



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

14 July 2016*

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

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

REQUESTS for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy) and the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court, Sardinia, Italy), made by decisions of 5 March 2014 and 28 January 2015 respectively, received at the Court on 3 October 2014 and 12 February 2015, in the proceedings

Promoimpresa srl (Case C-458/14)

v

Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro,

Regione Lombardia,

and

Mario Melis and Others (C-67/15)

v

Comune di Loiri Porto San Paolo,

Provincia di Olbia Tempio,

intervening parties:

Alessandro Piredda and Others,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, A. Tizzano, Vice-President of the Court, acting as Judge of the Fifth Chamber, A. Borg Barthet, E. Levits and M. Berger, Judges,

Advocate General: M. Szpunar,

* Language of the case: Italian.

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 3 December 2015,

after considering the observations submitted on behalf of:

- Promoimpresa srl, by E. Vaglio, R. Righi and E. Nesi, avvocati,
- the Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro, by M. Ballerini and C. Cerami, avvocati,
- the Regione Lombardia, by M. Tamborino, avvocato,
- Mario Melis and Others, by B. Ballero, A. Capacchione, F. Ballero and S. Ballero, avvocati,
- the Comune di Loiri Porto San Paolo, by G. Longheu, avvocato,
- the Provincia di Olbia Tempio, by G. Cosseddu and F. Melis, avvocati,
- Alessandro Piredda and Others, by S. Carboni and S. Dessy, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by P. Garofoli, avvocato dello Stato, and L. Serena-Rossi, acting as expert,
- the Czech Government, by M. Smolek, J. Vlášil and T. Müller, acting as Agents,
- the Greek Government, by K. Nasopoulou, acting as Agent,
- the Netherlands Government, by J. Langer, acting as Agent,
- the European Commission, by G. Conte, A. Tokár and E. Montaguti, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 February 2016,

gives the following

Judgment

- 1 These requests for a preliminary ruling concern the interpretation of Article 12 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36) and Articles 49, 56 and 106 TFEU.
- 2 The references have been made in the course of two sets of proceedings. The first proceedings (Case C-458/14) are between Promoimpresa srl and Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro (Consortium of councils of the Brescian shoreline by Lake Garda and Lake Idro, Italy, ‘the Consortium’) and the Regione Lombardia (Lombardy Region, Italy) concerning, first, the decision of the Consortium refusing to renew a concession held by Promoimpresa for the occupancy and management of State-owned land and, second, the decision of the Giunta Regionale Lombardia (Regional Executive Body, Lombardy) to subject the award of lakeside concessions to a comparative selection procedure. The second proceedings (Case C-67/15) are between Mr Mario Melis and others and the Comune di Loiri Porto San Paolo (Municipality of Loiri Porto San Paolo, Italy, ‘the Comune’) and the Provincia di Olbia Tempio (Province of Olbia Tempio, Italy) concerning

decisions relating to the approval of the plan for the use of the lakeside area, the award of concessions of State-owned maritime land and measures by which the municipal police ordered Mr Melis and others to remove certain equipment from that maritime land.

Legal context

EU law

- 3 Recital 39 of Directive 2006/123 states:

‘The concept of “authorisation scheme” should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession. Authorisation may be granted not only by a formal decision but also by an implicit decision arising, for example, from the silence of the competent authority or from the fact that the interested party must await acknowledgement of receipt of a declaration in order to commence the activity in question or for the latter to become lawful.’

- 4 Recital 57 of that directive states:

‘The provisions of this Directive relating to authorisation schemes should concern cases where the access to or exercise of a service activity by operators requires a decision by a competent authority. This concerns neither decisions by competent authorities to set up a public or private entity for the provision of a particular service nor the conclusion of contracts by competent authorities for the provision of a particular service which is governed by rules on public procurement, since this Directive does not deal with rules on public procurement.’

- 5 Under Article 4(6) of the directive, an ‘authorisation scheme’ means ‘any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof’.
- 6 Article 12 of the directive, which concerns situations in which an authorisation scheme seeks to authorise the conduct of economic activities requiring the use of scarce natural resources, provides:

‘1. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity, Member States shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.

2. In the cases referred to in paragraph 1, authorisation shall be granted for an appropriate limited period and may not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider.

