalia S.p.A., an expression of interest from ARRIVA ITALIA RAIL s.r.l. (on 13 January 2016) and from AW RAIL s.r.l. (on 2 November 2016).

4. By the Executive Decision of 17 July 2017, referred to above, the Region of Sardinia — on the assumption that the service contract arising from the negotiations with Trenitalia complied with the objectives which the Region had established for itself — awarded the service to Trenitalia, without opening a competitive tendering stage in which bids from the economic operators which had expressed interest would be competitively compared, and, in particular, without addressing the request submitted by ARRIVA ITALIA RAIL s.r.l., which, by letter of 27 March 2017, called on ‘the Region to indicate a formal framework within which the competitive tendering procedure would be conducted’ [...].

5. In challenging the contested measures, the Authority relies on two pleas in law which centre on the unlawfulness of directly awarding the regional rail transport services in breach of Article 7(2) and (4) of Regulation No 1370/2007. In particular, the Authority claims that the provision of Regulation No 1370/2007 which allows the services in question to be directly awarded (Article 5(6)) is silent as to the procedural rules that the competent authority must follow in order to make the award, which rules must be based on respect for the general principles of equality of treatment, non-discrimination and transparency, which form the basis of the Treaty on the Functioning of the European Union and to which effect is given by the provisions of Regulation (EC) No 1370/2007, including Article 7(2) and (4).

6. According to the Authority, in addition, the latter provisions must be interpreted in the light of recitals 29 and 30 of the [Or. 4] regulation. This should allow the EU rules on the direct award of the services concerned to be interpreted as meaning that the publication of the prior information notice well in advance of the award (Article 7(2) of Regulation No 1370/2007) serves the purpose of enabling potential operators of the public services to prepare a proposal for submission as part of the procedure for direct award [in this regard the Authority also invokes the Communication from the European Commission on interpretative guidelines concerning Regulation (EC) No 1370/2007, published in OJ C 92 of 29 March 2014, p. 1].

7. It follows, further, that the information obligations, imposed on the Region of Sardinia, as the competent authority in the present case, under Article 7(2) of the regulation, should also have included a request for the undertaking that has always operated the transport services ('the incumbent', in this case: Trenitalia S.p.A.) to furnish all data in its possession concerning levels of demand, number of employees, rolling stock etc. in order to make that information available to parties potentially interested in being awarded the contract for the service in question.

8. A statement of defence was lodged by the Region of Sardinia, which — pointing out that Regulation No 1370/2007 permits the direct award of public service contracts for transport by rail (Article 5(6)) — objects that the Authority's argument would lead to disapplication of the rule on direct award, which constitutes a genuine and proper competitive tendering procedure. Also in relation to the information obligations, whereas the regional authority respected the provisions of Article 7 of Regulation No 1370/2007, the further documentation requested by Arriva Italia Rail s.r.l. pertains to a variety of detailed information found in tendering procedures but not in procedures for the direct award of a contract.

9. Trenitalia S.p.A. also lodged submissions before the court, reiterating that the Region of Sardinia acted correctly, both by lawfully awarding the contract directly under Article 5(6) of Regulation [Or. 5] No 1370/2007 and by complying with the reporting obligations and the obligation to give reasons.

10. [...] [*procedure*]

11. In the light of the issues raised by the Authority, the court considers that it must refer a question concerning the interpretation of those provisions of Regulation No 1370/2007 to the Court of Justice of the European Union for a preliminary ruling, under Article 267 TFEU, in the terms to be set out below.

12. As a preliminary point, it must be noted that, given their close connection, both grounds for appeal are relevant since only one of the complaints put forward need be upheld in order for the dispute to be resolved with the resulting annulment of the contested measures.

13. — Relevant provisions of EU law

Various provisions of Regulation No 1370/2007 are germane to the outcome of the present case.

First, Article 5(6) of that regulation, which provides:

‘Unless prohibited by national law, competent authorities may decide to make direct awards of public service contracts where they concern transport by rail, with the exception of other track-based modes such as metro or tramways. In derogation from Article 4(3), such contracts shall not exceed 10 years, except where Article 4(4) applies’.

Also relevant are the provisions of Article 7(2) and (4), according to which:

‘Each competent authority shall take the necessary measures to ensure that, at least one year before the launch of the invitation to tender procedure or one year before the direct award, the following information at least is published in the Official Journal of the European Union:

(a) *the name and address of the competent authority;*

(b) *the type of award envisaged;*

[Or. 6]

(c) *the services and areas potentially covered by the award;*

...

