Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 25 February 2016[1]

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

Promoimpresa srl
v
Consorzio dei Comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro,
Regione Lombardia (C-458/14)(Request for a preliminary rulingfrom the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy))
and
Mario Melis,
Tavolara Beach Sas,
Dionigi Piredda,
Claudio Del Giudice
v
Comune di Loiri Porto San Paolo,
Provincia di Olbia Tempio (C-67/15)
(Request for a preliminary ruling

from the Tribunale Amministrativo Regionale per la Sardegna (Regional Administrative Court, Sardinia, Italy))

(Freedom of establishment — Exploitation of publicly-owned maritime and lakeside assets — Directive 2006/123/EC — Article 4(6) — Concept of 'authorisation scheme' — Article 12 — Number of authorisations limited because of the scarcity of available natural resources — Automatic renewal of authorisations — Obligation to interpret national law in conformity with EU law — Effect of a directive within the domestic legal order)

Introduction

1. These joined cases concern the same issue, namely the extension of exclusive rights for the commercial exploitation of publicly-owned maritime and lakeside assets in Italy.

2. Actions have been brought before the Italian courts for the annulment of administrative decisions terminating the instruments, classified as 'concessions' under Italian law, relating to the commercial exploitation of the State-owned areas located on the shore of Lake Garda and on the Sardinian coastline.[2] Challenging those decisions, the outgoing concessionaires rely on legislation which extends the period of validity of those instruments. The respective referring courts ask whether that legislation is compatible with the Treaty on the Functioning of the European Union and with Directive 2006/123/EC.[3]

1 — Original language: French.

2 — The same matter is addressed in the case of *Regione autonoma della Sardegna* (C-449/15), pending before the Court.

3 — Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

3. These cases thus afford the Court the opportunity to define the scope of the rules applicable to services concessions, as opposed to the scope of the provisions relating to authorisation for the provision of services, and to interpret Article 12 of Directive 2006/123 concerning the rules for granting authorisations limited in number because of the scarcity of available natural resources.

Legal framework

EU law

4. Articles 9 to 13 of Directive 2006/123 set out the provisions applicable to authorisation schemes which lay down the conditions governing access to or the exercise of service activities.

5. Article 12 of that directive, under the heading 'Selection from among several candidates' 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 Community law.'

Italian law

Law relating to maritime property concessions

6. State-owned maritime property is subject to the rules laid down by the Shipping Code, which provides, inter alia, in Article 36, that such property may be the subject of a concession.

7. Further, Article 37(2) of the Shipping Code provided for existing concessionaires to be granted a preferential right when the concession came up for renewal.

8. Following the opening of an infringement procedure by the European Commission, that preferential right was abolished by Article 1(18) of Decree Law No 194 (Decreto-legge n. 194 — Proroga di termini previsti da disposizioni legislative) of 30 December 2009 (GURI No 302, 30 December 2009; 'Decree Law No 194/2009').

9. Under that provision the period of validity of concessions of State-owned maritime assets due to expire by 31 December 2012 was extended until that date.

10. When Decree Law No 194/2009 was converted into law by Law No 25 (Legge No 25) of 26 February 2010 (GURI No 48, 27 February 2010), that provision was amended so as to extend the duration of validity of the concessions due to expire by 31 December 2015 until that date.

11. That provision was subsequently amended by Article 34k of Decree Law No 179 (Decreto-legge No 179 — Ulteriori misure urgenti per la crescita del Paese) of 18 October 2012 (GURI No 245, 19 October 2012), converted into Law No 221 (Legge No 221) of 17 December 2012 (GURI No 294, 18 December 2012), providing for a further extension of the duration of validity of the concessions to 31 December 2020.

Legislation transposing Directive 2006/123

12. Directive 2006/123 was transposed into Italian law by Legislative Decree No 59 (Decreto legislativo No 59 — Attuazione della direttiva 2006/123/CE relativa ai servizi nel mercato interno) of 26 March 2010 (GURI No 94, 23 April 2010).

13. Under Article 16(4) of that legislative decree, where the number of authorisations available is limited because of the scarcity of natural resources, such authorisations cannot be renewed automatically.