3. Subject to paragraph 1 and to Articles 9 and 10, Member States may take into account, in establishing the rules for the selection procedure, considerations of public health, social policy objectives, the health and safety of employees or self-employed persons, the protection of the environment, the preservation of cultural heritage and other overriding reasons relating to the public interest, in conformity with [EU] law.’

- 7 According to Recital 15 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):

‘... Certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land or any public property, in particular in the maritime, inland ports or airports sector, whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services, should not qualify as concessions within the meaning of this Directive. This is normally the case with public domain or land lease contracts which generally contain terms concerning entry into possession by the tenant, the use to which the property is to be put, the obligations of the landlord and tenant regarding the maintenance of the property, the duration of the lease and the giving up of possession to the landlord, the rent and the incidental charges to be paid by the tenant.’

Italian law

- 8 Article 1(18) of decreto-legge n. 194 (Decree Law No 194) of 30 December 2009 (‘Decree Law No 194/2009’), converted into law by legge n. 25 (Law No 25) of 26 February 2010 (‘Law No 25/2010’), provides:

‘Subject to the rules on the award of property to certain regions and local entities under Law No 42 of 5 May 2009 and their corresponding implementing rules, during the procedure for the review of the legal framework for the grant of concessions of State-owned maritime property used for touristic and recreational purposes, which must be carried out on the basis of criteria and detailed rules for the award of such concessions, on the basis of an agreement of the State-Regional Conference pursuant to Article 8(6) of Law No 131 of 5 June 2003, which shall be concluded in conformity with the principles of competition, freedom of establishment, the principle guaranteeing the exercise, development and exploitation of business activities and the protection of investments, and respecting the preferential right laid down in the second paragraph of Article 37(2) of the Shipping Code, the duration of concessions existing at the date of the entry into force of the present decree and due to expire at the latest on 31 December 2015 shall be extended until that date, ...’

- 9 That provision was amended by Article 34k of decreto legge n. 179 (Decree Law No 179) of 18 October 2012 (‘Decree Law No 179/2012’), introduced at the time of its conversion into law by Law No 221 of 17 December 2012 (‘Law No 221’) as follows:

‘Subject to the rules on the award of property to certain regions and local entities under Law No 42 of 5 May 2009 and their corresponding implementing rules, during the procedure for the review of the legal framework for the grant of concessions of State-owned maritime, lakeside and waterway property used for touristic and recreational purposes, fishing, fish-farming and related economic and sporting activities, and those used as marinas, berths and mooring spots for recreational boating activities, which must be carried out on the basis of criteria and detailed rules for the award of such concessions, on the basis of an agreement of the State-Regional Conference pursuant to Article 8(6) of Law No 131 of 5 June 2003, which shall be concluded in conformity with the principles of competition, freedom of establishment, the principle guaranteeing the exercise, development and exploitation of business activities and the protection of investments, and respecting the preferential right laid down in the second paragraph of Article 37(2) of the Shipping Code, the duration of concessions existing at the date of the entry into force of the present decree and due to expire at the latest on 31 December 2015 shall be extended until 31 December 2020, ...’

10 Article 16 of Decree Law No 59 of 26 March 2010, transposing Directive 2006/123, provides:

‘1. In the event that the number of authorisations available for a given activity involving the provision of services is limited for reasons connected with the scarcity of natural resources or technical capacity available, the competent authorities shall adopt a procedure for selection from among the potential candidates and ensure that the criteria and rules designed to guarantee that the procedure is impartial are determined in advance and published in accordance with the formal requirements laid down in their own rules.

2. In establishing the rules for the selection procedure, the competent authorities may take into account considerations of public health, social policy objectives, the health and safety of employees or self-employed persons, the protection of the environment, the preservation of cultural heritage and other overriding reasons relating to the public interest, in conformity with [EU] law.

3. Actual observance of the criteria and rules referred to in paragraph 1 must be apparent from the individual provisions relating to the grant of the authorisation.

4. In the cases referred to in paragraph 1, the authorisation shall be granted for a limited period and cannot be renewed automatically or confer any advantage on a provider whose authorisation is about to expire or on any other person, even if justified by reason of particular links with the former.’

