

**Case C-464/24****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:**

1 July 2024

**Referring court:**

Giudice di pace di Rimini (Italy)

**Date of the decision to refer:**

26 June 2024

**Applicant:**

Balneari Rimini

**Defendant:**

Comune di Rimini

**Subject matter of the main proceedings**

Action seeking compensation for non-material damage brought by the holder of a concession of State-owned coastal land before the giudice di pace di Rimini (Magistrate, Rimini, Italy) against the Comune di Rimini (Municipality of Rimini, Italy) following the adoption of a resolution setting a final expiry date for existing concessions.

**Subject matter and legal basis of the request**

Interpretation of Directive 2006/123/EC and Directive 2014/23/EU, in conjunction with Articles 51, 195 and 345 TFEU, in order to establish the applicability, *ratione materiae* and *ratione temporis*, of those directives to concessions of State-owned coastal land used for tourism and recreational purposes.

## Questions referred for a preliminary ruling

1. Do concessions of State-owned coastal land used for tourism and recreational purposes, such as the one held by the applicant – which does not provide specific services for the awarding entity, but exercises an economic activity on State-owned land – fall into the category of service concessions and, if so, do they fall within the scope of the authorisation referred to in Directive 2006/123/EC and/or Directive 2014/23/EU, as certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land, whereby the State establishes only general conditions for their use, according to the findings of the Court of Justice of the European Union in paragraphs 45 to 48 of the judgment of 14 July 2016, *Promoimpresa S.r.l. and Melis* (C-458/14 and C-67/15, EU:C:2016:558)?

2. Regardless of the Court's answer to the first question, are beach concessions such as the one held by the applicant, which commenced prior to 28 December 2009, outside the scope of Directive 2006/123/EC pursuant to Article 44 of that directive, as would seem to be implied by paragraph 73 of the Court's judgment of 20 April 2023 in *Autorità Garante della Concorrenza e del Mercato v Comune di Ginosa* (C-348/22, EU:C:2023:301)?

3. Regardless of the Court's answer to the first and second questions, must Article 195 of the Treaty on the Functioning of the European Union, particularly in the light of Article 345 TFEU and Article 1(5) of Directive 2006/123/EC, be interpreted as meaning that concessions of State-owned coastal land used for tourism and recreational purposes, such as the one held by the applicant, operating in the tourism sector, are excluded from the scope of harmonisation directives such as Directive 2006/123/EC?

4. Regardless of the Court's answer to the first, second and third questions, must Article 51 (previously Article 45 of the EC Treaty) of the Treaty on the Functioning of the European Union and Article 2(2)(i) of Directive 2006/123/EC be interpreted as meaning that concessions of State-owned coastal land used for tourism and recreational purposes, such as those held by the applicant, which consistently and regularly carries out activities in the public interest on State-owned land, such as the safeguarding of public property, the protection of public health and hygiene, the protection of the right of disabled people to have access to heliotherapy and bathing activities, as well as tourism, cultural and environmental activities, are excluded from the scope of both Article 49 TFEU and the Services Directive?

## Provisions of European Union law relied on

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market; recital 57, Article 1(5), Article 2(2)(i), and in particular Article 12(1) and (2) and Article 44

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; in particular recital 15

TFEU, Articles 46, 49, 51, 55, 195, 345

### **Case-law of the Court of Justice relied on**

Judgments of 14 July 2016, *Promoimpresa and Melis* (C-458/14 and C-67/15, EU:C:2016:558) ('the judgment in *Promoimpresa*'), and of 20 April 2023, *Autorità Garante della Concorrenza e del Mercato v Comune di Ginosa* (C-348/22, EU:C:2023:301) ('the judgment in *AGCM*')

Order of 24 October 2002, *RAS* (C-233/01, EU:C:2001:261) and judgments of 24 September 1998, *Tögel* (C-76/97, EU:C:1998:432) and of 3 May 2005, *Berlusconi and Others* (C-387/02, C-391/02 and C-403/02, EU:C:2005:270)

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

Article 36 of the Codice della navigazione (Regio decreto del 30 marzo 1942, n. 327) (Royal Decree No 327 of 30 March 1942; 'the Shipping Code') provides for the possibility for the awarding public authority (previously the competent ministry or the harbourmaster's office, depending on the duration, but now, since the adoption of Article 42 of Legislative Decree No 96/1999, the municipality) to grant, in a manner compatible with the requirements of public use, a concession for the occupation and use, including for exclusive occupation and use, of State-owned land and territorial waters for a fixed term.

