Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 21 March 2019[1]

Case C-526/17

European Commission
v

Italian Republic

(Failure of a Member State to fulfil obligations — Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts — Public works concession — Extension of an existing concession for the construction and management of a motorway without publication of a tender notice)

1. In 1969 a public works concession contract was awarded without following a public procurement procedure for a motorway to be built between Livorno and Civitavecchia on the west coast of Italy. That contract was subsequently amended by further contracts in 1987, 1999 and 2009. On no occasion was the further contract preceded by public procurement proceedings.

2. The European Commission has now brought infringement proceedings under Article 258 TFEU against the Italian Republic. It considers that the contract concluded in 2009 constituted material change to the original contract and that a public procurement procedure should therefore have been undertaken in accordance with Directive 2004/18/EC.[2] The Italian Republic disputes that contention.

Legislative framework

EU law

3. Article 1(2) of Directive 2004/18 defines 'public works contracts' as 'public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I [3] or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority'. Article 1(2) further provides that 'a "work" means the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function'. Article 1(3) defines 'public works concession' as 'a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment'.

1 Original language: English.

2 European Parliament and Council Directive of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114), now repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (OJ 2014 L 94, p. 65).

3 Annex I includes 'construction of highways'.

4. Article 2 of Directive 2004/18 provides that 'contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way'.

5. Article 56 provides that the rules governing public works concessions 'shall apply to all public works concession contracts concluded by the contracting authorities where the value of the contracts is equal to or greater than EUR 5 150 000'.[4]

6. Article 58 provides that:

'(1) Contracting authorities which wish to award a public works concession contract shall make known their intention by means of a notice.

(2) Notices of public works concessions shall contain the information referred to in Annex VII C and, where appropriate, any other information deemed useful by the contracting authority, in accordance with the standard forms adopted by the Commission pursuant to the procedure in Article 77(2).

(3) Notices shall be published in accordance with Article 36(2) to (8).

(4) Article 37 on the publication of notices shall also apply to public works concessions.'

7. Article 61 provides that:

'This Directive shall not apply to additional works not included in the concession project initially considered or in the initial contract but which have, through unforeseen circumstances, become necessary for the performance of the work described therein, which the contracting authority has awarded to the concessionaire, on condition that the award is made to the economic operator performing such work: — when such additional works cannot be technically or economically separated from the initial contract without major inconvenience to the contracting authorities, or — when such works, although separable from the performance of the initial contract, are strictly necessary for its completion. However, the aggregate value of contracts awarded for additional works may not exceed 50% of the amount of the original works concession contract.'

8. Article 80(1) provides that 'the Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive no later than 31 January 2006'.

Factual and procedural background

The 1969 Contract

9. On 23 October 1969 a public works concession contract was entered into between the contracting authority Azienda Nazionale Autonoma delle Strade ('ANAS') and the economic operator Società Autostrada Tirrenica ('SAT')[5] ('the 1969 Contract').

4 As amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 amending Directives 2004/17/EC and 2004/18/EC of the European Parliament and the Council in respect of their application thresholds for the procedures for the award of contracts (OJ 2007 L 317, p. 34).

5 Strictly speaking the Tyrrhenian Sea (il mar Tirreno) from which the economic operator derives its name is that part of the Mediterranean off the west coast of Italy that is bordered to the south by Sicily, to the west by Sardinia and Corsica, and to the North by the Isle of Elba, including the Gulf of Follonica. The waters from there up to Livorno itself are part of the Ligurian Sea. See the website of the Istituto idrografico della Marina (http://www.marina.difesa.it).

10. Article 1, paragraph 1 of that contract described its objective as the construction and management of the A12 motorway from Livorno (Cecina) to Civitavecchia ('the motorway').[6] Article 1, paragraph 2 specified the total length of the motorway to be 'approximately 237 km'.

11. Article 7 provided that 'the concession will terminate at the end of the 30th year following the point at which operation of the entire motorway commences; in any event, without prejudice to the provisions set out in Article 5(5) and (6), the period shall not exceed the 30th year from the date on which the works described in the general works implementation plan referred to in Article 5(1) and (2) are completed'.

The 1987 Contract

12. On 14 October 1987, a further contract was entered into between the same parties ('the 1987 Contract'). According to the Italian Government, that contract replaced Article 7 of the 1969 Contract with the following provision: 'The duration of the present concession is set at 30 years from the date on which the entire motorway is open to traffic.'

