Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 21 January 2021 [1]

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

Sisal SpA (C-721/19)
Stanleybet Malta Ltd,
Magellan Robotech Limited (C-722/19)
v
Agenzia delle Dogane e dei Monopoli,
Ministero dell'Economia e delle Finanze,
interveners:
Lotterie Nazionali Srl,
Lottomatica Holding Srl

(Request for a preliminary ruling from the Consiglio di Stato (Council of State, Italy))

(Preliminary-ruling proceedings – Freedom of establishment – Freedom to provide services – Restrictions – Directive 2014/23/EU – Articles 3 and 43 – Public procurement – Procedures for selection of concessionaire – Instant lotteries – National legislation providing for the renewal of a concession without issuing a call for tenders – Alteration of the terms of the concession – Substantial modifications – Right of access to the system of remedies)

1. The types of betting and gambling permitted in Italy include the so-called 'national instant lottery', [2] the operation of which was awarded in 2009 through the administrative concession system. The contracting authority selected the successful concessionaire in a public tendering procedure governed by the criterion of the most economically advantageous tender.

2. Decree-Law No 78/2009 [3] devised a concession system for the national instant lottery in which up to four concessionaires could be selected. The duration of the concession would be nine years, renewable once only for the same period of time.

3. Only one tenderer, Lotterie Nazionali Srl ('Lotterie Nazionali'), participated in the bidding and it was appointed as the sole concessionaire.

1 Original language: Spanish.

2 This is a 'scratch and win' lottery in which participants find out immediately the outcome of their bet. After a ticket is purchased, the winning random combination, which is printed and concealed, is revealed by scratching a particular area of the ticket.

3 Decree-Law No 78/2009 of 1 July 2009 on 'Measures to combat the crisis and the extension of time limits' (GURI No 150 of 1 July 2009), converted into statute, with amendments, by Law No 102 of 3 August 2009 (GURI No 179 of 4 August 2009; 'Decree-Law No 78/2009').

4. Two years before the expiry of the initial period (2010/2019), a new legislative provision, Decree-Law No 148/2017,[4] stipulated that the contracting authority was to authorise the 'continuation of the existing concession relationship … until the expiry date stipulated in the … concession contract',[5] in other words until 2028.

5. The Consiglio di Stato (Council of State, Italy) questions whether the continuation of the concession relationship for that period, without the launch of a new tendering procedure, is compatible with the right of freedom to provide services and the freedom of establishment (Articles 49 TFEU and 56 TFEU), and with Directive 2014/23/EU.[6]

6. The Consiglio di Stato (Council of State) also asks whether operators in the sector which did not participate in the original call for tenders are entitled to object to the renewal and request the launch of a new procurement procedure.

I. Legal framework

A. EU law. Directive 2014/23

7. According to Article 3 ('Principle of equal treatment, non-discrimination and transparency'):

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

…'

8. Article 43 ('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] Decree-Law No 148/2017 of 16 October 2017 on 'Urgent measures concerning finance and overriding requirements' (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 148/17').

[5] In some passages of the orders for reference (for example, paragraph 12(c)(8)), the national court states that continuation of the concession relationship is essentially the same as the renewal (*rinnovo*) or extension of that relationship.

[6] Directive of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1).

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;

…

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.'

B. Italian law

1. Decree-Law No 78/2009

9. Article 21 ('Award of concessions in the field of betting and gambling') reads:

'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 – Autonomous Administration of State Monopolies 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.

…

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;

…

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.'

2. Decree-Law No 148/2017

10. Article 20(1) reads:

'Pursuant to 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, the Customs and Monopolies Agency shall authorise the continuation of the existing concession for the operation, including by remote means, of national instant lotteries 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.'

II. Facts, national proceedings and 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 Amministratione Autonoma Monopoli di Stato (Autonomous Administration of State Monopolies, Italy) commenced the 'selection process for the award of the concession to operate the public games of chance known as "national instant lotteries"'.[7]

12. The tender specifications stipulated that:[8]

– Indirect management of the collection of stakes was always to be awarded as a concession.

– Concessions would normally be awarded to more than one undertaking, up to a maximum of four, which would be selected following open, competitive and non-discriminatory procedures.

– Each concessionaire would be liable to pay a fee based on a percentage of revenue.