The facts giving rise to the main proceedings and the questions referred for a preliminary ruling

Case C-458/14

14. By decisions of 16 June and 17 August 2006, the Consorzio dei Comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro ('the Consortium') awarded Promoimpresa srl ('Promoimpresa') a concession for the commercial exploitation of an area of public land in the vicinity of Lake Garda for leisure purposes.

15. Article 3 of the decision awarding that concession provided for its automatic cessation on 31 December 2010.

16. On 14 April 2010, Promoimpresa applied to have its concession renewed; the Consortium refused its application by decision of 6 May 2011 on the ground that the concession at issue in the main proceedings was limited to a five-year term precluding any form of automatic renewal and that the new concession had to be awarded by public tendering procedure.

17. Promoimpresa brought an action contesting that decision before the referring court, alleging inter alia infringement of Article 1(18) of Decree Law No 194/2009. It claimed that, even though it concerns maritime property concessions, the decree law also applies to concessions of publicly-owned lakeside assets.

18. The referring court takes the view that the provision concerned, inasmuch as it provides for the extension of the term of concessions of publicly-owned property, creates an unjustified restriction on freedom of establishment and on freedom to provide services, making it impossible for any other competitor to gain access to concessions that have expired.

19. In the light of those circumstances, the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do the principles of freedom of establishment, non-discrimination and safeguarding competition, respectively laid down in Articles 49 TFEU, 56 TFEU and 106 TFEU, and the ["rule of reason" principle] implicit therein, preclude national legislation under which the validity of concessions of economically significant publicly-owned maritime, lakeside and waterway assets 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

20. The applicants in the main proceedings, with the exception of the association of seaside resort businesses, run tourist and leisure-oriented businesses in a number of State-owned areas on the shore of the Comune di Loiri Porto San Paolo (municipality of Loiri Porto San Paolo, 'the municipality') under concessions awarded by the municipality in 2004 for a period of six years, and subsequently extended for a further year until 2011.

21. The applicants submitted a request to the Comune for an extension of the concessions for the 2012 season. In view of the municipal authorities' failure to respond to that request, they continued their activities, in the belief that they were entitled to do so, in accordance with Article 1(18) of Decree Law No 194/2009.

22. On 11 May 2012, the Comune published a notice for the award of seven new concessions, some of which were for locations in areas in which the applicants in the main proceedings already held concessions.

23. On 6 June 2012, the applicants in the main proceedings challenged the measures concerned in an action before the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court, Sardinia). They subsequently extended their grounds of complaint to the decision of 8 June 2012, by which the Comune had awarded concessions to persons other than the applicants in the main proceedings, before contesting the measures by which the municipal police force had ordered them to remove their equipment.

24. In their action they took issue with the Comune inter alia for failing to recognise the automatic extension of the concessions as provided for by national law.

25. According to the referring court, that automatic extension undermines the application of EU law, in particular Article 12 of Directive 2006/123. Article 16 of Legislative Decree No 59/2010, which transposes Article 12 of Directive 2006/123 into national law, was, in essence, not applied owing to the existence of a special rule adopted by the legislature extending existing concessions.

26. In the light of 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 the pursuit of 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?'

Procedure before the Court of Justice

27. The respective orders for reference were received at the Court Registry on 3 October 2014 (Case C-458/14) and 12 February 2015 (Case C-67/15). Written observations were submitted by the applicants in the main proceedings, the Italian Government and the Commission (in both cases) and by the Greek Government (Case C-458/14) and the Czech Government (Case C-67/15). By order of 27 October 2015, the cases were joined for the purposes of the oral procedure and judgment.

28. The applicants in the main proceedings, the municipality, the Italian and Netherlands Governments and the Commission took part in the hearing, which was held on 3 December 2015.

Assessment

29. By their questions, the referring courts are seeking to ascertain whether Articles 49 TFEU, 56 TFEU and 106 TFEU preclude national legislation under which the period of validity of concessions of State-owned maritime and lakeside property is automatically extended.

30. Furthermore, by the second question in Case C-67/15, the referring court asks whether such legislation is in conformity with Article 12 of Directive 2006/123.