Article 37 of the Shipping Code provided for a specific procedure for the comparative assessment of candidates only in the event that several applications for the grant of a concession were submitted in respect of the same State-owned land. In such a case, however, the second paragraph of that article stated that preference should be given to the existing concession holder ('the preferential right'). The preferential right clause remained in force until 30 December 2009, when it was repealed with the amendment of the second paragraph of Article 37 of the Shipping Code by Article 1(10) of decreto legge n. 194/2009 (Decree-Law No 194/2009) (converted with amendments by legge n. 25/2010 (Law No 25/2010)).

Article 42 of the Shipping Code governs the termination of concessions of State-owned coastal land. In paragraph 2, it states that concessions lasting more than four years or involving installations that are difficult to remove may be terminated for specific reasons relating to public use of the sea or for other reasons in the public interest, without compensation. Paragraph 4 provides, for concessions involving the construction of permanent structures, for compensation equal to a percentage of the cost of the structures based on the number of years remaining until the expiry of the original term.

Article 49 of the Shipping Code provides that when the concession comes to an end, the non-removable structures constructed on the State-owned area are to remain vested in the State, without any compensation or reimbursement, without prejudice to the granting authority's right to order their demolition, in which case the State-owned land is to be returned to its original condition.

Article 1161 of the Shipping Code (Unlawful occupation of State-owned land and non-compliance with limits on private property) provides that: 'Anyone who arbitrarily occupies State-owned coastal land, airports or inland ports, prevents the public use of them or makes unauthorised changes thereto, or who fails to observe the constraints to which private property is subject in areas near to State-owned coastal land or airports shall be liable to a prison sentence of up to six months or a fine of up to one million lire, provided that the conduct does not amount to a more serious criminal offence'.

Article 1(2) of decreto legge n. 400 del 1993 (Decree-Law No 400 of 1993), as amended by Article 10(1) of legge n. 88/2001 (Law No 88/2001, in force until 16 January 2012), provided for the automatic renewal of six-year concessions of State-owned coastal land for a further six years, without prejudice to the termination provided for in Article 42 of the Shipping Code.

Article 8(1) of Decree-Law No 400 of 1993 provides: '1. From 1990, the compensation payable for unauthorised use of State-owned coastal land, territorial waters and fixtures of State-owned coastal land, or for use other than for the purposes of the concession, shall be determined as an amount equal to that which would have resulted from the application of this decree, increased by two hundred percent and one hundred percent, respectively'.

Decreto legislativo 18 aprile 2016 n. 50 (Legislative Decree No 50 of 18 April 2016) (Public Procurement Code, replaced by decreto legislativo del 31 marzo 2023 n. 36 (Legislative Decree No 36 of 31 March 2023); the 'new Public Procurement Code', from 1 July 2023) transposed Directives 2014/23/EU, 2014/24/EU and 2014/25/EU. Article 17(1)(a) excluded the application of the provisions of the Public Procurement Code 'to service concessions and procurement: (a) having as their object the purchase or lease, irrespective of the related financial arrangements, of land, existing buildings or other immovable property or rights over such assets'.

Regolamento per l'esecuzione del Codice della navigazione (decreto del Presidente della Repubblica del 15 febbraio 1952, n. 328) (Implementing regulations for the Shipping Code (Presidential Decree No 328 of 15 February 1952)) stipulates the content of the concession agreement in the terms indicated in recital 15 of Directive 23/2014/EU on the award of concession contracts, that is to say, in order to allow the relationship between the awarding authority and the concessionaire to be treated as a 'lease'.

Regione Emilia-Romagna (Emilia-Romagna Region, Italy), by Article 18 of legge del 14 aprile 2004, n. 7 (Law No 7 of 14 April 2004) (see the applicant's Annex 15), provides for the preferential right of the outgoing concessionaire in the event of renewal of concessions in respect of public water resources in the region.

Legge di conversione n. 14/2023 del decreto legge n. 198/2022 (Law No 14/2023 converting Decree-Law No 198/2022) introduced regulatory amendments that suspend indefinitely the effects of legge n. 118/2022 (Law No 118/2022).

In particular, Article 3(1) of Law No 118/2022, as amended by Article 12(6-sexies) of Decree-Law No 198/2022, converted by Law No 14/2023, provided for an automatic extension of concessions of State-owned coastal land until 31 December 2024, amending the original expiry date of 31 December 2023.

