



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

2 September 2021 *

(Reference for a preliminary ruling – Articles 49 and 56 TFEU – Freedom to provide services – Restrictions – Directive 2014/23/EU – Award procedures for concession contracts – Article 43 – Substantial modifications – Instant lottery games – National legislation providing for the renewal of a concession without a new call for tenders – Directive 89/665/EEC – Article 1(3) – Legal interest in bringing proceedings)

In Joined Cases C-721/19 and C-722/19,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decisions of 20 June 2019, received at the Court on 23 September 2019, in the proceedings

Sisal SpA (C-721/19),

Stanleybet Malta Ltd (C-722/19),

Magellan Robotech Ltd (C-722/19)

v

Agenzia delle Dogane e dei Monopoli,

Ministero dell’Economia e delle Finanze,

interveners:

Lotterie Nazionali Srl,

Lottomatica Holding Srl, formerly Lottomatica SpA (C-722/19),

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász (Rapporteur), C. Lycourgos and I. Jarukaitis, Judges,

Advocate General: M. Campos Sánchez-Bordona

Registrar: A. Calot Escobar,

* Language of the case: Italian.

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Sisal SpA, by L. Medugno, F. Cintioli, S. Sticchi Damiani and A. Lauteri, avvocati,
- Stanleybet Malta Ltd and Magellan Robotech Ltd, by R.A. Jacchia, A. Terranova, F. Ferraro and D. Agnello, avvocati,
- Lotterie Nazionali Srl, by V. Fortunato, R. Baratta and A. Botto, avvocati,
- Lottomatica Holding Srl, formerly Lottomatica SpA, by S. Fidanzia and A. Gigliola, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by P.G. Marrone and S. Fiorentino, avvocati dello Stato,
- the European Commission, by L. Armati, G. Gattinara and L. Malferrari, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 January 2021,

gives the following

Judgment

- 1 These requests for a preliminary ruling concern the interpretation of Articles 49 and 56 TFEU and Articles 3 and 43 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), read in the light of the principles of legal certainty, non-discrimination, transparency, impartiality, freedom of competition, proportionality, legitimate expectations and consistency.
- 2 The requests were made in two sets of proceedings between, (i) Sisal SpA (Case C-721/19) and (ii) Stanleybet Malta Ltd and Magellan Robotech Ltd (together, ‘Stanleybet’) (Case C-722/19), on the one hand, and the Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Agency, Italy) (‘the ADM’), the Ministero dell’Economia e delle Finanze (Ministry of Economic Affairs and Finance, Italy) and Lotterie Nazionali Srl and Lottomatica Holding Srl, formerly Lottomatica SpA (Lottomatica) (Case C-722/19), on the other hand, concerning the conformity with EU law of the measure by which the ADM renewed, in 2017, the concession awarded in 2010 to Lotterie Nazionali for the management of instant lottery games.

Legal framework

European Union law

Directive 2014/23

- 3 Article 3 of Directive 2014/23, entitled ‘Principles of equal treatment, non-discrimination and transparency’, provides in the first subparagraph of paragraph 1 thereof:

‘Contracting authorities and contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.’

- 4 Article 43 of that directive, entitled ‘Modification of contracts during their term’, provides:

‘1. Concessions may be modified without a new concession award procedure in accordance with this Directive in any of the following cases:

- (a) where the modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the concession;

...

- (e) where the modifications, irrespective of their value, are not substantial within the meaning of paragraph 4.

...

4. A modification of a concession during its term shall be considered to be substantial within the meaning of point (e) of paragraph 1, where it renders the concession materially different in character from the one initially concluded. In any event, without prejudice to paragraphs 1 and 2, a modification shall be considered to be substantial where one or more of the following conditions is met:

- (a) the modification introduces conditions which, had they been part of the initial concession award procedure, would have allowed for the admission of applicants other than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the concession award procedure;
- (b) the modification changes the economic balance of the concession in favour of the concessionaire in a manner which was not provided for in the initial concession;
- (c) the modification extends the scope of the concession considerably;

(d) where a new concessionaire replaces the one to which the contracting authority or contracting entity had initially awarded the concession in other cases than those provided for under point (d) of paragraph 1.

5. A new concession award procedure in accordance with this Directive shall be required for other modifications of the provisions of a concession during its term than those provided for under paragraphs 1 and 2.'

5 Article 46 of that directive, entitled 'Amendments to Directive 89/665/EEC', provides:

'[Council] Directive 89/665/EEC [of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33)] is amended as follows:

(1) in Article 1, paragraph 1 is replaced by the following:

"...