The 1999 Contract

13. On 7 October 1999 a further contract was entered into between the same parties ('the 1999 Contract'). Article 2(1) thereof provided that 'the present agreement shall govern as between the concession-granting authority and the concessionaire the operation of the 36.6 km section between Livorno and Cecina, open to traffic on 3 July 1993 and forming an integral part of the A12 Livorno-Civitavecchia motorway, the concession for the construction and operation of which was granted to SAT'.

14. Article 2(3) further provided that 'when the legal and factual conditions for the continuation of the construction programme in respect of which a concession has been granted are met, an addendum shall be concluded to establish a contractual framework for the construction and operation of two further sections: Cecina-Grosseto and Grosseto-Civitavecchia'.

15. Article 23 was entitled 'Duration of the concession'. It provided that 'the concession shall expire on 31 October 2028'.

The 2009 Contract

16. On 11 March 2009, yet a further contract was entered into between the same parties ('the 2009 Contract'). The recitals to that contract provided, inter alia, that on 7 October 1999 the new agreement was concluded between ANAS and SAT, approved by Decree of 21 December 1999, registered with the Court of Auditors on 11 April 2000 which replaced the previous agreement of 23 October 1969 and the related addendum of 14 October 1987, and which, inter alia, provided that the concession is to terminate on 31 October 2028.

17. Article 1.4 provided that 'the parties agree that they have no right, interest or claim, actual or prospective, in respect of the agreement of 7 October 1999 or any act or measure adopted prior to the conclusion of the present agreement'.

6 The term motorway, as used in this Opinion, is defined in Article 1, paragraph 2 of the 1969 Contract as 'a dual carriageway, each side of which measures 7.5 metres and is separated by a central reservation and flanked by a hard shoulder'.

18. Article 2.1 provided that 'the present single agreement shall govern fully and exclusively the relationship between the concession-granting authority and the concessionaire as regards the design, construction and operation of all the works previously allocated under the concession agreement concluded with ANAS on 7 October 1999: (a) A12 Livorno – Cecina (Rosignano) 36.6 km (open to traffic on 3 July 1993); (b) Cecina (Rosignano) – Grosseto, 110.5 km; (c) Grosseto – Civitavecchia, 95.5 km, totaling 242.6 km'.

19. The first part of Article 4.1 provided that 'taking account of the periods when the execution of the works was suspended, as referred to in the preamble and Article 143 of Legislative Decree No 163/2006, the concession for the completion of the Cecina (Rosignano) – Civitavecchia motorway shall terminate on 31 December 2046'.

20. The second part of Article 4.1 provided that 'if the concession-granting authority has not approved the final project and the related economic and financial plan (EFP) for the execution of the Cecina – Civitavecchia section by 31 December 2012, the parties shall determine the economic and financial consequences thereof, including the investment costs incurred, by reference to the termination of the concession on the date originally stipulated, namely 31 October 2028'.

Progress of the construction work

21. The recitals of the 2009 Contract indicate that construction work on the motorway was suspended as a result of Article 11 of Law No 287 of 28 April 1971[7] and of Article 18a of Decree-law No 376 of 13 August 1975,[8] subsequently converted into Law No 492 of 16 October 1975.[9] That suspension was subsequently lifted by Articles 9 and 14 of Law No 531/1982, adopted on 12 August 1982.[10]

22. It is common ground that the first stretch of the motorway, covering 36.6 kilometres from Livorno to Cecina (Rosignano), was opened to traffic on 3 July 1993. The second and third stretches of the motorway, respectively from Cecina (Rosignano) to Grosseto and from Grosseto to Civitavecchia, were not built at that time. Only minor sections have subsequently been completed.[11]

23. The recitals of the 2009 Contract further indicate that construction work on the motorway was suspended again by Article 55(12) of Law No 449 of 27 December 1997,[12] and that that suspension was lifted by Law No 443 of 21 December 2001.[13] According to the Italian Government, Law No 286 of 24 November 2006 and Law No 101 of 6 June 2008 further required that the existing concession contracts be consolidated. It was on that basis that the 2009 Contract was agreed.

7 Legge n. 287, Modifiche ed integrazioni all'attuale legislazione autostradale (Law No 287, Modifying and complementing the legislation on motorways), GURI No 137 of 1 June 1971.

8 Decreto-legge n. 376, Provvedimenti per il rilancio dell'economia riguardanti le esportazioni, l'edilizia e le opere pubbliche (Decree-law No 376, introducing economic recovery measures for exports, construction and public works), GURI No 218 of 18 August 1975.

9 Legge n. 492, Conversione in legge, con modificazioni, del decreto-legge 13 agosto 1975, n. 376, concernente provvedimenti per il rilancio dell'economia riguardanti le esportazioni, l'edilizia e le opere pubbliche (Conversion into law, with amendments, of the Decree-Law of 13 August 1975, No 376, concerning measures to re-launch the economy concerning exports, construction and public works), GURI No 276 of 17 October 1975.