Article 3(3) of Law No 118/2022, as amended by Decree-Law No 198/2022, converted by Law No 14/2023, is currently worded as follows: '3. Where there are objective reasons which prevent the conclusion of the selection procedure before 31 December 2024, in connection, for example, with the existence of an ongoing dispute or with objective difficulties linked to the completion of the procedure itself, the competent authority may, by reasoned decision, postpone the expiry of existing concessions for the period strictly necessary to conclude the procedure and, in any event, not beyond 31 December 2025. Until that date, the occupation of the State-owned area by the outgoing concessionaire is, in any event, also lawful under Article 1161 of the Shipping Code'.

Pursuant to Article 10-quater(3) of decreto legge n. 198/2022 (Decree-Law No 198/2022), introduced at the time of conversion by legge n. 14/2023 (Law No 14/2023): '... the concessions and the relationships referred to in Article 3(1)(a) and (b) of legge del 5 agosto 2022, n. 118 (Law No 118 of 5 August 2022) shall in any case continue to be effective until the date on which the new concessions are granted'.

Lastly, Article 4(4-bis) of Law No 118/2022, introduced by Article 1(8)(b) of Law No 14/2023, provides that: 'until the adoption of the legislative decrees referred to in this article, the granting authorities are prohibited from issuing invitations to tender for the award of the concessions and the relationships referred to in Article 3(1)(a) and (b)'.

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

- 1 The applicant, a holder of a concession in respect of State-owned coastal land under continuous management since 1993, by virtue of a licence from the Ministero della Marina Mercantile (Ministry of the Merchant Navy) and the related ministerial concession of 1989, has brought an action before the referring court seeking compensation for the non-material damage allegedly caused to the applicant by the Municipality of Rimini for having set, in a resolution of its council, the expiry date as 31 December 2023 for all concessions of State-owned

coastal land used for tourism and recreational purposes (‘the beach concessions’), located in the municipality but owned by the State, including that held by the applicant. The expiry date was subsequently extended until 31 December 2024, to allow the granting Municipality to issue a call for tenders for the award of new concessions to other holders.

- 2 The applicant sought equitable damages in the amount of EUR 5 000 and claimed that the defendant should be ordered to reimburse legal expenses.
- 3 The matter has over time been the subject of various interventions by the national legislature, as well as rulings by the highest national courts and the Court of Justice, on whose interpretation and application the parties differ.
- 4 Article 1(682) to (683) of Law No 145/2018 provided for an extension until 31 December 2033 of existing concessions of State-owned coastal land, pursuant to which the Municipality of Rimini had extended the applicant’s beach concession until that date.
- 5 The Plenary Session of the Consiglio di Stato (Council of State, Italy), by judgment Nos 17 and 18 of 9 November 2021, subsequently held that ‘the national legislative provisions that have provided (and in future should still provide) for the automatic extension of concessions of State-owned coastal land for tourism and recreational purposes ... are contrary to [EU] law, in particular Article 49 TFEU and Article 12 of Directive 2006/123/EC (‘the Bolkestein Directive’), and that therefore ‘they must not be applied either by the courts or by the public administration’. Furthermore, to avoid the significant socio-economic impact caused by the immediate blanket expiry of all existing concessions, taking into account the technical time needed for the authorities to prepare the required tendering procedures, and pending an intervention by the national legislature to amend the relevant legislation to comply with EU principles, the Council of State held that ‘existing concessions in respect of State-owned land for tourism and recreational purposes [would continue] to be effective until 31 December 2023, it being understood that, beyond that date, even in the absence of legislation, they will cease to have effect, notwithstanding any further legislative extension adopted in the meantime, which shall be deemed to be void on the basis that it is contrary to the rules of [EU] law’.
- 6 Following a succession of legislative measures, the time limit for granting new concessions (and the consequent expiry of existing concessions) was initially set as 31 December 2023 (Law No 118/2022), then suspended indefinitely (Decree-Law No 198/2022), and finally extended until 31 December 2024 or 31 December 2025, as applicable (Law No 14/2023).
- 7 The Council of State, by judgments No 2192 of 1 March 2023 and No 3964 of 19 April 2023, upheld the principles set out in judgment Nos 17 and 18 of the Plenary Session of 2021, ordering the granting authorities to disapply the

supervening legislation enacted by Law No 14/2023 converting Decree-Law No 198/2022.