This Directive also applies to concessions awarded by contracting authorities, referred to in Directive [2014/23] unless such concessions are excluded in accordance with Articles 10, 11, 12, 17 and 25 of that Directive."

...'

6 According to paragraph 1 of Article 51 of Directive 2014/23, entitled 'Transposition', Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 18 April 2016.

7 Article 54 of Directive 2014/23, entitled 'Entry into force', provides:

'This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Directive shall not apply to the award of concessions tendered or awarded before 17 April 2014.'

Directive 89/665

8 Article 1(3) of Directive 89/665, as amended by Directive 2014/23 ('Directive 89/665'), provides:

'Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.'

Italian law

9 Decreto legge n. 78 – Provvedimenti anticrisi, nonché proroga di termini (Decree-Law No 78/2009 on Measures to combat the crisis and the extension of time limits) of 1 July 2009 (GURI No 150 of 1 July 2009), converted into statute, with amendments, by Law No 102 of

3 August 2009 (Ordinary Supplement to GURI No 179 of 4 August 2009) ('Decree-Law No 78/2009'), provides in Article 21 thereof, entitled 'Award of concessions in the field of betting and gambling':

'1. In order to ensure the protection of overriding public interests in connection with activities related to the collection of gambling [bets], where those activities are awarded to entities outside the public administration, the management of those activities shall always be awarded by a concession system, in compliance with EU and national principles and rules, normally to a number of entities selected at the end of open, competitive and non-discriminatory procedures. Accordingly, ... the Ministry of Economy and Finance [Amministrazione Autonoma Monopoli di Stato (Autonomous Administration of State Monopolies, Italy)] shall organise the necessary procedures to award the concession in a timely fashion, including as regards the remote collection of lottery bets, to the most qualified national and EU betting and gambling operators, limited, however, to a maximum of four satisfying the criteria required in terms of moral, technical and economic reliability.

2. The concession referred to in paragraph 1 shall provide for a right to remuneration, which shall include the 8 per cent remuneration payable to instant lottery points of sale, equal to 11.90 per cent of an amount representing the sum of total stakes collected and an average of the winnings paid out, for each successful concessionaire, up to a maximum of 75 per cent.

3. Selection by invitation to tender for the award of a concession shall be based on the criterion of the most economically advantageous tender, in the context of which priority shall be given to the following criteria: (a) increase of the value of the tenders submitted by reference to a pre-defined base which will guarantee in any event overall revenue of at least EUR 500 million in 2009 and EUR 300 million for 2010, whatever the final number of successful tenderers; (b) provision of quality standards to ensure the highest possible level of consumer security, in terms of preventing ticket tampering and counterfeiting, and the security of the prize payment system; (c) multi-stage distribution, by means of a nationwide network, exclusive to each concessionaire, consisting of at least 10 000 points of sale, which must be operational by 31 December 2010 at the latest, without prejudice to the prohibition, on pain of nullity, of contractual clauses which restrict the contractual freedom of suppliers of goods or services.

4. The concessions referred to in paragraph 1, which may be renewed no more than once, shall have a maximum term of nine years, divided into two periods of five and four years respectively. The continuation of the concession for the second period shall be subject to the positive appraisal of the management performance by the awarding authority, to be issued during the first six months of the fifth year of the concession.'

- 10 Article 20(1) of decreto legge n. 148 – Disposizioni urgenti in materia finanziaria e per esigenze indifferibili (Decree-Law No 148 on Urgent measures concerning finance and overriding requirements) of 16 October 2017 (GURI No 242 of 16 October 2017), converted into statute, with amendments, by Law No 172 of 4 December 2017 (GURI No 284 of 5 December 2017) ('Decree-Law No 148/2017'), provides:

'Pursuant to Article 21(3) and (4) of [Decree-Law No 78/2009], the [ADM] shall authorise the continuation of the existing concession for the collection, including by remote means, of national instant lottery receipts until the expiry date stipulated in Article 4(1) of the concession contract, so as to guarantee additional and increased government revenue of EUR 50 million for 2017 and EUR 750 million for 2018.'

