



Reports of Cases

Joined Cases C-458/14 and C-67/15

Promoimpresa Srl
v
Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro
and
Regione Lombardia
and
Mario Melis and Others
v
Comune di Loiri Porto San Paolo
and
Provincia di Olbia Tempio

(Requests for a preliminary ruling
from the Tribunale amministrativo regionale per la Lombardia and the Tribunale amministrativo
regionale per la Sardegna)

(References for a preliminary ruling — Public contracts and freedom of establishment — Article 49
TFEU — Directive 2006/123/EC — Article 12 — Concessions of State-owned maritime, lakeside and
waterway property of an economic interest — Automatic extension — Lack of tender procedure))

Summary — Judgment of the Court (Fifth Chamber), 14 July 2016

1. *Questions referred for a preliminary ruling — Admissibility — Need for a preliminary ruling and relevance of the questions referred — Assessment by the national court — Presumption of relevance of the questions referred*

(Art. 267 TFEU)

2. *Questions referred for a preliminary ruling — Jurisdiction of the Court — Limits — Questions which are manifestly irrelevant, hypothetical questions put in a context precluding a useful answer nor questions bearing no relation to the purpose of the main proceedings — No such questions — Admissibility*

(Art. 267 TFEU)

3. *Freedom of establishment — Freedom to provide services — Services in the internal market — Directive 2006/123 — Authorisation system — Inapplicability to concessions of public services covered by Directive 2014/23*

(European Parliament and Council Directives 2006/123, recital 57 and Chapter III, section 1, and 2014/23)

4. *Approximation of laws — Procedures for the formation of concession contracts — Directive 2014/23 — Scope — Concession de services — Definition*

(European Parliament and Council Directive 2014/23)

5. *Freedom of establishment — Freedom to provide services — Services in the internal market — Directive 2006/123 — Authorisation system — Obligation to organise a selection procedure in the event of several candidates for authorisation — National legislation providing for the automatic extension of existing authorisations of State-owned maritime and lakeside property for tourist and leisure-oriented business activities without any selection procedure — Not permissible*

(European Parliament and Council Directive 2006/123, Art. 12(1) to (3))

6. *Freedom of establishment — Public procurement — Concessions excluded from the scope of the public procurement directives but having a certain cross-border interest — Obligation of the contracting authority to observe the fundamental rules of the treaty — National legislation providing for the automatic extension of existing authorisations of State-owned property without any transparency — Not permissible — Breach of the principle of equal treatment*

(Art. 49 TFEU)

7. *Questions referred for a preliminary ruling — Admissibility — Need to provide the Court with sufficient information on the factual and legislative context — Presence of a potential cross-border interest — Presence of elements allowing for a meaningful reply*

(Art. 267 TFEU; Rules of Procedure of the Court, Art. 94)

1. See the text of the decision.

(see paras 28, 29)

2. See the text of the decision.

(see para. 30)

3. In so far as, according to recital 57 of Directive 2006/123 on services in the internal market, the provisions of that directive relating to authorisation schemes do not concern the conclusion of contracts by competent authorities for the provision of a particular service which is governed by rules on public procurement, those provisions cannot apply to concessions of public services capable, inter alia, of falling within the scope of Directive 2014/23 on the award of concession contracts.

(see paras 44, 45)

4. A services concession within the meaning of Directive 2014/23 on the award of concession contracts is characterised, inter alia, by a situation in which the right to operate a particular service is transferred by the contracting authority to the concessionaire and that the latter enjoys, in the framework of the contract which has been concluded, a certain economic freedom to determine the conditions under which that right is exercised and, in addition, is, to a large extent, exposed to the risks of operating the service. In that regard, in relation to concessions which do not concern the provision of a particular service by the contracting entity, but an authorisation to exercise an economic activity on State-owned land, it follows that such concessions do not fall within the category of service concessions.

(see paras 46, 47)

5. Article 12(1) and (2) of Directive 2006/123 on services in the internal market must be interpreted as precluding a national measure which permits the automatic extension of existing authorisations of State-owned maritime and lakeside property for tourist and leisure-oriented business activities, without any selection procedure for potential candidates.

Although Article 12(3) of Directive 2006/123 provides expressly that Member States may take into account overriding reasons relating to the public interest in establishing the rules governing the selection procedure, such considerations may be taken into account only when establishing the rules for the selection procedure of potential candidates and subject, in particular, to Article 12(1) of that directive. Consequently, Article 12(3) of the directive cannot be interpreted as enabling the automatic renewal of authorisations to be justified when no selection procedure referred to in paragraph 1 of that article was organised at the time of the initial grant of those authorisations.

(see paras 53-55, 57, operative part 1)

6. Article 49 TFEU must be interpreted as precluding national legislation which permits the automatic extension of existing concessions of State-owned property for tourist and leisure-oriented business activities, in so far as those concessions are of certain cross-border interest.

Public authorities are bound, when they envisage granting a concession which is outside the scope of the directives on the various categories of public contracts, to comply with the fundamental rules of the TFEU, in general, and the principle of non-discrimination, in particular. More specifically, since such a concession is of certain cross-border interest, its award, without any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession and which are located in other Member States. Such a difference in treatment is, in principle, prohibited by Article 49 TFEU.

(see paras 64, 65, 74, operative part 2)

7. As regards references for a preliminary ruling, the existence of certain cross-border interest must be assessed on the basis of all the relevant factors, such as the financial value of the contract, the place where it is to be performed or its technical features, and having regard to the particular characteristics of the contract concerned. In that regard, as is clear from Article 94 of the Rules of Procedure, a request for a preliminary ruling must contain a summary of the facts on which the questions are based and indicate the connection, *inter alia*, between those facts and the questions. Accordingly, the findings of fact enabling the Court to ascertain whether there is certain cross-border interest should be made by the referring court before the questions are referred to the Court.

(see paras 66, 68)