31. Although the question referred for a preliminary ruling in Case C-458/14 does not refer to Directive 2006/123, Article 12 thereof was nonetheless discussed by the parties to the proceedings and the interested parties. It should be pointed out in this regard that the Court may deem it necessary, in order to provide a satisfactory answer, to consider provisions of EU law to which the national court has not referred in its question. [4]

Admissibility of the questions referred

32. The Italian Government questions the admissibility of the request for a preliminary ruling in Case C-458/14, stating that, at the material time in the main proceedings, Article 1(18) of Decree Law No 194/09 concerned concessions of State-owned maritime property only. According to the Italian Government, extension of the effects of that legislation to lakeside property concessions, following the adoption of the measures contested before the referring court, is not applicable *ratione temporis*.

33. Here I would point out that, as far as interpreting national law is concerned, the Court is in principle required to base its consideration on the description in the order for reference, bearing in mind that, in accordance with settled case-law, the Court does not have jurisdiction to interpret the domestic law of a Member State. [5]

34. As regards the applicability of Article 1(18) of Decree Law No 194/09 in the main proceedings, it is apparent from the order for reference in Case C-458/14 that the applicant in the main proceedings alleges infringement of that provision, maintaining that it also applies to concessions of State-owned lakeside property. The referring court notes that the matter before it focuses on that plea and cites various reasons in support of its position that the facts of the main proceedings fall within the scope of that provision.

4 — See, inter alia, judgments in *Telaustria and Telefonadress*, (C-324/98, EU:C:2000:669, paragraph 59), and *Efir*, (C-19/12, EU:C:2013:148, paragraph 27).

5 — Judgment in *Târşia*, (C-69/14, EU:C:2015:662, paragraph 13 and the case-law cited).

35. In those circumstances, as the order for reference provides extensive details as to the relevance of the question referred, the Court cannot, to my mind, dismiss the request for a preliminary ruling on the premiss that 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. [6]

36. Secondly, in both cases, the Italian Government observes that Article 34k of Decree Law No 179/2012, which extends to 31 December 2020 the period of validity of the concessions at issue in the main proceedings, was enacted after the measures contested in the main proceedings and that the questions referred are consequently admissible only as regards the extension of the concessions until 31 December 2015.

37. In this connection it is sufficient to point out that the questions referred relate to national legislation under which the period of validity of concessions of State-owned maritime and lakeside property is automatically and repeatedly extended. Whether the applicable national provisions are those extending that period to 31 December 2015 or, indeed, to 31 December 2020, is not only a matter falling within the jurisdiction of the national courts but also a matter having no bearing on the admissibility of the questions referred in those specific terms.

38. In the light of those observations, I consider the questions referred for a preliminary ruling to be admissible.

Interpretation of Directive 2006/123

Relationship between Directive 2006/123 and the Treaty on the Functioning of the European Union

39. The questions referred concern the interpretation of the provisions of both primary law and Directive 2006/123.

40. According to settled case-law, where an area has been the subject of comprehensive harmonisation at EU level, any national measure relating to that area must be assessed in the light of the provisions of that harmonising measure and not of those of primary law. [7]

41. The Court has already held, in *Rina Services and Others*, [8] that Directive 2006/123 effected such comprehensive harmonisation, in respect of the services falling within its scope, with regard to Article 14 thereof on freedom of establishment. In the two other cases in which Directive 2006/123 was applicable to in the main proceedings, resulting in the judgments in *Trijber and Harmsen* and in *Hiebler*, the Court in essence adopted the same approach, confining itself to giving an interpretation of Articles 10, 11 and 15 of that directive and not taking a view on the provisions of the TFEU. [9]

42. To my mind, this approach is valid for all of Articles 9 to 13 of Directive 2006/123, which contain the provisions on authorisation schemes, and in particular for Article 12 thereof.

6 — Judgment in *Târşia*, (C-69/14, EU:C:2015:662, paragraph 14 and the case-law cited).

7 — See, inter alia, judgments in *Hedley Lomas* (C-5/94, EU:C:1996:205, paragraph 18), and *UPC DTH* (C-475/12, EU:C:2014:285, paragraph 63). See, for an assessment of that case-law, Opinion of Advocate General Cruz Villalón in *Rina Services and Others* (C-593/13, EU:C:2015:159, point 12).

8 — C-593/13, EU:C:2015:399 (paragraphs 37 and 38). The same approach, with regard to Articles 15 and 16 of Directive 2006/123, is proposed by Advocate General Bot in his Opinion in *Commission* v *Hungary* (C-179/14, EU:C:2015:619, paragraph 73), pending before the Court.