10 Legge n. 531, Piano decennale per la viabilità di grande comunicazione e misure di riassetto del settore autostradale (Law No 531 Introducing a ten-year plan for the viability of major roads and restructuring measures in the highway sector), GURI No 223 of 14 August 1982.

11 See point 36 below.

12 Legge n. 449, Misure per la stabilizzazione della finanza pubblica (Law No 449, Introducing measures to stabilise public finances), GURI No 302 of 30 December 1997.

13 Legge n. 443, Delega al Governo in materia di infrastrutture ed insediamenti produttivi strategici ed altri interventi per il rilancio delle attività produttive (Law No 443, Providing a delegation to the government for strategic infrastructure and production facilities as well as other interventions for the revival of production activities), GURI No 299 of 27 December 2001.

24. Neither the Commission nor the Italian Government has provided information concerning any subsequent changes to the Italian legislation that might affect the validity of the concession contract.[14]

Pre-litigation procedure

25. In 2009, the Commission received a complaint regarding the extension (from 31 October 2028 to 31 December 2046) of the term for the works concession contract awarded to SAT. The Commission pursued that complaint, which it registered under number 2009/4154. The exchange of communications between the Commission and Italy indicates that Italy undertook to reduce the term by three years to 2043 and to submit the award of all of the construction works on the motorway to a public procurement procedure. On the basis of that undertaking, the Commission decided not to proceed with complaint No 2009/4154.

26. It seems that SAT assigned approximately 30% of the value of the works to companies under its control, in two tranches totalling respectively EUR 34 724 661 and EUR 117 323 225, on respectively 15 December 2009 and 30 March 2012.

27. On 22 April 2014 the Commission sent a letter to Italy stating its formal position that by extending the concession contract term through the 2009 Contract without engaging in a public procurement procedure, Italy had infringed Directive 2004/18, in particular Articles 2 and 58 thereof, and that Article 61 of that directive was not applicable to the circumstances.

28. In June 2014, Italy offered to put out to tender 70% of the works and reiterated its offer to reduce the term of the concession by three years.

29. On 17 October 2014, the Commission sent Italy a reasoned opinion. It refused to accept that 30% of the works would *not* be subject to a public procurement procedure. The Commission considered that extending the contract to 2046 had been the equivalent of awarding a new contract and that 'as ANAS has concluded an agreement with SAT, which extended the end date of the concession for the A12 Civitavecchia – Livorno motorway from 31 October 2028 to 31 December 2046, without prior publication of a contract notice, the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of Directive 2004/18/EC'.

30. Subsequent to the reasoned opinion, Italy proposed various commitments with the aim of resolving the dispute between it and the Commission. Thus:

– on 27 October 2014, Italy sent the Commission a draft contract with a three year reduction in term and a commitment to tender out 100% of the works to third parties;

– on 26 June 2015, Italy sent the Commission a draft contract with a six year reduction in term and a commitment to tender out 100% of the works;

– on 22 July 2015, Italy sent the Commission a draft contract proposing a reduction in the term from 2046 to 2040 and the award of 100% of the works via a public procurement procedure. Furthermore, SAT would be deprived of its contract if it did not award those works to third parties, and the end date of the term would be brought forward to 2028 if the draft contract was not approved by 28 February 2017;

14 It seems that the route proposed for the construction of this particular motorway has given rise to controversy and that issues have been raised concerning, inter alia, its environmental impact (see wikivisually.com). I do not engage with that debate in this Opinion.

– on 24 July 2015, Italy provided further explanations as to why it had been necessary to extend the term, indicating that the delays in the works had inter alia been caused by lack of public funds and concerns relating to public security.

31. On 8 March 2016, the Commission requested Italy to take all measures necessary to bring the public works concession contract to an end by 31 October 2028, as previously provided for by the 1999 Contract.

32. In reply, on 18 November 2016, Italy sent evidence to the Commission in the form of a notarial act to the effect that SAT had committed to tendering out all of the works. Italy also raised the possibility of bringing forward the end date of the concession term from 2046 to 2038.

Litigation procedure

33. The Commission considered Italy's responses to be inadequate. It therefore brought infringement proceedings under Article 258 TFEU on 4 September 2017, seeking a declaration that 'in deferring expiry of the works contract relating to the A12 Civitavecchia-Livorno motorway until 31 December 2046 without publishing any contract notice, the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of Directive 2004/18/EC … as subsequently amended'. The Commission also requested that the Italian Republic should be ordered to pay the costs of the proceedings.