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-458/14

11 By decisions of 16 June and 17 August 2006, the Consortium awarded Promoimpresa a concession for the operation of a lakeside area in order to set up a kiosk, veranda, bathing facilities, jetty and pontoon on the State-owned land around Lake Garda.

12 Article 3 of that concession provided that the concession would cease automatically on 31 December 2010, without it being necessary to give formal notice and without the concessionnaire being able to rely on customary practices to continue its enjoyment of the concession.

13 Contemporaneously, the European Commission expressed the view, in a letter of formal notice addressed to the Italian Republic on 2 February 2009, that Article 37 of the Italian Shipping Code was incompatible with Article 49 TFEU in so far as it established a preferential right in favour of the outgoing concessionnaire in procedures for the award of concessions of State-owned maritime property. The Italian legislature intervened in order to remove that preferential right. Subsequently, at the time of the conversion of Decree Law No 194/2009 into Law No 25/2010, the Italian legislature inserted a reference to another legislative text, thereby permitting the automatic renewal of six-year concessions for a further six years. By an additional letter of formal notice of 5 May 2010, the Commission took the view that that reference, first, neutralised the effects of the removal of the preferential right and, second, was incompatible with Article 12 of Directive 2006/123 and Article 49 TFEU. Since the Italian legislature decided to repeal the provision enabling that cross-reference, the Commission was satisfied that it could close the infringement procedure on 27 February 2012.

14 On 14 April 2010, Promoimpresa lodged an application to have its concession renewed, which the Consortium rejected by decision of 6 May 2011. That decision was based on the ground, first, that the new concession could not be obtained by a mere application for renewal, but solely following a public tendering procedure and, second, that the concession which had expired was limited to a five-year term precluding any form of automatic renewal.

- 15 Promoimpresa brought an action contesting the decision of the Consortium before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy) alleging, inter alia, infringement of Article 1(18) of Decree Law No 194/2009, converted into law by Law No 25/2010, since that provision had provided for the extension of the term of the concessions.
- 16 The referring court states that the legal relationship between Promoimpresa and the Consortium is in the nature of a ‘concession’, within the meaning of EU law, in so far as Promoimpresa has a right of use over State-owned property in return for the payment of a periodic fee to the public authority owning that property and that the commercial risks of operating that property are borne by Promoimpresa.
- 17 The referring court considers that, in so far as it provides for the repeated extension of the duration of those State concessions, the Italian legislation creates an unjustified restriction on freedom of establishment, in particular in so far as it makes it in practice impossible for any other competitor to gain access to concessions that have expired.
- 18 In those circumstances, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Do the principles of freedom of establishment, non-discrimination and safeguarding competition, respectively laid down in Articles 49, 56 and 106 TFEU, and the precept of reasonableness implicit therein, preclude national legislation under which the validity of concessions of economically significant State-owned maritime, lakeside and waterway property is to be repeatedly extended through a succession of legislative acts, the duration of that validity being statutorily increased for at least 11 years, with the effect that the same concessionaire retains the exclusive right to exploit the asset economically, even though the period of validity under the concession awarded to that concessionaire has meanwhile expired, whereby interested economic operators are deprived of any opportunity of obtaining a concession for the asset on the basis of a public tendering procedure?’

Case C-67/15

- 19 For the most part, Mr Melis and others run tourist and leisure-oriented businesses in a number of areas on the shore of the Comune under concessions of State-owned maritime property awarded in 2004 for a term of six years, subsequently extended for a further year.
- 20 In 2012, Mr Melis and others submitted a request for formal extension by the Comune. That request remained unanswered. Mr Melis and others concluded from the lack of a response that they were legally entitled to continue their activities, from May 2012, in accordance with Article 1(18) of Decree Law No 194/2009, which provided for the automatic extension of the duration of concessions of State-owned maritime property for tourist and leisure-oriented business activities.
- 21 On 11 May 2012, after approving the coastal area use plan, the Comune published a notice for the award of seven new concessions of State-owned maritime property, some of which were for locations in areas where Mr Melis and others already held concessions.
- 22 On 5 June 2012, Mr Melis and others brought an action for the annulment of those decisions of the Comune before the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court, Sardinia, Italy). They subsequently submitted further pleas in law, notified on 11 June 2012, thereby extending their grounds of complaint to the decision by which the Comune had awarded the concessions referred to in the notice of 11 May 2012. Mr Melis and others also contested the measures by which the municipal police force of the Comune had ordered them to remove their equipment from the State-owned maritime property.