9 — Judgments in *Trijber and Harmsen*, (C-340/14 and C-341/14, EU:C:2015:641), and in *Hiebler*, (C-293/14, EU:C:2015:843).

43. As it did with regard to Article 14 of Directive 2006/123, which establishes a list of requirements that are prohibited in the exercise of freedom of establishment, the EU legislature laid down, in Articles 9 to 13 of the directive, a series of measures that Member States must comply with where access to a service activity is subject to the grant of authorisation. The legislature thus undertook a comprehensive harmonisation of the matter concerned.

44. In particular, under Article 12(1) and (2) of Directive 2006/123, where the number of authorisations available is limited because of the scarcity of available natural resources or technical capacity, authorisations must be granted in accordance with an impartial and transparent selection procedure, for a limited period, and may not be open to automatic renewal.

45. Those provisions would be deprived of any practical effect if Member States were permitted to abstain from applying them, citing reasons based on primary law.

46. I therefore take the view that, where Article 12 of Directive 2006/123 is applicable, the question whether the national legislation concerned complies with EU law must be examined in the light of that provision, not in the light of the rules of primary law.

Applicability of Article 12 of Directive 2006/123

47. First of all, I would like to point out that a measure by which a Member State confers an exclusive right to exploit a publicly-owned asset may, in principle, be assessed in the light of various provisions of EU law, in particular Articles 49 TFEU, 56 TFEU and 106 TFEU, as well as in the light of the public procurement rules.

48. In order to establish whether Directive 2006/123 is applicable in this case, it is necessary to consider whether the award under Italian law of a concession of State-owned maritime or lakeside property constitutes an authorisation scheme within the meaning of the directive.

49. Article 4(6) of Directive 2006/123 defines an ‘authorisation scheme’ as 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.

50. I note in this regard that, unlike Article 49 TFEU, the provisions of Chapter III of Directive 2006/123 on freedom of establishment are applicable whether or not there is a cross-border element.[10] There is consequently no need to establish, for the purpose of the application of Article 12 of the directive, whether the authorisation at issue has a definite cross-border interest.

51. However, the application of Article 12 in these circumstances calls for analysis of three factors discussed by the parties, namely, first, the similarity of the situation at issue to that involving a commercial lease, secondly, the difference between that situation and a situation entailing a services concession and, thirdly, the applicability of the provisions on authorisations limited on account of the scarcity of the natural resources available.

10 — I refer to point 24 of my Opinion in *Hiebler* (C-293/14, EU:C:2015:472) and to points 49 to 57 of my Opinion in Joined Cases *Trijber and Harmsen* (C-340/14 and C-341/14, EU:C:2015:505).

– The argument alleging similarity with a commercial lease

52. The applicants in the main proceedings in both cases and the Greek Government maintain that the relevant concessions of State-owned maritime and lakeside property constitute commercial leases which give individuals the opportunity to enjoy public property but do not constitute authorisations which are a prerequisite for access to a service activity.

53. I am not persuaded by that argument.

54. It is apparent from the orders for reference that access to the activity relating to the exploitation of publicly-owned maritime or lakeside assets in Italy, such as the running of tourist and leisure-oriented businesses in a State-owned coastal area, requires the competent municipal authority to award a concession. Access to the service activity at issue is therefore conditional on that decision to grant the concession.

55. Moreover, the applicants in the main proceedings are specifically challenging the decisions refusing to extend such authorisations.

56. The fact that the grant of such authorisations also entails the grant of exclusive access to publicly-owned property, in the form of a lease, cannot affect the definition of that mechanism as an authorisation scheme.

– Distinction to be made from services concessions

57. I note that a mechanism that can be defined as an 'authorisation scheme' nonetheless falls outside the scope of Directive 2006/123 where it is governed by the rules on public procurement.[11]

58. In the present case, the national courts state that the concessions of State-owned maritime and lakeside property at issue may be regarded as services concessions.

59. It is therefore necessary to consider whether this case concerns services concessions, in which instance they would be governed by the principles and rules of EU public procurement law, not by Directive 2006/123.

60. Here, the fact that the contracts at issue in the main proceedings are treated as 'concessions' under Italian law is without prejudice to their autonomous classification under EU law.

