

Request for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 23 September 2019 — Sisal SpA v Agenzia delle Dogane e dei Monopoli, Ministero dell'Economia and delle Finanze

(Case C-721/19)

(2019/C 432/30)

Language of the case: Italian

Referring court

Consiglio di Stato

Parties to the main proceedings

Appellant: Sisal SpA

Respondents: Agenzia delle Dogane e dei Monopoli, Ministero dell'Economia and delle Finanze

Questions referred

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/EU, ⁽¹⁾ to be interpreted as precluding a provision such as that contained in Article 20(1) of Decreto Legge (Decree-Law) No 148 of 16 October 2017 and in the subsequent implementing legislation, which provides that '1. Pursuant to Article 21(3) and (4) of decreto-legge 1° luglio 2009, n. 78 (Decree-Law No 78 of 1 July 2009), converted with amendments by legge 3 agosto 2009, n. 102 (Law No 102 of 3 August 2009), the Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Agency, Italy) 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 of 1 July 2009, converted with amendments by Law No 102 of 3 August 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 [appellant company] 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/EU, to be interpreted as precluding a provision such as that contained in Article 20(1) of Decree-Law No 148 of 16 October 2017, which, under Article 21(3) and (4) of Decree-Law No 78 of 1 July 2009, converted with amendments by

Law No 102 of 3 August 2009, provides that ‘the Customs and Monopolies Agency 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 of 1 July 2009, converted with amendments by Law No 102 of 3 August 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 with regard to its onerousness, particularly with the change in payment terms, which are accelerated compared with those envisaged by the original concession, taking into account — according to the [appellant’s] submissions — 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/EU, to be interpreted as precluding a provision such as that contained in the legislation implementing the aforementioned Decree, and in particular in Customs and Monopolies Agency Notice No 0133677 of 1 December 2017, which, in accordance with the provisions of Article 20(1) of Decree-Law No 148 of 16 October 2017, and on the basis of the provisions of the first paragraph of Article 4 of the concession agreement for the management of instant lotteries, 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 Customs and Monopolies Agency, 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 (Customs and Monopolies Agency 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, with regard to its onerousness, taking into account — according to the [appellant’s] submissions — 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/EU, 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?

(¹) 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).