Competent authorities may decide not to publish this information where a public service contract concerns an annual provision of less than 50 000 kilometres of public passenger transport services.

Should this information change after its publication, the competent authority shall publish a rectification accordingly as soon as possible. This rectification shall be

without prejudice to the launching date of the direct award or of the invitation to tender.

This paragraph shall not apply to Article 5(5).’ (Article 7(2) of Regulation No 1370/2007).

Article 7(4) stipulates that:

‘When so requested by an interested party, a competent authority shall forward to it the reasons for its decision for directly awarding a public service contract.’

Lastly, both recital 29 (according to which: *‘With a view to the award of public service contracts, with the exception of emergency measures and contracts relating to modest distances, the competent authorities should take the necessary measures to advertise, at least one year in advance, the fact that they intend to award such contracts, so as to enable potential public service operators to react’*), and recital 30 (*‘Directly awarded public service contracts should be subject to greater transparency’*) of Regulation No 1370/2007 should be taken into account.

14. National legal provisions.

In the context of national law, the provisions of Article 61 of Law No 99 of 23 July 2009 are relevant. According to those provisions, *‘in order to harmonise the process of liberalisation and competition in the regional and local public transport sector with EU law, authorities responsible for the award of service contracts may, including where derogations from sectoral rules apply, [Or. 7] have recourse to the provisions of Article 5(2), (4), (5) and (6), and of Article 8(2) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007. The exclusion under Article 18(2)(a) of decreto legislativo [Legislative Decree] No 422 of 19 November 1997 shall not apply to undertakings, in Italy or abroad, which have been awarded service contracts within the meaning of Regulation (EC) No 1370/2007.’*

Also to be taken into consideration is Article 17(1)(i) of decreto legislativo (Legislative Decree) No 50 of 18 April 2016 (*‘implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, on public procurement and on procurement by entities operating in the water, energy, transport and postal services sectors, and reforming the existing provisions in relation to public works, service and supply contracts’*), according to which *‘the provisions of this Code shall not apply to contracts and service concessions ... (i) concerning public passenger transport services by rail or metro; ...’*; as well as Article 4 of that decree: *‘The award of active public works contracts, public service contracts and public supply contracts exempted wholly or partly from the objective scope of this Code shall observe the principles of economy, efficiency, impartiality, equal treatment, transparency, proportionality, publicity, environmental protection and energy efficiency’.*

15. Conclusions.

The uncertainty that justifies the submission of a request for a preliminary ruling concerns the possibility of interpreting Article 7(2) and (4) of Regulation No 1370/2007, in accordance with the Treaty principles regarding competition, non-discrimination and transparency, by giving the broadest meaning possible to those provisions, both as regards the obligations resting on the competent authority intending to make a direct award to inform the market, which should allow all operators potentially interested in operating the service in question to submit a serious and reasonable offer; and as regards the obligations to **[Or. 8]** give reasons for choosing to make a direct award, which should include a comparative assessment in the event that the authority, after publication of the prior information notice under Article 7 of Regulation No 1370/2007, receives numerous proposals to operate the service. As stated above, the Court of Justice's reply is essential for the resolution of the dispute, which centres on the normative effect of the provisions of Regulation No 1370/2007.

16. The questions to be referred for a preliminary ruling.

In the light of the foregoing, the Tribunale Amministrativo Regionale per la Sardegna (Regional Administrative Court, Sardinia, Italy) refers the following questions:

‘Must Article 7(2) of Regulation (EC) No 1370/2007 of 23 October 2007 be interpreted as meaning that the competent authority which intends directly to award a contract must take the necessary steps to publish or communicate to all operators potentially interested in operating the service the information necessary to allow such operators to submit a serious and reasonable offer?’

‘Must Article 7(4) of Regulation (EC) No 1370/2007 of 23 October 2007 be interpreted as meaning that, before directly awarding the contract, the competent authority must carry out a comparative assessment of all bids to operate the service which may have been received following publication of the prior information notice under that Article 7(4)?’

On those grounds

The Tribunale Amministrativo Regionale per la Sardegna (Regional Administrative Court, Sardinia), First Chamber, makes the following order:

- (1) The case is referred to the Court of Justice of the European Union under Article 267 of the Treaty on the Functioning of the European Union for a preliminary ruling on the questions set out in the grounds of the present order.
- (2) The present proceedings are stayed pending determination of the questions referred.

[...] **[Or. 9]** [...]

[...] Cagliari [...] 4 July 2018 [...]

[...] [*procedural matters and signatures*]

WORKING DOCUMENT