34. The Commission and the Italian Government have submitted written pleadings, and the Italian Government has filed a written response to a written question from the Court, on which the Commission has submitted its observations.

35. That question concerned the investments already made by SAT in the construction of the motorway and the investments expected up till 2028, together with the total investment on which, it was alleged, SAT would not receive an adequate return if the concession were terminated in 2028. In its reply of 3 October 2018 to the Court, the Italian Government explained that:

(i) Between 2009 and 2017, SAT invested EUR 253.136 million in two stretches of motorway from Cecina (Rosignano) to San Pietro in Palazzi and from Tarquina Sud to Civitavecchia, both of which have since been opened to traffic.

(ii) In the economic and financial plan from 2011, based on the 2009 Contract, it was projected that SAT would invest EUR 3 411.7 million to finalise the motorway by 2028, of which the EUR 253.136 million identified above covered work planned for the period 2009 to 2015. If the contract were terminated in 2028, SAT would not earn a projected EUR 1 135.7 million during the period 2028 to 2046.

(iii) In the economic and financial plan from 2016, based on the commitments proposed by Italy to the Commission during the pre-litigation procedure, the overall investment to be made by SAT up to 2023 would be EUR 1 400 million. Since EUR 253.136 million had already been invested, that left EUR 1 146.86 million still to be invested. If the contract were terminated in 2028, SAT would not earn a projected EUR 505.185 million between 2028 and 2038 (that being one of the dates for the end of the concession that Italy had proposed during the pre-litigation procedure). [15]

15 See point 30 above.

36. In its observations of 25 October 2018 on that written answer, the Commission pointed out that the time frame for investments used by the Italian Government did not match the time frame specified in the question from the Court. The Commission also observed that, according to SAT's own website, the stretch of motorway from Cecina (Rosignano) to San Pietro in Palazzi had been opened in 2012, and that from Tarquina Sud to Civitavecchia in 2016. The Commission noted that the total stretch of motorway now completed was indicated to be 54.6 km. That represented an additional 18 km over and above the 36.6 km completed in 1993. Finally, the Commission observed that according to newspaper reports the Italian Government had given up further work on the planned motorway in 2017, preferring instead to renovate existing roads. [16]

37. A hearing was held on 12 December 2018 at which Italy and the Commission submitted further observations and responded to questions from the Court.

Preliminary observations

Applicability of Directive 2004/18

38. Italy contests the applicability of Directive 2004/18 to a contract originally entered into in 1969, prior to the development of any case-law or relevant secondary legislation on public procurement.

39. I do not share Italy's doubt. Whilst an initial contract may itself be outside the scope of public procurement rules, it does not follow that all amendments to the contract must likewise remain outside the scope of public procurement rules.

40. In *Belgacom* [17] the Court held that the 'principle of legal certainty, which is a general principle of European Union law, provides ample justification for observance of the legal effects of a contract, including — in so far as that principle requires — in the case of a contract concluded before the Court has ruled on the implications of the primary law on contracts of that kind and which, after the fact, turn out to be contrary to those implications'.

41. Accordingly, whilst the Court has also established that the fundamental principles of public procurement apply under certain circumstances to contracts formally excluded from the scope of EU legislation on public procurement, [18] such fundamental principles (here, in particular, the principles of equal treatment and transparency) cannot apply to a contract entered into before the principles in question were established by the Court.

42. The first EU legal instrument regulating the award of public works concessions was Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts. [19] That directive was to be transposed by 19 July 1990. [20] Self-evidently, therefore, it could not apply to the 1969 Contract.

16 The Commission referred to an article in *Il Fatto quotidiano* dated 15 April 2017, which it enclosed as an annex to its observations.

17 Judgment of 14 November 2013, C-221/12, EU:C:2013:736, paragraph 40 and the case-law cited.

18 See in relation to the principle of non-discrimination on grounds of nationality, judgment of 7 December 2000, *Telaustria and Telefonadress*, C-324/98, EU:C:2000:669, paragraph 60.

19 OJ 1989 L 210, p. 1. Directive 71/305 was subsequently replaced by Council Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54), which in turn was replaced by Directive 2004/18.