The main proceedings and the questions referred for a preliminary ruling

- 11 By notices published in the *Official Journal of the European Union* of 15 August 2009 and 2 April 2010, the Autonomous Administration of State Monopolies, the legal successor to the ADM, launched a call for tenders for the award of concessions to operate, at national level, instant lottery games, namely games of chance known as ‘scratch cards’.
- 12 On 5 August 2010, at the end of that call for tenders, a single concession was awarded, for the period from 1 October 2010 to 30 September 2019, to Lottomatica, the only economic operator which had participated in the tendering procedure, whose legal successor is Lotterie Nazionali.
- 13 The concessionaire was chosen in accordance with Decree-Law No 78/2009, which provides that the management of the collection of receipts should be the subject of a concession, awarded as a rule to a number of entities selected at the end of open, competitive and non-discriminatory procedures, with a view to guaranteeing overall revenue of at least EUR 500 million for 2009 and EUR 300 million for 2010, whatever the final number of successful tenderers. On account of the extension of the time limits for concluding the concession, the timetable for the payment of the fee was changed, so that the first instalment of EUR 520 million was to be paid by 28 May 2010 at the latest and the second instalment of EUR 280 million was to be paid by 30 November 2010 at the latest.
- 14 Article 4(1) of the concession contract concluded between the Autonomous Administration of State Monopolies and the concessionaire (‘the concession contract at issue’) stipulated that ‘the concession, which may be renewed no more than once, shall have a maximum term of nine years, divided into two periods of five and four years respectively, commencing on 1 October 2010. The continuation of the concession for the second period shall be subject to the positive appraisal of the Autonomous Administration of State Monopolies, to be issued during the first six months of the fifth year of the concession’.
- 15 At the end of the first five-year period of operation of the concession, it was allowed to continue for the second period, in accordance with that contractual provision.
- 16 On 26 July 2017, Lotterie Nazionali applied to the ADM, the legal successor to the Autonomous Administration of State Monopolies, for the renewal of the concession which had been awarded to it, on the basis of the renewal clause also provided for in that contractual provision. For their part, Sisal and Stanleybet have expressed an interest in the organisation of a new concession award procedure.
- 17 By communication of 19 September 2017, the ADM took the view that the renewal of the concession contract at issue was in the public interest.
- 18 Similarly, Decree-Law No 148/2017, which entered into force on 16 October 2017, provides, in Article 20(1) thereof, that the ADM, under Article 21(3) and (4) of Decree-Law No 78/2009, must authorise the continuation of the concession contract at issue until its expiry date, provided for in Article 4(1) thereof, so as to guarantee additional and increased government revenue.
- 19 By communication of 1 December 2017, the ADM decided to renew the concession granted to Lotterie Nazionali until 30 September 2028, provided that, in accordance with Article 20(1) of Decree-Law No 148/2017, the concessionaire makes an advance payment to the State budget of the fee of EUR 800 million, that is to say an amount of EUR 50 million no later than

15 December 2017, EUR 300 million no later than 30 April 2018 and EUR 450 million no later than 31 October 2018, instead of two instalments of EUR 500 million and EUR 300 million, before the normal date of expiry of the concession on 30 September 2019.

- 20 Sisal and Stanleybet challenged that decision before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy). In their view, Article 20(1) of Decree-Law No 148/2017 is contrary to EU law, in so far as it introduces a monopoly system in favour of a single operator, by providing for the continuation, for the benefit of Lotterie Nazionali, of the concession contract at issue, whereas the scheme provided for by Decree-Law No 78/2009 allowed the administration, upon expiry of the initial concession period, to opt either for renewal or for the launching of a new call for tenders. Moreover, they take the view that the matter in question is not simply a continuation of the concession contract at issue, but a novation of the contractual relationship, which, furthermore, occurred two years before the normal date of expiry of the initial concession contract, in so far as the parties have agreed on fee payment arrangements other than those initially provided for in that contract. Finally, the need to secure significant additional revenue for the State budget does not constitute an overriding reason in the public interest which would justify a different scheme solely for instant lottery games.
- 21 Following the dismissal of their actions by the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio), Sisal and Stanleybet appealed against that decision to the referring court, the Consiglio di Stato (Council of State, Italy). Like the applicants in the main proceedings, the Consiglio di Stato (Council of State) has doubts as to whether the new scheme introduced by Article 20(1) of Decree-Law No 148/2017 complies with EU law. Moreover, according to the referring court, that scheme may breach the principle of legitimate expectations, in so far as, even though Sisal and Stanleybet did not participate in the initial tender held in 2010, they could have participated in a new call for tenders upon expiry of the initial concession period in 2019, since renewal of that concession was, until the entry into force of that decree-law, only one option left to the discretion of the administration. However, under the new rules, the administration was no longer able to choose between the launch of a new tender procedure and automatic renewal, since the latter was imposed by Article 20(1) of Decree-Law No 148/2017.
- 22 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling the following questions, which are identical in the two joined cases:
- ‘(1) Is EU law, and in particular the right of establishment and freedom to provide services (Articles 49 et seq. and 56 et seq. TFEU), the [EU-law] principles of legal certainty, non-discrimination, transparency and impartiality, freedom of competition, proportionality, legitimate expectations and consistency, and – where deemed applicable – Articles 3 and 43 of Directive [2014/23], to be interpreted as precluding a provision such as that contained in Article 20(1) of [Decree-Law No 148] and in the subsequent implementing legislation, which provides that “... Pursuant to Article 21(3) and (4) of [Decree-Law No 78/2009], the [ADM] shall authorise the continuation of the existing concession for the collection, including by remote means, of national instant lottery receipts for the period envisaged in Article 4(1) of the concession contract, so as to guarantee additional and increased government revenue of EUR 50 million for 2017 and EUR 750 million for 2018”, in a situation in which:
- Article 21(1) of [Decree-Law No 78/2009] provided for the concessions in question to be granted as a rule to more than one entity selected by means of open, competitive and non-discriminatory procedures;