- 8 By the judgment in *AGCM*, the Court of Justice answered the questions referred for a preliminary ruling by the Tribunale amministrativo regionale, Lecce (Regional Administrative Court, Lecce, Italy) by the order of 11 May 2022 in Case C-348/22.
- 9 The applicant, together with 24 other holders of Rimini beach concessions, lodged an appeal before the Tribunale amministrativo regionale per l'Emilia Romagna (Regional Administrative Court, Emilia Romagna, Italy) against, inter alia, the resolution at issue of the municipal council of Rimini, seeking a declaration that the resolution was null and void and/or unlawful since it was contrary to EU law, the Italian Constitution and ordinary rules, and a determination that it may continue using the concessions in respect of State-owned land indefinitely, and in any case until 31 December 2033.
- 10 In February 2024, the applicant, together with 22 other holders of concessions of State-owned coastal land, lodged an appeal on a point of law against the Italian Government, the AGCM and the Municipality of Rimini, seeking to have set aside judgment No 17/2021 of the Plenary Session.

#### **The essential arguments of the parties in the main proceedings**

- 11 The Municipality of Rimini justified the adoption of the resolution at issue by invoking the direct effect in national law of Article 12(1) and (2) of Directive 2006/123/EC ('the Bolkestein Directive' or 'the Authorisation Directive'), which was established by the two judgments of the Court of Justice of 14 July 2016 in Joined Cases C-458/14 and C-67/15 (the judgment in *Promoimpresa*) and of 20 April 2023 in Case C-348/22 (the judgment in *AGCM*).
- 12 According to the applicant, the Municipality of Rimini has acted improperly, since the national legislation in force prohibits invitations to tender and makes the duration of beach concessions indefinite, compared with the time limit originally set by individual measures as 31 December 2033.
- 13 The resolution at issue is therefore an unlawful administrative measure, which amends the laws currently in force and applies legislative provisions that are no longer in force or delegated laws that were never ratified, to the detriment of the applicant concessionaire, in a sector in which, moreover, beach concessions are awarded exclusively according to the rules of the Shipping Code and the implementing regulations, since no public and open tendering procedure is provided for under the Public Procurement Code or EU law.
- 14 In the proceedings before the referring court, the applicant proposed that the referring court first submit four questions to the Court of Justice for a preliminary ruling under Article 267 TFEU.

- 15 The defendant opposed the reference for a preliminary ruling from the Court of Justice, arguing that the direct application of Article 12 of Directive 2006/123/EC to concessions of State-owned coastal land has been established by the two judgments of the Court of Justice (the judgment in *Promoimpresa* and the judgment in *AGCM*), the invitation to tender by 31 December 2024 thus being valid.

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

- 16 According to the referring court, the direct application of EU law was the main point of debate as far as concerns the duration of concessions of State-owned coastal land for tourism and recreational use which led to the involvement of the EU institutions (Court of Justice and Commission) and national institutions at both the legislative and executive levels (Parliament and Government) and jurisdictional level (Corte costituzionale (Constitutional Court, Italy), Cassazione a Sezioni Unite (Combined Chambers of the Supreme Court of Cassation, Italy), Plenary Session of the Council of State), who were clearly not aligned as regards interpretation and norms.
- 17 The referring court also notes that, with the declaration of unlawful occupation of State-owned coastal land for tourism and recreational use, which was subject to penalties with effect from 1 January 2024 by the Council of State, the holders of concessions that expired on 31 December 2023, such as the applicant, face the following consequences under civil and criminal law:
- application of the compensation provided for in Article 8 of Decree-Law No 400/1993 (converted with amendments by Law No 494/1993) in an amount equal to the fees provided for by the same legislation in the event of lawful occupation based on a valid concession, increased by 200%;
  - application of Article 54 of the Shipping Code with an order from the managing bodies to the former concessionaires unlawfully occupying the State-owned coastal land to restore the public land to its original state with the demolition of non-removable structures and the removal of removable structures, with the public body covering the expenses of the interested party in the event of non-enforcement of the order;
  - application of Article 1161 of the Shipping Code, which provides that anyone who arbitrarily occupies State-owned coastal land is liable to a prison sentence of up to six months or a fine of up to EUR 516, provided that the conduct does not amount to a more serious criminal offence.
- 18 It therefore considers that the answers of the Court of Justice to the questions referred are essential to remove any doubt as to the validity of the applicant's claim and the possible incompatibility with EU law of the indefinite occupation of State-owned coastal land by the applicant for the purposes of the concession activity.