61. As the Netherlands Government is right to point out, the term 'concession' is often used to refer to an exclusive right or an authorisation but that does not mean that it is a concession as defined by public procurement law.[12]

62. A services concession is characterised in particular by the fact that the public authority entrusts the exercise of a service activity, a service the provision of which would as a rule fall to that public authority, to the concessionaire, thus requiring that concessionaire to provide a specific service.[13]

63. For an instrument to be regarded as a services concession, it must therefore be established that the provision of services is subject to specific requirements laid down by the public authority concerned and that the economic operator is not at liberty to withdraw from the provision of such services.

11 — See recital 57 of Directive 2006/123.

12 — See also footnote 25 in the Commission interpretative communication on concessions under Community law (OJ 2000 C 121, p. 2).

13 — See, to that effect, judgment in *Belgacom* (C-221/12, EU:C:2013:736, paragraph 33). See also Opinion of Advocate General La Pergola in *BFI Holding* (C-360/96, EU:C:1998:71) and Opinion of Advocate General Alber in *RI.SAN.* (C-108/98, EU:C:1999:161, point 50).

64. Those considerations are borne out by recital 14 of Directive 2014/23,[14] according to which certain Member State acts such as authorisations or licences, in particular where the economic operator remains free to withdraw from the provision of works or services, should not qualify as concessions. Unlike those acts, concession contracts provide for mutually binding obligations whereby the execution of the works or services is subject to specific requirements defined by the contracting authority.

65. In this case it is not apparent from the facts described in the respective orders for reference whether the applicants in the main proceedings were required, under acts classified under national law as 'concessions of State-owned assets', to provide services that had been specifically entrusted to them by a public authority and were subject to specific requirements defined by that authority.

66. As the Commission is right to observe, the measures at issue in the main proceedings do not concern the provision of services defined by the contracting entity; they concern the exercise of tourist and leisure-oriented economic activities in a bathing resort, which involves the exclusive use of that public area.

67. Those circumstances — subject to verification by the national court — indicate that the agreements at issue in the main proceedings do not amount to services concessions for the purposes of the EU rules on public procurement.

68. I consider, therefore, that national provisions such as those granting concessions of State-owned maritime and lakeside property under Italian law constitute authorisation schemes covered by Articles 9 to 13 of Directive 2006/123.

69. I would add that, if the agreements at issue in the main proceedings were to be regarded as 'services concessions' within the meaning of EU law, with the result that the harmonised rules of Directive 2006/123 did not apply, the requirements imposed on the national authorities pursuant to the fundamental rules of the Treaty and the principles flowing therefrom would, essentially, be the same. In so far as the matter involves economic activities with definite cross-border interest, in terms of the obligation to comply with those fundamental rules and to observe those principles, an authorisation is no different from a services concession.[15]

– Existence of a limited number of authorisations on account of the scarcity of natural resources

70. Article 12 of Directive 2006/123 concerns the specific case of schemes comprising a limited number of authorisations because of the scarcity of available natural resources or technical capacity.

71. I note that the respective orders for reference state that the authorisations concerned here were granted at municipality level and are limited in number.

72. The State-owned lakeside or coastal sites that may be available for economic exploitation within a particular municipality are obviously limited in number and, thus, may be treated as scarce natural resources for the purposes of Article 12 of Directive 2006/123.

73. However, with the exception of the scarcity of those natural resources, the parties do not present any other overriding reason relating to the public interest capable of justifying the limited number of authorisations available in the present case.

14 — 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), albeit inapplicable in this case *ratione temporis*, may be used as guidance in defining the concept of 'service concession'.

15 — Judgments in *Sporting Exchange* (C-203/08, EU:C:2010:307, paragraphs 46 and 49); *Engelmann* (C-64/08, EU:C:2010:506, paragraphs 52 to 54); and *Belgacom* (C-221/12, EU:C:2013:736, paragraph 33).

74. In this respect, the argument put forward by the applicants in the main proceedings and by the Italian Government that the Italian coastal areas as a whole cannot be regarded as 'scarce resources', seems, to my mind, to digress from the essential focus of the case.

75. As regards authorisations granted at municipality level, account must be taken of the State-owned areas concerned. It is clear in this case that the number of authorisations available is limited, thus placing the potential candidates for the selection procedure mentioned in Article 12(1) of Directive 2006/123 in competition with one another.