20 See Article 3 of Directive 89/440.

43. However, the Court has also established that, where a contract was concluded prior to the adoption of EU legislation on public procurement, and that contract therefore remains outside the scope of that legislation both *ratione materiae* and *temporis*, any material change of the contract falls to be considered in light of the EU legislation in force at the time of change. In particular, where the intention of the parties is to renegotiate the essential terms of the contract, the application of the EU public procurement rules may be justified. In infringement proceedings (such as these) the burden of proof rests with the Commission. [21]

44. It is common ground that the contract at issue falls within the definition of a public works concession contract in Article 1(3) of Directive 2004/18. It also clearly exceeds the threshold value in Article 56 of the directive, as amended. Accordingly, the 2009 Contract also *ratione materiae* falls within the field of application of Directive 2004/18, as well as being covered *ratione temporis*.

45. It follows that any change imposed by the 2009 Contract falls to be evaluated under Directive 2004/18. As explained by the Court in *pressetext Nachrichtenagentur*, [22] the deciding issue is whether the change may be considered to be 'material'.

46. I note also that, whilst questions could be raised as to whether the 1987 and 1999 Contracts complied with EU legislation on public procurement, there is no basis for the Court to address such questions in the present case. The Commission has challenged only the compliance of the 2009 Contract with EU law. Accordingly, I shall refer to and, as necessary, interpret the preceding contracts in this Opinion only to the extent that they may contribute to an understanding of whether the 2009 Contract introduced material changes to the contractual relationship between ANAS and SAT.

Legal assessment

The Commission's case

47. The burden in these proceedings is on the Commission to prove each allegation it makes. [23] It is important, therefore, to clarify the case that the Commission makes against Italy.

48. The Commission claims that Italy has violated Articles 2 and 58 of Directive 2004/18 by failing to undertake a public procurement procedure in order to make a material change in a contract. [24] The factual basis for the allegation is relatively concise, namely that the 2009 Contract extended the term of the public works concession from 2028, the end date set in the 1999 Contract, to 2046. The Italian Government criticises the simplicity of that allegation. In its view, the 2028 date set by the 1999 Contract related only to one stretch of the motorway, whilst the remaining stretches were subject to a term to be specified at a later time. The Italian Government nevertheless accepts that the 2009 Contract now sets the term for the entire concession for the motorway at 2046.

49. I do not consider that that argument of the Italian Government affects the admissibility of the Commission's case. The Commission's position was clearly communicated, thus allowing the Italian Government to establish its defence in relation to the 'Community legislation in force at the close of the period prescribed by the Commission for the Member State concerned to comply with its reasoned opinion'. [25]

21 Judgment of 5 October 2000, *Commission* v *France*, C-337/98, EU:C:2000:543, paragraphs 41 to 45.

22 Judgment of 19 June 2008, C-454/06, EU:C:2008:351; see further point 66 et seq. below.

23 See, inter alia, judgments of 25 May 1982, *Commission* v *Netherlands*, 96/81, EU:C:1982:192, paragraph 6, and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 25.

24 See point 27 above.

25 Judgment of 9 November 1997, *Commission* v *Italy*, C-365/97, EU:C:1999:544, paragraph 32.

50. The Court can only proceed to its legal analysis of the infringements allegations once it has a clear view of the contractual arrangements in place. It is therefore necessary to analyse the scope of the original 1969 Contract and, in particular, the termination date that it established, and then to consider the amendments introduced by the subsequent contracts.

Interpretation of the contracts

51. Article 7 of the 1969 Contract provided for what may be termed a floating term of up to 30 years for the concession, commencing on completion of the entire motorway from Livorno to Civitavecchia. That term was amended by the 1987 Contract so as to be a period of exactly 30 years, rather than up to 30 years.

52. Did the setting of a definitive termination date (2028) in the 1999 Contract apply to the entire contract (the 'wide' interpretation), or only to the first stretch of motorway from Livorno to Cecina (Rosignano), which opened to traffic in 1993, but which covered only 36.6 kilometres of the projected 240 kilometres for the entire motorway (the 'narrow' interpretation)? Whilst there should normally be no doubts as to the date of termination of a contract, there is doubt here as to what aspects of the 1969 Contract were covered by that new termination date.

53. The Italian Government prefers the narrow interpretation; the Commission the wide interpretation.

54. In favour of the narrow interpretation is the fact that Article 2(1) of the 1999 Contract expressly states that that contract only applies to the first stretch of motorway from Livorno to Cecina, whilst Article 2(3) states that the necessary conditions are to be agreed for the remaining two stretches of motorway once the legislation has been adopted to enable work on these stretches to continue. That interpretation therefore leads to the conclusion that the 1999 Contract applies only to that first stretch of motorway, not to the entire route.