– The selection of concessionaires would be based on the principle of the most economically advantageous tender and the criteria considered would include the increase of tenders by reference to a pre-defined base in order to ensure, in every case, overall revenue of at least EUR 500 million in 2009 and EUR 300 million in 2010, irrespective of the final number of successful tenderers.

– Concessions, which could be renewed once only, would be for a term of nine years, divided into two periods of five and four years. The continuation of the concession for the second period would be subject to the positive appraisal of the management performance of the concessionaire, which the administrative authority was required to carry out during the first half of the fifth year.

13. Only Lotterie Nazionali participated in the tendering procedure and was awarded the concession on an exclusive basis.

[7] According to the orders for reference (paragraph 3.1), under an agreement of 14 October 2003, that type of lottery had, until 31 May 2010, been operated by the temporary consortium Lottomatica (which subsequently became Lotterie Nazionali). Lottomatica Holding Srl controls Lotterie Nazionali, holding 64% of its share capital.

[8] The specifications essentially reproduced the provisions of Article 21 of Decree-Law No 78/2009.

14. At the end of the first subperiod of five years, the Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Agency, Italy; 'the ADM')[9] approved the continuation of the concession for the second subperiod of four years, until 30 September 2019.

15. On 26 July 2017, Lotterie Nazionali asked the ADM to activate the clause relating to continuation of the concession for a further period of nine years.

16. By memorandum of 19 September 2017, the ADM concluded that the requested continuation of the concession was in the public interest.

17. On 16 October 2017, Article 20(1) of Decree-Law No 148/2017 entered into force.

18. In accordance with that provision, the ADM, by memorandum of 1 December 2017, set 30 September 2028 as the expiry date of the concession, following the concessionaire's formal acceptance of the conditions specified in Article 20(1) of Decree-Law No 148/17. Loterie Nazionali accepted those conditions on the same date.

19. Sisal SpA, Stanleybet Malta Ltd and Magellan Robotech Limited ('the appellant companies') challenged that decision before the Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio, Italy), which dismissed their claims by judgments Nos 9730/2018 and 9734/2018, both of 4 October 2018.

20. The appellant companies brought an appeal before the Consiglio di Stato (Council of State) against the judgments at first instance. The ADM and Lotterie Nazionali also lodged incidental appeals against those judgments in connection with objections to admissibility which had been rejected.

21. By 'non-final partial judgments' Nos 6079 and 6080 of 3 November 2019, the Consiglio di Stato (Council of State) dismissed the incidental appeals brought by ADM and Lotterie Nazionali, and, as regards the substance, called into question whether Article 20(1) of Decree-Law No 148/17 was compatible with EU law.

22. Against that background, the Consiglio di Stato (Council of State) referred the following questions to the Court of Justice for a preliminary ruling:

'(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, to be interpreted as precluding a provision such as that contained in Article 20(1) of 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 Decree-Law No 78 of 1 July 2009, converted with amendments by Law No 102 of 3 August 2009, 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", taking into account that:

[9] The ADM had succeeded the Autonomous Administration of State Monopolies.

– 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 companies] 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",taking into account that:

– it provides for the extension of the sole existing concession, rather than renewing the multiple concessions provided for in Article 21of 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, certain aspects are modified 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, taking into account that:

– such provisions were adopted 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);

– the objective pursued is to ensure […] 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?'

III. Procedure before the Court of Justice

23. The requests for a preliminary ruling were received at the Registry of the Court on 23 September 2019. The Court decided to join the two requests in view of their connection.

24. Written observations were lodged by Lotterie Nazionali, Lottomatica Holding, Sisal, Stanleybet Malta, Magellan Robotech, the Italian Government and the Commission, all of which (with the exception of Sisal) replied in writing to the questions addressed to them by the Court.

IV. Assessment

A. Preliminary points

25. The uncertainties set out by the Consiglio di Stato (Council of State) in the orders for reference concern, in particular, the substantive aspects of the dispute, addressed in questions 1 to 3.

26. Question 4, on the other hand, is more procedural in tone, since it asks whether the fact that the appellant companies, 'operators in the sector currently interested in entering the market', did not participate in the original call for tenders has any bearing on the dispute.

27. After examining question 1, I shall group together my thoughts on questions 2 and 3, which I believe it is preferable to deal with jointly on account of their close connection.