76. In the light of the foregoing considerations, Article 12 of Directive 2006/123 is, in my view, applicable in this case.

Interpretation of Article 12 of Directive 2006/123

77. Under Article 12(1) of Directive 2006/123, where the number of authorisations available for a given activity is limited because of the scarcity of natural resources or technical capacity, the grant of such authorisations must be subject to a selection procedure providing full guarantees of transparency and impartiality.

78. Article 12(2) of the directive provides that the authorisation thus granted must be for an appropriate limited period, must not be automatically renewable or confer any advantage on the outgoing provider.

79. By requiring that authorisations be granted for a limited period by means of a transparent and impartial procedure, the provisions concerned ensure that the activity involving a limited number of operators because of the scarcity of resources remains open to competition and, therefore, potentially accessible to new service providers.

80. Those provisions are also based on well-established case-law under which the absence of a transparent selection procedure in such circumstances amounts to indirect discrimination vis-à-vis the economic operators established in other Member States, which is, as a rule, contrary to the principle of freedom of establishment. [16]

81. I note that the statutory extension of authorisations granted prior to the transposition of Directive 2006/123 is obviously at variance with Article 12 of that directive.

82. Extending the period of validity of existing authorisations constitutes a failure to fulfil the obligation under Article 12(1) of Directive 2006/123 to provide a transparent and impartial procedure for selecting candidates.

83. Furthermore, statutory extension of the period of validity of authorisations amounts to automatic renewal, which is precluded expressly by Article 12(2) of Directive 2006/123.

84. The applicants in the main proceedings and the Italian Government nonetheless submit that extending the concessions concerned could be justified as a transitional measure, for reasons of legal certainty.

16 — See, in relation to a services concession, judgment in *Belgacom* (C-221/12, EU:C:2013:736, paragraph 37 and the case-law cited), and, in relation to an authorisation scheme, judgment in *Engelmann* (C-64/08, EU:C:2010:506, paragraphs 46 and 51 and the case-law cited).

85. The applicants in the main proceedings assert that it is necessary to extend the concessions of State-owned maritime and lakeside property to enable the parties concerned to recoup the cost of the investments made, since they could reasonably expect the authorisations to be renewed automatically under the legislation applicable at the time when they were granted and up to the adoption of Decree Law No 194/2009.

86. That position is also adopted by the Italian Government, which states that extension of those concessions constitutes a transitional measure in the transition from an automatic renewal mechanism to an award system involving a tendering procedure. According to the Italian Government, such a measure is justified by the need to enable the parties concerned to make a return on the investments made, in accordance with the principle of protection of legitimate expectations.

87. I note, in this regard, that the EU legislature has already taken account of the legitimate interests of the holders of authorisations inasmuch as it provided, in Article 12(2) of Directive 2006/123, that authorisations limited in number because of the scarcity of available resources must be granted for an appropriate period.

88. In view of recital 62 of the directive, that period must be fixed in such a way that it does not restrict or limit free competition beyond what is necessary in order to enable the provider to recoup the cost of investment and to make a fair return on the capital invested. [17]

89. Those considerations apply, in principle, to authorisations granted under Directive 2006/123.

90. In my view, as regards authorisations that have not been the subject of a procedure as required by Article 12(1) of Directive 2006/123, Member States may not, under that provision, renew those authorisations on expiry and thus defer the selection procedure citing an overriding reason relating to the public interest.

91. Although Article 12(3) of Directive 2006/123 provides that Member States may take into account considerations relating to overriding reasons in the public interest in establishing the rules for the selection procedure, they are not permitted under that provision to cite those considerations as grounds for refraining from organising such a procedure.

92. In any event, the protection of legitimate expectations cited by the applicants in the main proceedings and by the Italian Government as justification in my view calls for assessment on a case-by-case basis, in order to show, on the basis of specific information, that the holder of the authorisation could reasonably expect its authorisation to be renewed and that it made the corresponding investments.

93. Such justification therefore cannot reasonably be cited in support of an automatic extension, such as that established by the Italian legislature, which is applied indiscriminately to all concessions of State-owned maritime and lakeside assets.