- Article 21(4) of the abovementioned Decree provided that the concessions referred to in paragraph 1 may be renewed no more than once;
 - the [applicants in the main proceedings] did not participate in the call for tenders held in 2010;
 - the concession in question was originally with a sole concessionaire following a public invitation to tender in which a single tender was submitted;
 - the continuation of the existing concession would have the practical effect of continuing the concession exclusively with that sole concessionaire, rather than renewing it with several entities, without another call for tenders being held?
- (2) Is EU law, and in particular the right of establishment and freedom to provide services (Articles 49 et seq. and 56 et seq. TFEU), the [EU-law] principles of legal certainty, non-discrimination, transparency and impartiality, freedom of competition, proportionality, legitimate expectations and consistency, and – where deemed applicable – Articles 3 and 43 of [Directive 2014/23], to be interpreted as precluding a provision such as that contained in Article 20(1) of [Decree-Law No 148/2017], which, under Article 21(3) and (4) of [Decree-Law No 78/2009], provides that “the [ADM] shall authorise the continuation of the existing concession for the collection, including by remote means, of national instant lottery receipts for the period envisaged in Article 4(1) of the concession contract, so as to guarantee additional and increased government revenue of EUR 50 million for 2017 and EUR 750 million for 2018”, providing for this:
- by extending the sole existing concession, rather than renewing the multiple concessions provided for in Article 21(4) of [Decree-Law No 78/2009], and without issuing a new call for tenders;
 - prior to the expiry of the concession: Decree-Law No 148/2017 entered into force on 16 October 2017, that is to say, on the same date as the publication in the *Gazzetta ufficiale della Repubblica italiana*, whereas the concession would have expired on 30 September 2019;
 - to guarantee additional and increased government revenue of EUR 50 million for 2017 and EUR 750 million for 2018, thus changing certain aspects relating to the method and date of payment of the concession fee, as well as potentially the overall amount of the payment due [from the concessionaire], particularly with the change in payment terms, which are accelerated compared with those envisaged by the original concession, taking into account – according to the ... submissions [of the applicants in the main proceedings] – the objective and well-known fact of the value of time in financial terms?
- (3) Is EU law, and in particular the right of establishment and freedom to provide services (Articles 49 et seq. and 56 et seq. TFEU), the [EU-law] principles of legal certainty, non-discrimination, transparency and impartiality, freedom of competition, proportionality, legitimate expectations and consistency, and – where deemed applicable – Articles 3 and 43 of Directive [2014/23], to be interpreted as precluding a provision such as that contained in the legislation implementing [Decree-Law No 148/2017], and in particular in [ADM] Notice No 0133677 of 1 December 2017, which, in accordance with the provisions of Article 20(1) of [that decree-law], and on the basis of the provisions of the first paragraph of Article 4 [of the

concession contract at issue], which provides for the renewal of the same no more than once, changes the expiry date of the concession to 30 September 2028 – without prejudice to the provisions of Article 4 regarding the division of the concession period into two periods of five and four years respectively (therefore, once the first period of five years commencing on 1 October 2019 has expired, the continuation for the next four years until the expiry date of 30 September 2028 is contingent on a positive appraisal of the management performance by the [ADM], to be indicated by 30 March 2024) – and requires the company to arrange payment of EUR 50 million by 15 December 2017, EUR 300 million by 30 April 2018 and EUR 450 million by 31 October 2018;