28. First of all, it is necessary to identify which provision of EU law is applicable to these cases and which is the general body of rules laid down by the Court's case-law and Directive 2014/23 with regard to amendment of the terms of a concession.

29. I should also point out that, in the proceedings, no objection has been raised which seeks to challenge the Italian legislation on the grounds that it makes the type of lottery at issue subject to a concession system; the Court has already ruled on the compatibility of that system with EU law. [10]

30. Nor is there any dispute in these proceedings regarding the justification for the total duration of the concession (nine years initially, with the possibility of a further nine) [11] or any other aspects of the rules applicable to it. [12]

[10] Judgment of 19 December 2018, *Stanley International Betting and Stanleybet Malta*, C-375/17, EU:C:2018:1026 ('judgment in *Stanley International Betting and Stanleybet Malta*'), paragraph 66: 'the Court has validated the use of the system of concessions in the sector of games of chance, considering that it may constitute an efficient mechanism enabling operators active in the sector of games of chance to be controlled with a view to preventing the exploitation of those activities for criminal or fraudulent purposes (see, to that effect, judgment of 12 September 2013, *Biasci and Others*, C-660/11 and C-8/12, EU:C:2013:550, paragraph 24 and the case-law cited).'

[11] The total duration of a concession may be a relevant factor. In accordance with the case-law, 'the grant of concessions for a duration of up to 15 years is liable to impede or even prohibit the exercise of the freedoms guaranteed by Articles 43 EC and 49 EC' (judgment of 9 September 2010, *Engelmann*, C-64/08, EU:C:2010:506, paragraph 46).

[12] It is clear from reading the judgments given at first instance by the Tribunale amministrativo regionale del Lazio (Regional Administrative Court, Lazio) that, at the relevant time, a challenge was brought against the first invitation to tender, in which Sisal intervened, and which was finally resolved by the Consiglio di Stato (Council of State) in judgment No 1705/2010.

B. Applicable legal framework

31. In accordance with Article 54 of Directive 2014/23, that directive 'shall not apply to the award of concessions tendered or awarded before 17 April 2014.' Given that the original concession for the national instant lottery was awarded in 2010, it would appear, in principle,[13] that that provision excludes the application of Directive 2014/23 to the dispute.[14]

32. I will say now that, whatever the reply to that question is, it will be necessary in any event to take into consideration the Court's case-law on the effect of Articles 49 TFEU and 56 TFEU, concerning freedom of establishment and freedom to provide services, on the rules on public procurement.

33. In particular, that case-law draws from those two provisions of the FEU Treaty consequences concerning when substantial amendments to a public contract may, in principle, require a new call for tenders. That criterion also applies to service concession contracts.[15]

34. If, in the light of substantial amendments to the terms of a concession, that concession must be the subject of a new call for tenders, that call for tenders must be governed by the provisions in force on the date on which it is announced and not by those in force when the original concession was awarded.[16]

35. On that basis, if the alterations of the terms of the concession for the instant lottery which were introduced by Decree-Law No 148/17 were substantial, to the extent that a new call for tenders was required, Directive 2014/23 would be applicable *ratione temporis* to that call for tenders.[17]

36. That same approach may apply to extensions like that at issue in these proceedings, even if the extension was provided for in the original instrument. Since the grant of the extension for a further, prolonged period (of nine years) is dependent on a case-by-case assessment by the contracting authority, and is not automatic,[18] it seems to me to make more sense that the legislative framework in force on the date on which that assessment is carried out should be complied with.

[13] Judgment in *Stanley International Betting and Stanleybet Malta*, paragraph 34: 'according to settled case-law, established in the field of public procurement and applicable by analogy as regards service concessions, the applicable directive is, as a rule, the one in force when the contracting authority 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.'

[14] In this case, it is not possible to talk about a purely internal situation: owing to its characteristics, the concession has a clear cross-border dimension, which goes beyond the national dimension, and two of the appellant companies have their registered offices outside Italy.

[15] Judgment of 13 April 2010, *Wall*, C-91/08, EU:C:2010:182, paragraph 37: 'In order to ensure transparency of procedures and equal treatment of tenderers, substantial amendments to essential provisions of a service concession contract could in certain cases require the award of a new concession contract, if they are materially different in character from the original contract'.