94. That conclusion is by no means contradicted by the judgment in *ASM Brescia*, which concerns a specific case of reliance on an overriding reason in the public interest relating to the principle of legal certainty in connection with the assessment of a services concession in the light of Articles 49 TFEU and 56 TFEU. [18]

17 — The same considerations may be seen in the Court's case-law under which the duration of an authorisation must be justified by overriding reasons relating to the public interest, such as, inter alia, the operator's need to have a sufficient length of time to recoup the investments made. See, to that effect, judgment in *Engelmann* (C-64/08, EU:C:2010:506, paragraphs 46 to 48 and the case-law cited).

18 — C-347/06, EU:C:2008:416. Although the Court refers, at paragraph 64 of that judgment, to an 'objective' circumstance, it follows from the ensuing reasoning that the case concerned an overriding reason in the public interest. See, to that effect, judgment in *Belgacom* (C-221/12, EU:C:2013:736, paragraph 38).

95. In that judgment the Court acknowledged that the principle concerned may require that the termination of a public service concession for the distribution of gas be coupled with a transitional period, taking into account both the requirements of the public service and economic aspects.

96. The Court took into account a series of considerations, namely: first, that the EU directives did not require existing concessions for the distribution of gas to be called into question; secondly, that the concession had been granted in 1984 and was to have effect until 2029, so its termination was therefore early; and, thirdly, that the principle of legal certainty requires that rules of law be clear, precise and predictable in their effects, whereas, at a time when the concession in question in the main proceedings was granted, the Court had not yet held that some contracts with a cross-border interest might be subject to requirements of transparency under primary law. [19]

97. However, none of those considerations taken into account by the Court in that judgment in respect of the principle of legal certainty are applicable in the main proceedings.

98. The authorisations at issue in the main proceedings for the pursuit of tourist and leisure-oriented business activities in publicly-owned maritime and lakeside areas were granted in 2004 and 2006 respectively, when application of the principle of transparency to concessions was already well established. [20] The measures at issue in the main proceedings were expressly stated to expire in 2010, thus making it possible for the concession holders to forecast the value of their investments on the basis on a pre-determined period in which to amortise the investment.

99. The approach adopted by the Court in *ASM Brescia*, [21] based on the principle of legal certainty, cannot therefore be applied to the main proceedings.

100. In the light of the foregoing, I consider that Article 12(1) and (2) of Directive 2006/123 must be interpreted as precluding national legislation under which the period of validity of authorisations for the commercial exploitation of publicly-owned maritime and lakeside assets is automatically extended.

Effect of Article 12 of Directive 2006/123 within the national legal order

101. As regards the effect of Article 12 of Directive 2006/123 in the national legal order, I would point out that the national courts are bound by the obligation to interpret national law in conformity with EU law.

102. That obligation is not restricted to the interpretation of domestic law enacted for the purpose of transposing Directive 2006/123; it in fact calls for consideration of the whole body of national law in order to assess the degree to which the national law may be applied so as not to achieve an outcome contrary to that sought by that directive. [22]

103. That is *a fortiori* the case when the national court is seised of a dispute concerning the application of domestic provisions which have been specifically enacted for the purpose of transposing a directive. The national court must, in that regard, presume that the Member State had the intention of fulfilling entirely the obligations arising from the directive concerned. [23]

19 — Judgment in *ASM Brescia* (C-347/06, EU:C:2008:416, paragraphs 67 to 71). See also, to that effect, judgment in *Belgacom* (C-221/12, EU:C:2013:736, paragraph 40).

20 — See, in particular, judgment in *Telaustria and Telefonadress* (C-324/98, EU:C:2000:669, paragraphs 60 to 62).

21 — C-347/06, EU:C:2008:416.

22 — Judgments in *Marleasing* (C-106/89, EU:C:1990:395, paragraph 8) and *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 38).

23 — Judgment in *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 112 and the case-law cited).

104. In my view, where, in the course of such an interpretation, a national court is faced with a conflict between the provisions of national law transposing Directive 2006/123 and those governing a specific area, it must resolve that conflict by considering the specific nature of Directive 2006/123.

105. The Handbook on implementation of the Services Directive [24] makes that point in paragraph 1.2.1, which states that if Member States choose to transpose Directive 2006/123 or certain articles of the directive by horizontal legislation — as is the case in Italy — they will need to ensure that such horizontal legislation takes precedence over specific legislation. Furthermore, under paragraph 6.1. of the handbook, the provisions relating to authorisation schemes must, in view of their transversal role, be incorporated into the horizontal legislation.