- providing for this before the original expiry date of the concession ([ADM] Notice No 0133677 was issued on 1 December 2017, whereas the concession contract would have expired on 30 September 2019);
- thereby ensuring ... the advance payment of EUR 800 million (EUR 50 million by 15 December 2017, EUR 300 million by 30 April 2018 and EUR 450 million by 31 October 2018) prior to that expiry date (30 September 2019);
- thereby ... potentially changing the overall amount of the payment due [from the concessionaire], taking into account – according to the ... submissions [of the applicants in the main proceedings] – the objective and well-known fact of the value of time in financial terms?

- (4) Is EU law, and in particular the right of establishment and freedom to provide services (Articles 49 et seq. and 56 et seq. TFEU), the principles of legal certainty, non-discrimination, transparency and impartiality, freedom of competition, proportionality, legitimate expectations and consistency, and – where deemed applicable – Articles 3 and 43 of Directive [2014/23], to be interpreted as precluding such a provision, even if the operators in the sector currently interested in entering the market ... did not participate in the call for tenders originally held to award the concession which was due to expire and which was continued with the outgoing concessionaire on the new contractual terms described, or does ... any restriction on access to the market ... apply only if they actually participated in the original call for tenders?’

The questions referred for a preliminary ruling

Preliminary considerations

- 23 The questions referred for a preliminary ruling have arisen in the context of the renewal of a concession for the management of instant lottery games in Italy, namely games of chance known as ‘scratch cards’, which was granted in 2010 to Lotterie Nazionali and was renewed in 2017. In addition to Articles 49 and 56 TFEU and certain principles of EU law, the referring court mentions in its questions Articles 3 and 43 of Directive 2014/23. Since that directive entered into force on 17 April 2014, that is to say after the initial decision awarding the concession but before its renewal, it is necessary, as a preliminary point, to determine whether that directive is applicable *ratione temporis* to the disputes in the main proceedings.

- 24 In that regard, it must be observed that, according to settled case-law, established in the field of public procurement and applicable by analogy as regards service concessions, the EU legislation applicable to a concession contract is, as a rule, that in force when the contracting entity chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (see, to that effect, judgment of 19 December 2018, *Stanley International Betting and Stanleybet Malta*, C-375/17, EU:C:2018:1026, paragraph 34 and the case-law cited).
- 25 In the present case, the call for tenders was published in the *Official Journal of the European Union* on 15 August 2009 and 2 April 2010, that is to say before the period prescribed for the transposition of Directive 2014/23 expired on 18 April 2016.
- 26 Moreover, the concession was awarded, following that call for tenders, before 17 April 2014, and consequently that initial award falls, in any event, outside the scope of Directive 2014/23, in accordance with the second paragraph of Article 54 thereof.
- 27 If a concession contract contains a renewal clause as an integral part of the original contract, that clause is also governed by the public procurement legislation applicable to that concession.
- 28 However, it is also apparent from the case-law of the Court that, in the event of a substantial amendment of a concession contract, the EU legislation in the light of which that modification must be assessed is that in force at the date of that amendment. The Court has stated in that context that the fact that the original concession contract was concluded prior to the adoption of EU rules on the matter is therefore without consequence in that regard (see, to that effect, judgment of 18 September 2019, *Commission v Italy*, C-526/17, EU:C:2019:756, paragraph 60 and the case-law cited).
- 29 In the present case, the disputes in the main proceedings concern the decision, under Article 20(1) of Decree-Law No 148/2017, to renew the existing concession and to extend it for nine years, such a possibility having been provided for in Article 21(4) of Decree-Law No 78/2009. In that regard, the applicants in the main proceedings claim that that renewal entails substantial modifications to the concession contract at issue.
- 30 It follows that, in the cases in the main proceedings, the question whether such modifications were made to that concession contract when it was renewed must be assessed in the light of the provisions of Directive 2014/23, since that contract was renewed subsequent to the entry into force of that directive.
- 31 In that regard, it must be observed that Article 43 of that directive provides for exhaustive harmonisation of the circumstances in which, on the one hand, concessions may be modified without it being necessary for that purpose to organise a new concession award procedure in accordance with the rules laid down by that directive, and the circumstances in which, on the other hand, such an award procedure is required in the event of modification of the terms of the concession.
- 32 A national measure in a sphere which has been the subject of full harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty (judgment of 14 July 2016, *Promoimpresa and Others*, C-458/14 and C-67/15, EU:C:2016:558, paragraph 59 and the case-law cited).