- 23 The referring court states that the legal relationship between Mr Melis and others and the Comune is in the nature of a ‘concession’, within the meaning of EU law, in so far as it concerns the provision of a service and the commercial risks are borne by the concessionnaires.
- 24 The referring court considers, in addition, that the automatic extension laid down by the national legislation undermines the application of EU law, in particular of Article 12 of Directive 2006/123 and the provisions of the TFEU on the freedom to provide services and the freedom of establishment.
- 25 In those circumstances, the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court, Sardinia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Do the principles of freedom of establishment, non-discrimination and safeguarding competition, as laid down, respectively, in Articles 49 TFEU, 56 TFEU and 106 TFEU, preclude national legislation under which the period of validity of concessions of economically significant State-owned maritime property is repeatedly extended through a succession of legislative acts?
- (2) Does Article 12 of Directive 2006/123 preclude a national provision, such as Article 1(18) of Decree Law No 194 of 30 December 2009, converted into law by Law No 25 of 26 February 2010, as amended and supplemented, which permits the automatic extension of existing concessions of State-owned maritime property for tourist and leisure-oriented business activities to 31 December 2015, or to 31 December 2020, pursuant to Article 34k of Decree Law No 179 of 18 October 2012, inserted by Article 1(1) of Law No 221 of 17 December 2012 converting the aforesaid decree law into law?’
- 26 By decision of 27 October 2015, the cases were joined for the purposes of the oral procedure and the judgment.

Consideration of the questions referred for a preliminary ruling

Admissibility of the questions

- 27 In the first place, the Italian Government claims that Article 1(18) of Decree Law No 194/2009, referred to in Case C-458/14, concerned, at the time of the facts in the main proceedings, exclusively concessions of State property by the seashore. The application of that provision to lakeside and waterway concessions took place after the adoption of the acts contested before the referring court; as a result that provision is applicable neither *ratione temporis* nor *ratione materiae* to the concession at issue in the present case.
- 28 In that regard, it should be borne in mind that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (judgment of 6 October 2015 in *Târșia*, C-69/14, EU:C:2015:662, paragraph 12 and the case-law cited).
- 29 In particular, it is not for the Court of Justice, in the context of the judicial cooperation established by Article 267 TFEU, to call into question or to verify the accuracy of the interpretation of national law made by the national court, as such interpretation falls within the exclusive jurisdiction of that court. Thus, the Court, when a question is referred to it by a national court, must base itself on the interpretation of national law as described to it by that court (judgment of 6 October 2015 in *Târșia*, C-69/14, EU:C:2015:662, paragraph 13 and the case-law cited).

- 30 Furthermore, the Court may refuse to rule on questions referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 6 October 2015 in *Târșia*, C-69/14, EU:C:2015:662, paragraph 14 and the case-law cited).
- 31 It appears, in the present case, from the order for reference in Case C-458/14 that Promoimpresa, in bringing its action before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy), relied on Article 1(18) of Decree Law No 194/2009, as amended by Law No 25/2010, claiming that, although adopted for State-owned maritime property concessions, that provision should also apply to State-owned lakeside property.
- 32 The referring court in that case implicitly accepted that interpretation in so far as it considered that the resolution of the dispute in the main proceedings depends on whether that national provision should not be applied on the ground that it is incompatible with EU law.
- 33 In the second place, the Commission observes that, at the material time in each of the cases in the main proceedings, the concessions granted to the applicants in those cases did not fall *ratione temporis* within the scope of Article 34k of Decree Law No 179/2012. That provision, which extends until 31 December 2020 concessions relating to State-owned land which were initially to terminate on 31 August 2015, was adopted after the decisions contested in the main proceedings. That institution therefore concludes that the questions referred are admissible only in so far as they concern the renewal of the concessions until 31 December 2015.
- 34 In that regard, the Court notes, as did the Advocate-General in point 37 of his Opinion, that, by its questions, the referring court refers, generally, to the case of national legislation under which the date of the termination of concessions of State-owned maritime and lakeside property is automatically and repeatedly extended. Thus, the question of whether the applicable national provisions in the cases in the main proceedings are those extending that period to 31 December 2015 or to 31 December 2020 not only falls within the jurisdiction of the national court, but has no bearing in any event on the admissibility of the questions referred.
- 35 In view of the foregoing, the references for a preliminary ruling must be treated as being admissible.