55. In favour of a wider interpretation is the fact that Article 23 of the 1999 Contract provides that the concession ends in 2028 without apparently making any distinction between the different stretches of the motorway. That appears to be underpinned by the recitals to the 2009 Contract, which explain that the 1969 and 1987 Contracts, which applied to the entire motorway without distinction, were to be amended by the 1999 Contract so as to end the concession in 2028.[26]

56. The second part of Article 4.1 of the 2009 Contract explicitly states that the 'original' 2028 end date applies to the remaining stretches from Cecina (Rosignano) to Civitavecchia.[27] The first part of Article 4.1 of the 2009 Contract also provides for a new termination date in 2046, likewise without making any distinction between the different stretches of the motorway.[28]

57. Finally, the Italian Government's answer to the question from the Court and the Commission's observations thereon made it clear that work was undertaken on the remaining stretches of motorway prior to the adoption of the 2009 Contract. That fact militates against favouring the narrow interpretation.

58. I therefore prefer the wider interpretation of the 1999 Contract advanced by the Commission; and consider that Article 23 of the 2009 Contract changed the termination date for the concession for the whole of the motorway from 2028, as established by the 1999 Contract, to 2046.

26 See point 16 above.

27 See point 20 above.

28 See point 19 above.

59. However, even if the narrower interpretation were to be preferred, I note that the 2009 Contract changes the termination date also for the second and third stretches of the motorway. That could be seen to build upon Article 2(3) of the 1999 Contract, which provided that conditions for the second and third stretches of the motorway were to be established at a later date.

60. On that basis, the termination dates specified in the 1969 and 1987 Contracts thereafter no longer applied to any part of the motorway. The setting of a termination date in the 2009 Contract accordingly constituted a change also for the second and third stretches of the motorway.

61. Here I recall that the proposition that a pre-existing contract cannot be challenged under subsequent legislation, or under subsequently established principles of law, must be regarded as an exception, which in accordance with well-established case-law of the Court must be given a restrictive interpretation.[29] Thus, once the 1969 Contract was amended by the 1999 Contract, it could not subsequently be changed back to more generous terms in line with the original contract.

62. I would therefore consider that having modified the 1969 and 1987 Contracts in the 1999 Contract by providing that conditions were to be agreed at a later stage, the Italian Government is precluded from arguing that those conditions, defined by the 2009 Contract, correspond more or less to the original conditions in the 1969 and 1987 Contracts and for that reason should be excluded from public procurement obligations.

63. However, even if what might be termed a 'very narrow' approach is adopted, so that the arrangements in the 2009 Contract in relation to the second and third stretches of the motorway are compared only with the conditions laid down in the 1969 and 1987 Contracts, the fact remains that the termination date was changed from a floating 30 year period to a definitive 37 year period. Thus even taking that very narrow interpretation, the essence of the Commission's allegation remains intact. The conditions of the contract have been changed.

64. I merely add that, to the extent that there are difficulties and uncertainties regarding the proper wording in, and import of, the various contracts, ANAS and through it the Italian Government must take responsibility for the contractual texts that were agreed. Where there is doubt, an ambiguous text should not automatically be construed in their favour.

65. I turn now to the question of whether the changes made by the 2009 Contract can be characterised as material.

Material changes

66. The Court has established a non-exhaustive list of circumstances and conditions under which a change is to be viewed as material. Thus, the Court has held in *pressetext Nachrichtenagentur* that a change may be considered material when it:

– is materially different in character from the original contract and therefore such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract; or

– if introduced at the time of the initial award procedure, would have permitted other tenderers to have been admitted or accepted; or

– extends the scope of the contract considerably to encompass services not initially covered; or

29 Judgment of 13 January 2005, *Commission* v *Spain*, C-84/03, EU:C:2005:14, paragraph 58.

– changes the economic balance of the contract in favour of the contractor in a way that was not provided for in the initial contract.[30]

67. In my view, two of the criteria for material change that the Court set out in *pressetext Nachrichtenagentur* are fulfilled here. The parties clearly intended to renegotiate essential terms of the contract. They did so in a manner that changed the economic balance in favour of the contractor.

68. I begin with whether the termination date of a contract may be considered an 'essential term of that contract' and one that 'changes the economic balance'. The contracts at issue are for a public works concession. The longer the concessionaire can exploit that concession, the more it can look to generate profit once the works are completed and it has recovered the costs of construction through the tolls charged for the use of the motorway.

69. The length of the term negotiated between the parties is, in my view, very obviously an essential aspect of any contract governing such a concession. The 29 year exploitation period in the 1999 Contract (until 2028) was extended by an additional 18 years in the 2009 Contract (until 2046). That must be regarded as constituting a change to essential terms and at the same time, a change in the economic balance of the contract in favour of the concessionaire.