33 It follows that the question whether the national legislation at issue in the main proceedings has introduced modifications requiring the launch of a new award procedure must be assessed solely in the light of the provisions of Directive 2014/23.

The first question

34 By its first question, the referring court asks, in essence, whether EU law, and, in particular, Article 43 of Directive 2014/23, must be interpreted as precluding national legislation requiring the renewal of a concession contract without a new award procedure, in circumstances in which that contract was awarded to a single concessionaire, whereas the applicable national law provided that such a concession should in principle be awarded to several, and up to four, economic operators.

35 The Court has repeatedly held that legislation of a Member State which makes the exercise of an economic activity, such as the management of certain games of chance, subject to a licensing requirement constitutes an obstacle to the freedoms guaranteed in Articles 49 and 56 TFEU, and that that is so whether the contracting authority uses a sole concessionaire or multiple concessionaire model (see, to that effect, judgment of 19 December 2018, *Stanley International Betting and Stanleybet Malta*, C-375/17, EU:C:2018:1026, paragraphs 38 and 39 and the case-law cited).

36 As the Court has also pointed out in its case-law on games of chance, consumer protection and the prevention of both fraud and incitement to squander money on gambling can be categorised as overriding reasons of public interest justifying restrictions on fundamental freedoms deriving from Articles 49 and 56 TFEU (judgment of 19 December 2018, *Stanley International Betting and Stanleybet Malta*, C-375/17, EU:C:2018:1026, paragraph 43 and the case-law cited).

37 However, it should be noted that, by its first question, the referring court does not indicate the reasons which led the Member State concerned to introduce and maintain such restrictions in that field.

38 In the present case, the applicants in the main proceedings do not seek to challenge the concession model chosen for the management of instant lotteries as such, but claim that, because of the arrangements for the renewal of that concession and the conditions laid down for that purpose, Article 20(1) of Decree-Law No 148/2017 abandoned the multiple concessionaire model provided for in Article 21(1) of Decree-Law No 78/2009 and brought about a return to a sole concessionaire model, which constitutes a substantial amendment of the concession contract at issue.

39 In that regard, it must be observed that, in accordance with the wording of Article 43(1)(a) of Directive 2014/23, the EU legislature has provided that concessions may be modified without a new concession award procedure where the modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses, or options. Such clauses are to state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They are not to provide for modifications or options that would alter the overall nature of the concession.

40 It is common ground that the concession contract at issue contained a clause providing for an option for the renewal, for a period of nine years, of the concessions initially awarded.

- 41 Moreover, the fact that, in the cases in the main proceedings, a single concessionaire was once again designated by the contracting authority for a further period of nine years does not stem from an amendment to the national legislation concerning the award method, since Article 21(1) of Decree-Law No 78/2009 provides that the concession at issue in the main proceedings was, in principle, to be awarded to ‘a number of entities selected at the end of open, competitive and non-discriminatory procedures’. The designation of a single concessionaire is the consequence of implementation of the option to renew the concession, provided for by Decree-Law No 78/2009 and by the concession contract at issue, a possibility which could not be disregarded, in view of the outcome of the initial call for tenders, in which, as was pointed out by the referring court, only Lottomatica, whose legal successor is Lotterie Nazionali, participated, the applicants in the main proceedings and other economic operators having failed to do so.
- 42 However, such renewal without a new award procedure is possible, in accordance with Article 43(1)(a) of Directive 2014/23, only in so far as the conditions regarding the implementation of the clause provided for that purpose have been fulfilled.
- 43 In that respect, it should be noted, as did the Advocate General in points 52 and 53 of his Opinion, that, subject to verification by the referring court, even though the renewal at issue in the main proceedings was formally required by Decree-Law No 148/2017, that renewal reflected the previously expressed intention of the ADM, in particular having regard to its communication of 19 September 2017.
- 44 In the light of the foregoing, the answer to the first question is that EU law, and in particular Article 43(1)(a) of Directive 2014/23, must be interpreted as not precluding national legislation requiring the renewal of a concession contract without a new award procedure, in circumstances in which that contract was awarded to a single concessionaire, whereas the applicable national law provided that such a concession should in principle be awarded to several, and up to four, economic operators, where that national legislation constitutes the implementation of a clause contained in the initial concession contract which provided for the option of such a renewal.