The second question in Case C-67/15

- 36 By its second question, which it is appropriate to consider first, the referring court asks, in essence, whether Article 12 of Directive 2006/123 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits the automatic extension of existing concessions of State-owned maritime and lakeside property for tourist and leisure-oriented business activities.

Conditions for the application of Article 12 of Directive 2006/123

- 37 Article 12 of Directive 2006/123 appears in Section 1 of Chapter III of that directive, relating to authorisations, and concerns the specific case in which the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity. In that section, Article 9 of the directive governs the option of the Member States to make access to a service activity or the exercise thereof subject to an authorisation scheme. Article 10 of the directive concerns the conditions for the granting of authorisations and Article 11 of the directive concerns their duration.

- 38 The Court notes, first, that, under Article 4(6) of that directive, an authorisation scheme means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof.
- 39 Moreover, recital 39 of the directive states that the concept of an ‘authorisation scheme’ should cover, inter alia, the administrative procedures for granting concessions.
- 40 The cases in the main proceedings concern concessions granted by public authorities of State-owned maritime and lakeside property relating to the exploitation of State land for tourist and leisure-oriented business activities.
- 41 Those concessions may therefore be characterised as ‘authorisations’ within the meaning of the provisions of Directive 2006/123 in so far as they constitute formal decisions, irrespective of their characterisation in national law, which must be obtained by the service providers from the competent national authorities in order to be able to exercise their economic activities.
- 42 The Court notes, second, that the concessions at issue in the main proceedings concern natural resources, within the meaning of Article 12 of Directive 2006/123, since the State land at issue is located either by the shore of Lake Garda or on the Sardinian coastline.
- 43 As regards, more specifically, the question of whether those concessions are necessarily subject to a limited number of authorisations on account of the scarcity of natural resources, it is for the referring court to determine whether that condition is satisfied. In that regard, the fact that the concessions at issue in the main proceedings are not granted at national level but at a municipal level must, in particular, be taken into account in establishing whether such State land available for economic exploitation is scarce.
- 44 In addition, in so far as the referring courts consider that the concessions at issue in the main proceedings may constitute service concessions, it must be noted that, according to recital 57 of Directive 2006/123, the provisions of that directive relating to authorisation schemes do not concern the conclusion of contracts by competent authorities for the provision of a particular service which is governed by rules on public procurement.
- 45 It follows that the provisions of Directive 2006/123 relating to authorisation schemes cannot apply to concessions of public services capable, inter alia, of falling within the scope of Directive 2014/23.
- 46 In that regard, the Court notes that a services concession is characterised, inter alia, by a situation in which the right to operate a particular service is transferred by the contracting authority to the concessionaire and that the latter enjoys, in the framework of the contract which has been concluded, a certain economic freedom to determine the conditions under which that right is exercised and, in addition, is, to a large extent, exposed to the risks of operating the service (see, to that effect, judgment of 11 June 2009 in *Hans & Christophorus Oymanns*, C-300/07, EU:C:2009:358, paragraph 71).
- 47 However, in the cases in the main proceedings, as the Commission notes, the concessions do not concern the provision of a particular service by the contracting entity, but an authorisation to exercise an economic activity on State-owned land. It follows that the concessions at issue in the main proceedings do not fall within the category of service concessions (see, by analogy, judgment of 14 November 2013 in *Belgacom*, C-221/12, EU:C:2013:736, paragraphs 26 to 28).

48 Such an interpretation is, furthermore, supported by recital 15 of Directive 2014/23. That recital states that certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land, whereby the State establishes only general conditions for their use without procuring specific works or services, should not qualify as ‘service concessions’ within the meaning of that directive.