70. It is true that if one adopts the very narrow approach, and the 37 year fixed exploitation period in the 2009 Contract is thus compared to the floating 30 year exploitation period in the 1969 Contract, it becomes less easy to assess which of the two is more economically beneficial for the concessionaire.

71. I have however, set out above the reasons why I consider that the very narrow interpretation is not readily supported by the texts.[31] Moreover, where — as here — there is a change that *on any view* fundamentally alters the contract, I consider that it is for the Italian Government to demonstrate that such a change should nevertheless *not* be regarded as a 'material change' in the sense of *pressetext Nachrichtenagentur*.[32] I do not find that the Italian Government has done so here.

72. Furthermore, were the Court to conclude that only the first stretch of the motorway (approximately 36 kilometres) was subject to material change, the Commission's allegation would still remain proven for that sector.

73. I do not regard it as significant that the first stretch of the motorway constituted only 15% of a larger contractual engagement to construct 240 kilometres of motorway. That cannot affect the finding that the public procurement obligations were not respected.

74. Accordingly, I conclude that the 2009 Contract constituted a material change to the pre-existing contractual arrangements and that it should therefore have been made subject to a public procurement procedure.

75. I turn now to the question of whether the Italian Government can rely on any grounds exempting it from that obligation.

30 Judgment of 19 June 2008, C-454/06, EU:C:2008:351, paragraphs 34 to 37. That case concerned the application of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1), but I see no good reason to apply a different test as to 'material change' in the context of Directive 2004/18. See also judgments of 5 October 2000, *Commission* v *France*, C-337/98, EU:C:2000:543, paragraph 46, and of 11 July 2013, *Commission* v *Netherlands*, C-576/10, EU:C:2013:510, paragraph 46.

31 See points 63 and 64 above.

32 Judgment of 19 June 2008, C-454/06, EU:C:2008:351, paragraphs 34 to 37.

Grounds for exemption

76. The Italian Government has referred to factual and legal elements that have intervened since 1969, specifically external developments outside the control of SAT which contributed to the delay in building the motorway and hence to being able to exploit the concession. The Italian Government argues that an extension of the exploitation period was required in order to 'guarantee the balance of the contract'. It claims that had the exploitation period not been extended, that balance would have been undermined.

77. I reject that argument for two reasons.

78. First, the Court has already made clear that 'neither (i) the fact that a material change of the terms of a contract results not from the deliberate intention of the contracting authority and the successful tenderer to renegotiate the terms of that contract, but from their intention to reach a settlement in order to resolve objective difficulties encountered in the performance of the contract nor (ii) the objectively unpredictable nature of the performance of certain aspects of the contract can provide justification for the decision to carry out that change without respecting the principle of equal treatment from which all operators potentially interested in a public contract must benefit'.[33]

79. Second, it is clear from the facts that I have summarised above[34] that the delays to the construction of the motorway were primarily attributable to certain legislative initiatives undertaken by the Italian Government itself. Whatever may have been the reasons for introducing the legislation in question, the fact remains that the Italian Government made an explicit choice by adopting legislation that directly affected SAT's ability to construct and exploit the motorway according to the schedule originally envisaged.

80. It follows from well-established case-law of the Court that 'a Member State may not plead practical or administrative difficulties in order to justify non-compliance with the obligations and time limits laid down by a directive. The same holds true of financial difficulties, which it is for the Member States to overcome by adopting appropriate measures'.[35] Accordingly, although the Italian Government may have had perfectly valid reasons to take measures that affected the public works concession previously granted, and although the Italian Government may have wished to mitigate the impact of that legislation on SAT by extending the exploitation period, it could not do so in disregard of EU public procurement law.

81. The Italian Government further argues that the absence of a public procurement procedure in 2009 (thus derogating from the principle of equality of treatment) may be justified by reference to SAT's right to rely on the principles of legal certainty and legitimate expectations.

82. In so arguing, the Italian Government appears to rely on an *a contrario* argument derived from the Court's ruling in *Promoimpresa and Others*, where the Court held that 'the concessions at issue in the main proceedings were awarded when it had already been established that contracts with certain cross-border interest were subject to a duty of transparency, so that the principle of legal certainty cannot be relied on in order to justify a difference in treatment prohibited on the basis of Article 49 TFEU'.[36]

33 Judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraph 32.

34 See points 21 to 23 above.

35 Judgment of 18 October 2012, *Commission* v *United Kingdom*, C-301/10, EU:C:2012:633, paragraph 66 and the case-law cited.