[16] Judgment of 18 September 2019, *Commission* v *Italy*, C-526/17, EU:C:2019:756, paragraph 60: '… the applicable EU legislation is that in force at the time of that [substantial] amendment'. In its response to the questions from the Court, the Italian Government argues that that case-law, relating to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, is not applicable because Directive 2014/23 contains a special rule (Article 54) which was not in the earlier directive. I do not agree with that argument, which is circular, because the stipulation in Article 54 presupposes that there have not been any substantial amendments.

[17] Decree-Law No 148/17 and the subsequent memorandum from the ADM postdate the deadline for transposition of Directive 2014/23 (18 April 2016, in accordance with Article 51(1) thereof).

[18] In their replies to the Court's questions, Stanleybet Malta, Magellan Robotech and the Commission point out that there was no *obligation* to continue the concession.

37. In any event, Articles 3 and 43 of Directive 2014/23 merely incorporate the Court's case-law on public contracts into a legislative text:

– Article 3 reflects the principles of equal treatment, non-discrimination and transparency which contribute to achieving 'the principal objective of the Community rules in the field of public procurement [of ensuring] the free movement of services and the opening-up to undistorted competition in all the Member States'. [19]

– Article 43, which governs the modification of a concession during its term, is also based on rules derived from settled case-law, [20] pursuant to which, 'in principle, a substantial modification of a concession contract … requires a new procedure for the award of the contract so modified'. [21]

38. Therefore, in accordance with the case-law relating to the freedom of establishment and the freedom to provide services, and with Articles 3 and 43 of Directive 2014/23, the outcome is substantively the same.

39. As regards the non-application *ratione materiae* derived from recital 35 of Directive 2014/23, [22] to which Lotterie Nazionali refers, [23] suffice it to state that, in this case, there was a competitive procedure for the award of the concession which was made public.

C. General rules on the modification of concessions

40. Following the line of case-law set out above, Article 43 of Directive 2014/23 differentiates between modifications of a concession which can be carried out 'without a new … procedure' (paragraphs 1 and 2) and all other modifications. The latter are categorised as *substantial*.

41. Article 43(5) specifically provides that '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.'

42. The key for determining when a modification is substantial and requires the launch of a new procedure is stipulated in Article 43(4) of Directive 2014/23: ' A modification of a concession during its term shall be considered to be substantial … where it renders the concession materially different in character from the one initially concluded.'

[19] Judgment of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraphs 31 and 32.

[20] Recital 75 of Directive 2014/23 expresses it as follows: 'It is therefore necessary to clarify the conditions under which modifications of a concession during its performance require a new concession award procedure, taking into account the relevant case-law of the Court of Justice of the European Union.'

[21] Judgment of 18 September 2019, *Commission* v *Italy*, C-526/17, EU:C:2019:756, paragraph 59. Both that judgment and the judgment of 11 July 2013, *Commission* v *Netherlands*, C-576/10, EU:C:2013:510, paragraph 54, concern the amendment of the essential aspects of the contract. It is logical that minor or non-essential amendments would be permitted and would not require a new call for tenders. Recital 75 of Directive 2014/23 confirms this as follows: 'Modifications of the concession resulting in a minor change of the contract value up to a certain level value should always be possible without the need to carry out a new concession procedure.'

[22] 'It is appropriate to exclude from the scope of this Directive concessions relating to the operation of lotteries awarded by a Member State to an economic operator on the basis of an exclusive right granted by means of a procedure without publicity pursuant to applicable national laws, regulations or published administrative provisions in accordance with the TFEU. That exclusion is justified by the granting of an exclusive right to an economic operator, making a competitive procedure inapplicable, as well as by the need to retain the possibility for Member States to regulate the gambling sector at national level in view of their obligations in terms of protecting public and social order.'

[23] Paragraph 9 of its written observations.

43. As a concrete expression of that rule, Article 43(4) refers to four examples of substantial modifications, two of which may be relevant to this case:

– 'the modification introduces conditions which, had they been part of the initial concession award procedure, … would have attracted additional participants in the concession award procedure'. [24]

– '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'. [25]

D. Question 1

44. After pointing out that the appellant companies did not participate in the tendering procedure held in accordance with Decree-Law No 78/2009, the Consiglio di Stato (Council of State) states that the reason they did not do so could have been the fact that renewal of the concession was merely a possibility since it was dependent on the exercise of a discretionary power granted to the administrative authority.