The application of Article 12 of Directive 2006/123

49 If the concessions at issue in the main proceedings fall within the scope of Article 12 of Directive 2006/123 — which it is for the referring court to establish, as stated in paragraph 43 above — it should be noted that, according to paragraph 1 of that provision, where the number of authorisations is limited because of the scarcity of natural resources, the grant of such authorisations must be subject to a selection procedure between potential candidates which must ensure full guarantees of impartiality and transparency, including, in particular, adequate publicity.

50 As the Advocate General notes in point 83 of his Opinion, national legislation, such as that at issue in the main proceedings, in so far as it provides for statutory extension of the date of termination of authorisations, amounts to automatic renewal of those concessions, which is expressly excluded by Article 12(2) of Directive 2006/123.

51 In addition, the automatic renewal of authorisations relating to the economic exploitation of State-owned maritime and lakeside property does not allow a selection procedure to be organised as described in paragraph 49 above.

52 However, the applicants in the cases in the main proceedings and the Italian Government claim that the automatic renewal of the authorisations is necessary in order to safeguard the legitimate expectations of the holders of those authorisations in so far as their renewal enables the cost of the investments made by those holders to be recouped.

53 In that regard, it must be noted that Article 12(3) of Directive 2006/123 provides expressly that Member States may take into account overriding reasons relating to the public interest in establishing the rules governing the selection procedure.

54 Nevertheless, such considerations may be taken into account only when establishing the rules for the selection procedure of potential candidates and subject, in particular, to Article 12(1) of that directive.

55 Consequently, Article 12(3) of the directive cannot be interpreted as enabling the automatic renewal of authorisations to be justified when no selection procedure referred to in paragraph 1 of that article was organised at the time of the initial grant of those authorisations.

56 Furthermore, as the Advocate General stated in points 92 and 93 of his Opinion, the protection of legitimate expectations as a justification entails an assessment on a case-by-case basis whether the holder of the authorisation could reasonably expect its authorisation to be renewed and made the corresponding investments. Such a justification cannot therefore be relied on in support of an automatic extension enacted by the national legislature and applied indiscriminately to all of the authorisations at issue.

57 It follows from the foregoing that Article 12(1) and (2) of Directive 2006/123 must be interpreted as precluding a national measure, such as that at issue in the main proceedings, which permits the automatic extension of existing authorisations of State-owned maritime and lakeside property for tourist and leisure-oriented business activities, without any selection procedure for potential candidates.

The question in Case C-458/14 and the first question in Case C-67/15

- 58 By their questions, which it is appropriate to consider together, the referring courts ask, in essence, whether Articles 49, 56 and 106 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits the automatic extension of existing concessions of State-owned property for tourist and leisure-oriented business activities.
- 59 As a preliminary point, the Court notes that 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 30 April 2014 in *UPC DTH*, C-475/12, EU:C:2014:285, paragraph 63 and the case-law cited).
- 60 As the Advocate General stated in points 41 to 43 of his Opinion, Articles 9 to 13 of Directive 2006/123 lay down a series of measures that Member States must comply with where access to a service activity is subject to the grant of authorisation.
- 61 As has already been held with regard to Article 14 of that directive, which establishes a list of requirements that are ‘prohibited’ within the framework of the exercise of freedom of establishment, the Court considers that Articles 9 to 13 of Directive 2006/123 provide for exhaustive harmonisation concerning the services falling within their scope (see, by analogy, judgment of 16 June 2015 in *Rina Services and Others*, C-593/13, EU:C:2015:399, paragraphs 37 and 38).
- 62 Consequently, in so far as the questions referred for a preliminary ruling concern the interpretation of primary law, those questions arise for consideration only if Article 12 of Directive 2006/123 is not applicable to the cases at issue in the main proceedings, which it is for the referring courts to determine, as stated in paragraph 43 above. Accordingly, it is subject to that proviso that the Court answers the questions referred.
- 63 The Court also notes that the concessions at issue in the main proceedings concern a right of establishment on State-owned land with a view to conducting tourist and leisure-oriented business activities so that the situations at issue in the cases in the main proceedings fall, by their very nature, within the scope of Article 49 TFEU.
- 64 In that regard, it has been held that public authorities are bound, when they envisage granting a concession which is outside the scope of the directives on the various categories of public contracts, to comply with the fundamental rules of the TFEU, in general, and the principle of non-discrimination, in particular, (see, to that effect, judgment of 17 July 2008 in *ASM Brescia*, C-347/06, EU:C:2008:416, paragraphs 57 and 58 and the case-law cited).
- 65 More particularly, since such a concession is of certain cross-border interest, its award, without any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession and which are located in other Member States. Such a difference in treatment is, in principle, prohibited by Article 49 TFEU (see, by analogy, judgments of 17 July 2008 in *ASM Brescia*, C-347/06, EU:C:2008:416, paragraphs 59 and 60, and 14 November 2013 in *Belgacom*, C-221/12, EU:C:2013:736, paragraph 37).
- 66 First of all, it should be noted that the existence of certain cross-border interest must be assessed on the basis of all the relevant factors, such as the financial value of the contract, the place where it is to be performed or its technical features, and having regard to the particular characteristics of the contract concerned (see, to that effect, judgments of 14 November 2013 in *Belgacom*, C-221/12, EU:C:2013:736, paragraph 29 and the case-law cited, and 17 December 2015 in *UNIS and Beaudout Père et Fils*, C-25/14 and C-26/14, EU:C:2015:821, paragraph 30).