***The first question referred for a preliminary ruling***

- 19 The referring court holds that the Court of Justice – having identified, in paragraph 4 of the judgment in *Promoimpresa*, as the EU legislation applicable in that case to concessions of State-owned coastal land for tourism and recreational use, recital 57 of Directive 2006/123/EC, and in paragraph 7, recital 15 of Directive 2014/23/EU – may have intended to exclude those concessions, as concessions in respect of assets awarded by the public authority, from the scope of both Directive 2006/123/EC and Directive 2014/23/EU on the award of concession contracts, as certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land, whereby the State establishes only general conditions for their use (recital 15 of Directive 2014/23/EC).
- 20 Moreover, in the judgment in *Promoimpresa*, the Court of Justice seems to state expressly (paragraphs 44 to 48) that concessions in respect of State-owned land are not considered service concessions and therefore do not fall within the scope of Directive 2006/123/EC or even Directive 2014/23/EU. On the other hand, according to paragraph 39 of the judgment delivered by that Court on 18 September 2019 in Case C-526/17, *Commission v Italian Republic* (EU:C:2019:756), the European Commission also seems aware of the Court of Justice’s interpretation.

***The second question referred for a preliminary ruling***

- 21 Article 44 of Directive 2006/123/EC provides that the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 28 December 2009.
- 22 Therefore, according to the referring court, the Bolkestein Directive never applied to concessions of State-owned coastal land, since they are concessions in respect of property and not in respect of services or works. In any event, it could not have applied to beach concessions such as the applicant’s, which commenced prior to 28 December 2009. Paragraph 73 of the Court’s judgment in *AGCM* seems to acknowledge the exclusion of concessions of State-owned coastal land from the scope of Directive 2006/123/EC if they commenced prior to 28 December 2009.
- 23 In its judgment No 229/2022 of 13 January 2022, the Council of State clarified, recalling the Court’s judgment in *Tögel*, that beach concessions which commenced prior to 28 December 2009 do not fall within the scope of the Bolkestein Directive.

***The third question referred for a preliminary ruling***

- 24 Article 195 TFEU, with effect from 1 November 2009 (the rule was not present in the EC Treaty), excludes that, in the tourism sector, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may

introduce, at the legislative level, specific measures to harmonise the laws and regulations of the Member States.

- 25 Article 345 TFEU provides that the Treaties are in no way to prejudice the rules in Member States governing the system of property ownership.
- 26 The second paragraph of Article 01 of Decree-Law No 400 of 1993, as amended by Article 10(1) of Law No 88/2001 and in force until 16 January 2012, provided for the automatic renewal of existing six-year concessions of State-owned coastal land for a further six years, without prejudice to the termination provided for in Article 42 of the Shipping Code, while the original text of Article 37(2) of the Shipping Code until 29 December 2009 provided for the ‘preferential right’ of the previous holder of the concession in respect of State-owned coastal land.
- 27 The national legislature has proposed the same situation as the repealed provisions with the combined provisions of Article 3(1) and (3) and Article 4(4-bis) of Law No 118/2022, and with Article 10-quater(3) of Decree-Law No 198/2022, currently in force, in the part in which the national rules classify as lawful for an indefinite period the occupation of the State-owned coastal land awarded in accordance with the Shipping Code until the termination or expiry of the concession, preventing the commission of the criminal offence provided for in Article 1161 of the Shipping Code in the event of unlawful occupation.
- 28 According to that court, it is for the Constitutional Court, and not for the public administration or the ordinary or administrative courts, to disapply current legislation on concessions in respect of State-owned coastal land on the basis that they are allegedly inconsistent with EU directives, since this could have criminal consequences for the concessionaires under Article 1161 of the Shipping Code. The Constitutional Court itself has clarified, in its own case-law, that direct effects must be considered excluded if criminal liability derives from the application of the directive (see also Court of Justice, order of 24 October 2002, *RAS*, C-233/01, EU:C:2001:261, and judgment of 3 May 2005, *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, EU:C:2005:270) and that it is the exclusive responsibility of central government, as owner of the land, to determine the procedures for the renewal and/or reallocation of concessions of State-owned coastal land for tourism and recreational purposes.
- 29 Therefore, according to the referring court, harmonisation directives such as Directive 2006/123/EC should not apply to concessions in respect of State-owned coastal land, partly because, otherwise, taking into account Article 1(5) of that directive, they would interfere with legislation on the ownership and/or possession of immovable property and the classification of their occupation as lawful or unlawful under criminal law.

*The fourth question referred for a preliminary ruling*

- 30 Article 51 (previously Article 46 of the EC Treaty) in Title IV, Chapter 2 TFEU provides that the provisions of Chapter 2 (Articles 49 to 55 TFEU) do not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.
- 31 Therefore, according to the referring court, concessions in respect of State-owned coastal land are excluded from the scope of Article 49 TFEU, since they form part, not merely occasionally but directly, of the exercise of official authority for the protection of coastal heritage and public health and hygiene and for the guaranteeing of free and safe access to bathing for disabled people, among other things.

WORKING DOCUMENT