The second and third questions

- 45 By its second and third questions, which should be examined together, the referring court asks, in essence, whether EU law, and, in particular, Article 43 of Directive 2014/23, must be interpreted as precluding national legislation which, on the one hand, provides that the renewal of a concession will be decided upon two years before its expiry date and, on the other hand, modifies the arrangements for payment of the concessionaire’s financial contribution, as set out in the initial concession contract, so as to guarantee additional and increased government revenue.
- 46 At the outset, it must be observed, on the one hand, that the fact that, in the present case, the renewal was granted two years before the expiry date of the concession contract at issue does not, in itself, constitute an amendment of the provisions of that contract, when, subject to verification by the referring court, it is apparent from the documents before the Court that the law governing that contract did not fix a date on which the decision on any renewal could be taken.
- 47 On the other hand, the reasons justifying that renewal, in particular the aim of guaranteeing additional and increased government revenue, are not decisive for the purposes of assessing whether the conditions of that renewal entail substantial modifications.

- 48 As regards the modification of the arrangements for payment of the concessionaire's financial contribution, as set out in the concession contract at issue, it cannot be inferred from Article 43(1)(a) of Directive 2014/23 that, in the context of implementation of a clause or option covered by that provision, any modification which is not expressly provided for by that clause or option would result in a new concession award procedure being required under Article 43(5) thereof.
- 49 In the disputes in the main proceedings, pursuant to Article 43(1)(e) of Directive 2014/23, such modifications may be made to a concession without it being necessary to carry out a new award procedure for that purpose, provided that those modifications are not substantial within the meaning of Article 43(4) thereof.
- 50 The latter provision lays down a general rule according to which a modification of a concession contract during its term is to be considered to be substantial where it renders the concession materially different in character from the one initially concluded. That provision further specifies that, 'in any event', a modification is to be considered to be substantial, *inter alia*, where the modification introduces conditions which, if they had prevailed in the initial concession award procedure, would have allowed for the admission of applicants other than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the concession award procedure, or where the modification changes the economic balance of the concession in favour of the concessionaire in a manner which was not provided for in the initial concession contract.
- 51 In that regard, it must be observed that, in the present case, the amount to be paid by the concessionaire in consideration for the grant of the service concession at issue in the main proceedings remained unchanged, only the arrangements for the payment of that amount, which are the subject matter of the questions referred by the referring court, have been modified.
- 52 It is apparent from the documents before the Court that, as regards the concession contract at issue, the agreed amount was payable, in part, in the year in which the concession entered into force and, in part, in the following year. Upon renewal, by contrast, the first part of the amount due is payable two years before the entry into force of the renewed concession, while the remaining amount is payable in the year preceding the date of its entry into force.
- 53 Subject to verification by the referring court, it appears that such a modification cannot be considered to be substantial within the meaning of Article 43(4) of Directive 2014/23. In that regard, it is important to note that, in so far as that advance payment might be capable of increasing the amount to be paid, such a modification does not appear to alter the economic balance of the concession in favour of the concessionaire, within the meaning of Article 43(4)(b).
- 54 As regards the question whether, in the present case, the application of those payment arrangements as modified to the concession contract at issue would have allowed for the admission of applicants other than those which actually participated or the participation of additional applicants, for the purposes of Article 43(4)(a) of Directive 2014/23, it must be observed that none of the applicants in the main proceedings put forward such a view and that the documents before the Court contain no evidence capable of supporting such an assertion.
- 55 In the light of all the foregoing considerations, the answer to the second and third questions is that EU law, and in particular Article 43(1)(e) of Directive 2014/23, must be interpreted as not precluding national legislation which, on the one hand, provides that the renewal of a concession

will be decided upon two years before its expiry date and, on the other hand, modifies the arrangements for payment of the concessionaire's financial contribution, as set out in the initial concession contract, so as to guarantee additional and increased government revenue, where that modification is not substantial within the meaning of Article 43(4) thereof.