36 Judgment of 14 July 2016, C-458/14 and C-67/15, EU:C:2016:558, paragraph 73.

83. As I understand it, the Italian Government here relies on the (undisputed) fact that the 1969 Contract was concluded before EU public procurement rules and principles became applicable, so as to claim that it should thereafter remain exempt from scrutiny under EU law. However, the question is not whether the 1969 Contract complies with the relevant EU rules. It is whether the 2009 Contract does. [37]

84. Furthermore, as the Commission has correctly pointed out, the principle of legal certainty cannot 'be relied on to give an agreement an extended scope which is contrary to the principles of equal treatment and non-discrimination and the obligation of transparency deriving therefrom. It is of no import in that regard that that extended scope may offer a suitable solution for putting an end to a dispute which has arisen between the parties concerned, for reasons outside their control, as to the scope of the agreement by which they are bound'. [38] As I see it, there is no reason not to apply that dictum to the 1969 Contract.

85. The very nature of a concession is that the majority of risk must pass over to the concessionaire. [39] Thus, in contrast with other types of contract, the concessionaire (here SAT) must accept the inherent element of future risk when entering into the initial contract. Ordinary commercial prudence will ensure that the need to factor in such risk will affect the bid that is put forward and/or the detailed negotiations for the contract itself.

86. It should be noted that the Court has indeed held that provisions within the original contract documents of a public procurement procedure may expressly allow for material changes to be made subsequently. [40]

87. Against that background, the Italian Government might have sought to argue that Article 2(3) of the 1999 Contract, according to which the contractual conditions attaching to the second and third stretches of the motorway were to be concluded at a later stage 'when the legal and factual conditions for continuation of the construction programme in respect of which a concession has been granted are met' should be treated as a reservation analogous to a reservation in the contract documents.

88. In my opinion, that cannot be the case for two reasons.

89. First, there *were* no original 'contract documents' resulting from a public procurement procedure, since none of the contracts in question were made subject to such a procedure.

90. Second, the right to use such a reservation as a basis for later material change must be regarded as an exception to the general principle that all the necessary elements resulting from a public procurement procedure should be reflected in the contract documents drawn up by the contracting public authority. In accordance with well-established case-law, exceptions are to be given a restrictive interpretation. It would be unacceptable if a contract, which was originally exempted from public procurement obligations, could later be 'complemented' by inserting a reservation that introduced a material change at a time when such a contract would otherwise be subject to public procurement obligations under EU law.

91. Thus, even if one construes the 1999 Contract as containing a reservation for future changes, that reservation cannot serve as the basis for exonerating the 2009 Contract from the requirement to comply with Directive 2004/18.

37 See point 46 above.

38 Judgment of 14 November 2013, *Belgacom*, C-221/12, EU:C:2013:736, paragraph 40.

39 Judgment of 10 March 2011, *Privater Rettungsdienst und Krankentransport Stadler*, C-274/09, EU:C:2011:130, paragraphs 24 to 26.

40 Judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraphs 36 and 37.

92. Finally, I do not consider that Italy can rely on Article 61 of Directive 2004/18 which allows changes to be made with regard to 'additional works'. The material change between 1999 and 2009 was not to the scope of the original works that were to be undertaken by the concessionaire, but to the *time* given for SAT to derive profit from them after their completion. Such a change does not fall within the scope of Article 61 *ratione materiae*.

93. In my view the change to the duration of the concession introduced by Article 4.1 of the 2009 Contract constituted a material change, as defined in *pressetext Nachrichtenagentur*,[41] irrespective of whether it is considered in relation to the 1999 Contract (as the Commission argues) or in relation to the 1969 Contract (the approach proposed by the Italian Government). The conclusion of the 2009 Contract without following a public procurement procedure thus constituted a violation of the equal treatment obligation in Article 2 of Directive 2004/18 and the obligation to publish a contract notice laid down by Article 58 thereof.

Costs

94. Under Article 138(1) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since I consider that the Court should grant the form of order sought by the European Commission, the Italian Republic should pay the costs.

Conclusion

95. In the light of the foregoing considerations, I therefore propose that the Court should:

(1) Declare that the extension, from 2028 to 2046, to the term of the public works concession for the construction and management of the A12 motorway introduced in 2009 was a change to a material aspect of the 1999 Contract between the contracting authority (Azienda Nazionale Autonoma delle Strade) and the concessionaire (Società Autostrada Tirrenica); and that, by failing to subject that change to a public procurement procedure, the Italian Republic has infringed its obligations under Articles 2 and 58 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, as amended;

(2) order the Italian Republic to pay the costs.

41 Judgment of 19 June 2008, C-454/06, EU:C:2008:351, paragraphs 34 to 37.