45. The referring court adds that that discretionary power was abolished by Decree-Law No 148/17, which, moreover, entered into force two years before the end of the (first) period of nine years set out in the concession contract.

46. Any incompatibility with the EU legislation therefore resides in the fact that, in 2017, the legislature abolished, by a legislative act, any possibility of administrative discretion in relation to the decision on whether to maintain the concession relationship or issue a new call for tenders.

47. In my view, the first point to make is that continuation of the concession relationship for a further period of nine years was already provided for in the original act which, for its part, complied with Decree-Law No 78/2009.

48. That detail is important because the *activation* of that provision complied with that act simply by applying one of the provisions of the original concession agreement.

49. As I shall explain below, the exercise of the power to continue the concession, not more than once, for a further period of nine years did not alter the original model which complied with the system of multiple concessionaires (it provided for up to four possible successful tenderers to be awarded the concession).

50. That model, as such, remain unchanged. Since, when it was implemented in 2010, only one economic operator had in fact participated in the tendering procedure and had therefore become the sole concessionaire, continuation of the concession relationship for an additional nine years, as provided for in the original instrument, had to be awarded to that operator.

[24] The Court addressed that scenario in the judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraph 29: 'a reduction in the scope of that contract's subject matter may result in it being brought within reach of a greater number of economic operators.'

[25] The judicial origin of this rule can be found in the judgment of 19 June 2008, *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, paragraph 37.

51. However, it is the case that, also pursuant to the original instrument, the awarding authority was required to give a positive appraisal of the management performance of the concessionaire in order to facilitate the transition to the subsequent period of nine years.

52. Notwithstanding what I shall say with regard to the specific conditions imposed on the tenderer in order to secure the continuation of the concession contract for a further nine years, I believe that it is irrelevant that the decision on that continuation was adopted in a Decree-Law after the awarding authority had confirmed that it was in line with the public interest.

53. In a memorandum dated 19 September 2017,[26] the ADM gave a positive appraisal of the management performance of Lotterie Nazionali up to that date and set out the reasons why it was appropriate to continue the concession relationship with that company for another nine years, in accordance with the original instrument. When it carried out that appraisal, the ADM used the discretionary powers of assessment to which the Consiglio di Stato (Council of State) refers.

54. That memorandum states that continuation of the concession contract with Lotterie Nazionali, in addition to being beneficial for the public interest from an economic point of view, was justified because the appraisal of that company's conduct was positive.[27]

55. Decree-Law No 148/17 confirmed, therefore, that it was appropriate to continue the concession relationship which the ADM had already assessed in the exercise of its discretion.

56. Whatever the reasons for deciding to continue the concession by a legislative decision and not by an act of the awarding public administrative authority, the fact is that the latter had, I repeat, already given a favourable assessment of the management performance of the concessionaire before the adoption of Decree-Law No 148/17 and had indicated that it was in the public interest to continue the concession relationship.

1. Multiple concessionaires and sole concessionaire

57. A number of passages of the orders for reference, and some of the observations submitted by those opposing the continuation of the concession in favour of Lotterie Nazionali,[28] argue that that continuation would lead to the conversion of a multiple concessionaire system into a different, sole concessionaire system.

58. I have already stated that the choice of the multiple concessionaire system, referred to in Decree-Law No 78/2009, remained in force when the continuation of the concession contract was authorised, and that, as such, it was not replaced by a sole concessionaire model under Decree-Law No 148/17.

59. I have also explained that any reference to a sole concessionaire in the context of this dispute is not due to the application of a rule but rather to the purely factual circumstance that only one candidate submitted a tender.

[26] The memorandum responded to the request for renewal of the concession submitted on 26 July 2017 by the concessionaire company.

[27] According to the ADM, the concessionaire had maintained the required levels of collection; had managed the national instant lottery's physical distribution network effectively, taking account of the information provided by the ADM; and had proceeded with particular care to pay, in a proper and timely fashion, the fee owed to the State and the prizes due to consumers.

[28] Those arguing that a new invitation to tender is needed submit that, by stipulating that the concession was to be renewed, Decree-Law No 148/17 led to a sole concessionaire model.

60. From the point of view of EU law, either of the two options could in principle be valid, as the Court has confirmed.[29] From a legislative perspective, however, the choice of the sole concessionaire model must pursue, in a consistent manner, a legitimate objective.