The fourth question

- 56 It should be recalled, as a preliminary point, that, even if, formally, the questions referred do not concern the interpretation of any specific provision of Directive 89/665, that does not prevent the Court from providing all the elements of interpretation of EU law that may be of assistance in adjudicating in the case in the main proceedings. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation, in view of the subject matter of the main dispute (see, by analogy, judgment of 6 May 2021, *Analisi G. Caracciolo*, C-142/20, EU:C:2021:368, paragraph 26 and the case-law cited).
- 57 In that context, in so far as access to review procedures concerning the award of public contracts is governed by Directive 89/665, which is also applicable to concessions awarded in accordance with Directive 2014/23, it is necessary to reformulate the fourth question to the effect that, by that question, the referring court asks in essence whether Article 43(4) of Directive 2014/23 and Article 1(3) of Directive 89/665 must be interpreted as meaning that an economic operator may bring an action against a decision to renew a concession on the ground that the conditions for performance of the initial concession contract were modified when that decision was taken, even though that operator did not participate in the initial procedure for the award of that concession.
- 58 Under Article 1(3) of Directive 89/665, the Member States are to ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.
- 59 It follows that an economic operator's right to bring an action requires it to show an interest in being awarded the concession at issue in the context of a new concession award procedure.
- 60 In accordance with the case-law of the Court in the field of public procurement, participation in a contract award procedure may, in principle, validly constitute a condition which must be fulfilled before the person concerned can show an interest in obtaining the contract at issue or that he or she risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract. If he or she has not submitted a tender it will be difficult for such a person to show that he or she has an interest in challenging that decision or that he or she has been harmed or risks being harmed as a result of that award decision (see, to that effect, judgments of 12 February 2004, *Grossmann Air Service*, C-230/02, EU:C:2004:93, paragraph 27, and of 28 November 2018, *Amt Azienda Trasporti e Mobilità and Others*, C-328/17, EU:C:2018:958, paragraph 46).
- 61 That case-law is not, however, applicable in the cases in the main proceedings, in which the issue is not whether economic operators which did not participate in the initial procedure for the award of the concession are entitled to challenge the outcome of that procedure. As the referring court has pointed out, the issue in those cases is whether such operators have an interest in the contracting entity ensuring that the clause relating to the renewal of that concession is applied in accordance with the relevant legislation.

- 62 In that regard, it is irrelevant whether or not the economic operator participated in the initial procedure for the award of the concession, provided that, at the time when the concession is due for renewal, that operator can show an interest in being awarded such a concession.
- 63 In that context, that economic operator is not required to prove that it would actually participate in that new award procedure. The mere existence of such a possibility must be regarded as being sufficient in that respect (see, to that effect, judgment of 5 September 2019, *Lombardi*, C-333/18, EU:C:2019:675, paragraph 29).
- 64 Accordingly, an economic operator who fulfils such conditions is, where appropriate, entitled to challenge the decision of the contracting authority to renew the concession in favour of the original concessionaire, on the ground that the conditions for performance of the initial concession contract were modified when that decision was taken. To that end, as the Advocate General has stated in point 94 of his Opinion, in order to establish whether those modifications are substantial, that economic operator must be able to bring an action to examine that question.
- 65 The answer to the fourth question is therefore that Article 43(4) of Directive 2014/23 and Article 1(3) of Directive 89/665 must be interpreted as meaning that an economic operator may bring an action against a decision to renew a concession on the ground that the conditions for performance of the initial concession contract have been substantially modified, even though that operator did not participate in the initial procedure for the award of that concession, provided that, at the time when the concession is due for renewal, that operator can show an interest in being awarded such a concession.

Costs

- 66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

- 1. European Union law, and in particular Article 43(1)(a) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, must be interpreted as not precluding national legislation requiring the renewal of a concession contract without a new award procedure, in circumstances in which that contract was awarded to a single concessionaire, whereas the applicable national law provided that such a concession should in principle be awarded to several, and up to four, economic operators, where that national legislation constitutes the implementation of a clause contained in the initial concession contract which provided for the option of such a renewal.**
- 2. European Union law, and in particular Article 43(1)(e) of Directive 2014/23, must be interpreted as not precluding national legislation which, on the one hand, provides that the renewal of a concession will be decided upon two years before its expiry date and, on the other hand, modifies the arrangements for payment of the concessionaire's financial contribution, as set out in the initial concession contract, so as to guarantee additional and increased government revenue, where that modification is not substantial within the meaning of Article 43(4) thereof.**

3. **Article 43(4) of Directive 2014/23 and Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Directive 2014/23, must be interpreted as meaning that an economic operator may bring an action against a decision to renew a concession on the ground that the conditions for performance of the initial concession contract have been substantially modified, even though that operator did not participate in the initial procedure for the award of that concession, provided that, at the time when the concession is due for renewal, that operator can show an interest in being awarded such a concession.**

[Signatures]