- 67 Thus, in Case C-458/14, the information provided by the referring court allows the Court to find that the concession at issue in that case is of certain cross-border interest having regard, in particular, to the geographic location of the public property and the economic value of that concession.
- 68 However, in Case C-67/15, the referring court has not provided the Court with the findings of fact needed to establish that there is certain cross-border interest. As is clear from Article 94 of the Rules of Procedure, a request for a preliminary ruling must contain a summary of the facts on which the questions are based and indicate the connection, inter alia, between those facts and the questions. Accordingly, the findings of fact enabling the Court to ascertain whether there is certain cross-border interest should be made by the referring court before the questions are referred to the Court (see, to that effect, judgment of 17 December 2015 in *UNIS and Beaudout Père et Fils*, C-25/14 and C-26/14, EU:C:2015:821, paragraph 28).
- 69 In those circumstances, the first question referred for a preliminary ruling in Case C-67/15 is inadmissible.
- 70 As regards Case C-458/14, the Court finds that legislation, such as that at issue in the main proceedings, in the light of the extension that it introduces, delays the award of the concessions through a transparent tender procedure to such an extent that it must be found that such legislation introduces a difference in treatment to the detriment of undertakings located in another Member State which might be interested in those concessions, which is prohibited, in principle, by Article 49 TFEU.
- 71 Lastly, in so far as the Italian Government claims that the renewals resulting from the operation of the national legislation aim to allow concessionaires to recoup the cost of their investments, it must be noted that such a difference in treatment may be justified by overriding reasons in the public interest, inter alia, by the need to comply with the principle of legal certainty (see, to that effect, judgments of 17 July 2008 in *ASM Brescia*, C-347/06, EU:C:2008:416, paragraph 64, and 14 November 2013 in *Belgacom*, C-221/12, EU:C:2013:736, paragraph 38).
- 72 It has therefore been held in relation to a concession awarded in 1984, although the Court had not established at that time that contracts with certain cross-border interest might be subject to a duty of transparency, that the principle of legal certainty requires that the termination of such a concession be coupled with a transitional period enabling the contracting parties to untie their contractual relations on acceptable terms, inter alia, from an economic point of view (see, to that effect, judgments of 17 July 2008 in *ASM Brescia*, C-347/06, EU:C:2008:416, paragraphs 70 and 71, and 14 November 2013 in *Belgacom*, C-221/12, EU:C:2013:736, paragraph 40).
- 73 However, 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.
- 74 It follows from the foregoing considerations that Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits the automatic extension of existing concessions of State-owned property for tourist and leisure-oriented business activities, in so far as those concessions are of certain cross-border interest.

Costs

- 75 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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. **Article 12(1) and (2) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as precluding a national measure, such as that at issue in the main proceedings, which permits the automatic extension of existing authorisations of State-owned maritime and lakeside property for tourist and leisure-oriented business activities, without any selection procedure for potential candidates.**
2. **Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits the automatic extension of existing concessions of State-owned property for tourist and leisure-oriented business activities, in so far as those concessions are of certain cross-border interest.**

[Signatures]