61. I do not believe that it is essential to proceed down this path in order to examine the justification for a sole concessionaire model because, I repeat, that is not the model at issue in this case.

62. It is true that the ADM's memorandum of 19 September 2017 referred to the sole concessionaire system which that public agency considered to be preferable at that time.[30] However, those were considerations set out by the ADM in the alternative, in case the continuation of the concession agreement with Lotterie Nazionali, which it proposed, did not take place.[31]

63. To my mind, the debate concerning a (non-existent) change of model is therefore inappropriate. It was not the intention of the Italian legislature, including when it adopted Decree-Law No 148/17, that concessions to operate the national instant lottery should in the future comply with the sole concessionaire model. It was simply decided in that Decree-Law that the concession relationship should continue, under the terms of the original act, with the company which had been awarded the concession after being the sole tenderer in a tendering procedure launched under the multiple concessionaire model.

E. Questions 2 and 3

64. The Consiglio di Stato (Council of State) acknowledges that Decree-Law No 148/17 has retained 'the same legal instrument (*causa petendi*) and the original contractual subject matter (*petitum*)'. In particular, the total amount that Lotterie Nazionali is required to pay in respect of the second nine-month period is the same as that stipulated in the original act (EUR 800 million).

65. However, the orders for reference draw attention to a *change* affecting 'the method and date of payment of the concession fee': the advance payment of that fee in 2017 (EUR 50 million) and 2018 (EUR 750 million).[32]

66. The national court adds that that factor could 'potentially [change] 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'.

[29] Judgment in *Stanley International Betting and Stanleybet Malta*, paragraph 53 and operative part: 'Articles 49 and 56 TFEU must be interpreted as not precluding national rules … which provide, for the concession for management of the Lotto, a sole concessionaire model, unlike other games, prediction games and betting, to which a multiple concessionaire model applies, provided that the national court establishes that the national rules actually pursue, in a consistent and systematic manner, the objectives relied on by the Member State concerned.'

[30] Paragraph 64 of the Italian Government's observations.

[31] It stated, in particular, that, if the approach of opting to continue the concession relationship was not taken, the essential features of a new tendering procedure would have to be laid down in a specific measure.

[32] Three instalments were set: EUR 50 million by 15 December 2017; EUR 300 million by 30 April 2018; and EUR 450 million by 31 October 2018.

67. Those who contend that that new method of payment did not involve a substantial modification submit that, when the contract was awarded in 2010 and when it was renewed in 2017, the amount that the concessionaire was required to pay was identical (EUR 800 million). Furthermore, advance payment is more onerous for the concessionaire since the payment date also falls before the start of the second nine-year period.

68. In order to reply to the uncertainties raised by the Consiglo di Stato (Council of State), it is necessary: a) to compare the method of payment applicable during the first period of the concession with that applicable during the second period; and b) if that comparison reveals that there was any change, to determine whether or not it is substantial.

1. Comparison of the methods of payment

69. In the case of the original concession, revenue payable to the awarding authority was set as at least EUR 500 million in the first year (2009) and EUR 300 million in the second year (2010).

70. As pointed out above, according to the distribution of payments introduced by Decree-Law No 148/17, that government revenue was EUR 50 million for the first year (2017) and EUR 750 million for the second year (2018), from which it follows that, in fact, the fee in respect of the renewal period of the concession was paid in advance.

71. Therefore, the new payment terms meant that:

– The first instalment (EUR 50 million) of the renewed period represented one tenth of the instalment stipulated (EUR 500 million) for the first payment tranche in the provisions applied to the 2010 concession.

– However, the second instalment (EUR 750 million) of the renewed period was more than double its counterpart (EUR 300 million) for the original concession.

72. Accordingly, there was a modification of the rate at which the concessionaire was required to pay its contribution, not of the amount of that contribution or of its division into two consecutive tranches.

73. It is realistic to assume that, as the Commission states,[33] the reduction of the amount of the first payment (EUR 50 million) would enable the concessionaire *to prepare itself* better for payment of the second tranche (EUR 750 million) the following year. Although the second tranche came to more than double the corresponding amount set in Decree-Law No 78/2009, the concessionaire was able, from the outset, to count on revenue from the concession itself and therefore it cannot be ruled out that it benefitted from the system as a whole.