106. Therefore, in the present cases, the Italian courts are required to interpret domestic law, as far as possible, in such a manner as to ensure that Article 16 of Legislative Decree No 59/2010, which transposes Article 12 of Directive 2006/123, takes precedence over the specific legislation on concessions of State-owned maritime and lakeside assets.

107. That consideration is all the more important in the main proceedings given that — as the referring court observed in Case C-67/15 — as a result of the extension granted by the Italian legislature, Article 12 of Directive 2006/123, albeit formally transposed by the legislature, might in fact not be applied with regard to concessions of State-owned property because of the existence of specific legislation in that area.

108. In any event, I note that Article 12 of Directive 2006/123 specifically embodies the obligations which already flowed from Articles 49 TFEU and 56 TFEU as regards the award of concessions and authorisations concerning service activities.

109. It is clear from case-law that the fundamental freedoms protected by Articles 49 TFEU and 56 TFEU have direct effect in the sense that they may be relied upon directly in a dispute involving contractual relations in order to enable the services market to be opened up to competition. [25]

110. That direct effect must accordingly be conferred on Article 12 of Directive 2006/123, which embodies those principles.

Interpretation, in the alternative, of Article 49 TFEU

111. In view of my conclusion that Article 12 of Directive 2006/123 precludes the extension of authorisations such as those at issue in the main proceedings, there is no need to interpret the provisions of the Treaty on the Functioning of the European Union cited in the requests for a preliminary ruling.

112. In the alternative, I would point out, however, that if it were concluded that Directive 2006/123 was not applicable, on the ground that the measures concerned constituted services concessions, their extension would be contrary to the requirements flowing from Article 49 TFEU.

24 — Although it does not constitute a binding measure, the Court has already relied on that handbook for its reasoning, in particular in the judgment in *Hiebler* (C-293/14, EU:C:2015:843, paragraphs 32, 53 and 73).

25 — See, to that effect, judgments in *Telaustria and Telefonadress* (C-324/98, EU:C:2000:669, paragraphs 60 to 62); *ASM Brescia* (C-347/06, EU:C:2008:416, paragraphs 69 to 70); and *Belgacom* (C-221/12, EU:C:2013:736, paragraph 40).

113. Where they grant services concessions that may be of interest to economic operators established in other Member States, which certainly seems to be the case here,[26] the public authorities are required to comply with the fundamental rules of the Treaties, in particular Article 49 TFEU, and with the consequent obligation of transparency.[27]

114. The authorities cannot evade those requirements by deciding to extend automatically the period of validity of the concessions that had been granted without any transparency. A national measure which leads to the deferment of the award of a new concession under a transparent procedure constitutes indirect discrimination, which is prohibited, as a rule, by Article 49 TFEU.[28] Furthermore, although the Court has acknowledged that such a national measure might be justified by an overriding reason in the public interest relating to legal certainty, the conditions established by that case-law clearly are not met in the cases before the referring courts.[29]

Conclusion

115. In the light of the foregoing considerations, I propose that the Court should give the following answer to the questions referred by the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy) and the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court, Sardinia):

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 national legislation under which the period of validity of authorisations relating to the commercial exploitation of publicly-owned maritime and lakeside property is automatically extended.

26 — The referring court in Case C-458/14 observes that the concession in question is certainly of cross-border interest, in the light, in particular, of the geographic location of the public property and the economic value of the concession.

27 — Judgments in *Telaustria et Telefonadress* (C-324/98, EU:C:2000:669, paragraphs 60 to 62); *Coname* (C-231/03, EU:C:2005:487, paragraphs 16 to 19); *Parking Brixen* (C-458/03, EU:C:2005:605, paragraphs 46 to 48); *Wall* (C-91/08, EU:C:2010:182, paragraph 33); *Engelmann* (C-64/08, EU:C:2010:506, paragraphs 51 to 53); and *Belgacom* (C-221/12, EU:C:2013:736, paragraph 33).

28 — Judgment in *ASM Brescia* (C-347/06, EU:C:2008:416, paragraph 63).

29 — See point 99 of this Opinion.