74. However, payment two years in advance of the fee due for the renewed period could in itself cause the concessionaire financial difficulties similar to those that any economic operator has to face in order to make advance payments as consideration for revenue not yet received.[34]

[33] Paragraphs 47 to 49 of its observations.

[34] This is implied by Lotterie Nazionali (final subparagraph of paragraph 32 and final part of the second indent of paragraph 35 of its observations) and Lottomatica (paragraph 4.3 of its observations). However, it cannot be ruled out that Lotterie Nazionali agreed to pay in advance because, ultimately, it suited it to do so. Otherwise, it is logical to suppose that it would not have agreed to continue the concession relationship.

2. Has there been a substantial modification?

75. Leaving aside for now the other circumstances pertaining to payment of the fee, the agreement to continue the concession relationship with Lotteria Nazionali for nine years did not constitute a (substantial or minor) modification of the concession because, I repeat, it complied with the original instrument.

76. It would be different if renewal of the concession had not been provided for at the outset in the concession instrument. In that situation, the extension – whether *ex lege* or as a result of an independent decision of the contracting authority – for nine years of a concession which had come to an end, without issuing a call for tenders, would undoubtedly constitute a substantial modification of the concession contract. [35]

77. Therefore, the dispute centres on the determination of whether the method of payment applicable to the second period of the concession differed *substantially* from that applicable to the first period.

78. It should be recalled that, for the purposes of both periods, 'the legal instrument (*causa petendi*) and the contractual subject matter (*petitum)*' remained unchanged, as did the fee payable by the concessionaire and the requirement that payment was to be made in two tranches corresponding to the first and second years of each period.

79. The change which was actually imposed concerned the partial amounts of those two tranches, which differed in the terms set out above, and the payment of those tranches in 2017 and 2018, in advance of the commencement of the new concession period which began in 2019. [36]

80. Subject to the assessment of the referring court, which is better placed to deal with this point given its knowledge of the dispute, I do not believe that the modification of the amounts of each tranche can be described as substantial because, after weighing up its advantages and drawbacks for the concessionaire and the awarding authority, it does not appear to tip the financial balance of the concession in favour of the awarding authority to the extent that a fresh call for tenders is required.

81. Only a more in-depth financial assessment would make it possible to determine whether what appears to be a drawback for the concessionaire (advance payments when Lotterie Nazionali was not yet able to receive revenue from the second period of the concession) was really a drawback, or whether, paradoxically, it was likely to be beneficial to the concessionaire, or whether it merely preserved, overall, the original financial balance.

[35] The Court confirmed this in relation to renewals or extensions of Italian concessions in the judgements of 13 September 2007, *Commission* v *Italy*, C-260/04, EU:C:2007:508, concerning horse-racing betting licences; of 14 July 2016, *Promoimpresa*, C-458/14 and C-67/15, EU:C:2016:558, concerning concessions of State-owned property; and of 18 September 2019, *Commission* v *Italy*, C-526/17, EU:C:2019:756, concerning a public works concession.

[36] According to Article 20(1) of Decree-Law No 148/17, the aim was to 'guarantee additional and increased government revenue … for 2017 and … for 2018', that is, to provide liquidity during those two years instead of waiting until collection of the fee in 2019 and 2020.

82. The reasoning in ADM's memorandum of 19 September 2017, concerning the advantages of continuing the concession relationship with the concessionaire for the second nine-year period, takes account of the fact that other operators were prepared to take the concessionaire's place.[37] The orders for reference also mention 'operators in the sector currently interested in entering the market'.

83. However, the appellant companies' expectations cannot override the undeniable fact that the original concession provided, *ab initio*, that it could be renewed for a second period of nine years, without competition from third parties. Those expectations will be able to take full effect at the end of that (non-extendable) period of nine years.

84. Lottomatica Holding and Lotterie Nazionali maintain, for their part,[38] that bringing the decision to continue the concession contract forward to 2017 was justified because, otherwise, sufficient time would have been required to issue a new call for tenders and have a concessionaire in place by 30 September 2019.

85. It falls to the referring court to establish whether that or any other ground was met for the purpose of commencing contact with the concessionaire before the end of the first nine-year period and for the purpose of deciding then whether to continue the concession contract for the second period and for the same term.

86. In any event, I believe that that factor is irrelevant when it comes to determining whether the changes imposed on the payment of the fee can be classified as substantial modifications of the concession. The important point in that respect is to have regard to the subject matter of such changes and not the time when the awarding authority decided to impose them.

87. The timeframe in which the ADM adopted that decision may affect other elements of the judicial scrutiny of that decision (for example, because it may reveal a misuse of power) but I do not find those to be relevant for the purposes of examining whether there was a substantial modification of the terms of the concession.

88. In summary, restricting the dispute to the assessment of whether the alteration of the sequence of payments can be deemed substantial, on the ground that 'it renders the concession materially different in character from the one initially concluded' (Article 43(4) of Directive 2014/23), my view is that it cannot, although, I stress, the national court will have the final word on this point.

[37] Lottomatica and Lotterie Nazionali acknowledge in their observations (paragraphs 4.2 and 26, respectively) that third parties were interested in bidding for the concession, explaining that the renewal process was brought forward in view of the number of disputes arising in the context of tendering procedures in the betting and gambling sector in Italy. When the appellant companies became aware of the adoption of Decree-Law No 148/17, they contacted the ADM immediately to notify it of their interest in the concession (letters from Sisal dated 31 October and 9 November 2017, and letter from Stanleybet Malta dated 8 November 2017, annexed to their observations).

[38] Paragraphs 4.2 and 26 of their written observations, respectively.

F. Question 4

89. By its final question, the Consiglio di Stato (Council of State) asks, essentially, whether, although they did not participate in the original tendering procedure for the award of the concession, 'which was continued with the outgoing concessionaire on the new contractual terms described [in the order for reference]' the appellant companies are entitled to challenge the renewal of the concession.

90. The view of the Consiglio di Stato (Council of State) is that, rather than having a legitimate interest in the reopening of the tendering procedure, those companies may have a legitimate interest in the exercise by the awarding authority of its discretionary power after the end of the first period of the concession.[39] For those purposes it is irrelevant whether or not they participated in the 2010 tendering procedure.

91. According to the Court, as a rule, 'participation in a contract award procedure may, in principle, with regard to Article 1(3) of Directive 89/665, 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 risks suffering harm as a result of the allegedly unlawful nature of the decision to award that contract.'[40]

92. In my view, that general rule is not applicable to these proceedings which are not concerned with determining whether those who did not submit tenders in the procedure for selecting a concessionaire have legal standing to challenge the (original) award decision. The issue in this case is whether, in the context of renewal of the concession, the appellant companies were entitled to assert their interest in that renewal being the subject of a call for tenders and, therefore, to bid for the award of the concession.

93. The answer is linked to the substantive issues already addressed: whether the changes to the rules on payment of the fee for the second period of the concession were of sufficient magnitude to alter substantially the original terms of that concession.

94. In order to determine whether or not those changes were substantial, thereby creating an obligation to issue a new invitation to tender in which the operators concerned could participate, those operators must be recognised as having the right to bring legal proceedings for the examination of that question.

[39] That is apparent from paragraph 12, point c.9) of the orders for reference.

[40] Judgment of 28 November 2018, *Amt Azienda Trasporti and Mobilità and Others*, C-328/17, EU:C:2018:958, paragraph 46.

V. Conclusion

95. In the light of the foregoing considerations, I suggest that the following replies be given to the Consiglio di Stato (Council of State, Italy):

Articles 49 TFEU and 56 TFEU, together with 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, must be interpreted as meaning that:

(1) Where the original concession instrument for the operation of national instant lotteries provides for the continuation of the concession relationship for a second period of nine years with the same concessionaire, those articles do not preclude that measure from being adopted in a provision which has the force of law after the awarding authority has confirmed that it is in the public interest and compatible with the original instrument to continue the concession.

(2) Subject to the assessment which must be performed by the referring court, modifications of the terms of the concession which, while retaining the same instrument, the same object, and the same fee to be paid in two tranches, merely adjust the partial amounts which the concessionaire is required to pay in each of those tranches are not substantial within the meaning of Article 43 of Directive 2014/23.

(3) Operators wishing to bid for the award of the concession have legal standing to challenge the continuation of the concession contract with the concessionaire, arguing that the conditions to which that continuation is subject constitute a substantial modification of the original concession. For those purposes, the fact that those operators did not participate in the original call for tenders is irrelevant.