Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

21 March 2019*

(Reference for a preliminary ruling — Internal market in natural gas — Public service distribution concessions — Early termination of concessions at the end of a transitional period — Reimbursement by the incoming concessionaire to the outgoing concessionaire — Principle of legal certainty)

In Case C-702/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 15 June 2017, received at the Court on 14 December 2017, in the proceedings

Unareti SpA

v

Ministero dello Sviluppo Economico,

Presidenza del Consiglio dei Ministri — Dipartimento per gli Affari Regionali,

Autorità Garante per l'Energia Elettrica il Gas e il Sistema Idrico — Sede di Milano,

Presidenza del Consiglio dei Ministri — Conferenza Stato Regioni ed Unificata,

Ministero per gli affari regionali — Dipartimento per gli affari regionali e le autonomie,

Conferenza Unificata Stato Regioni e Enti Locali,

intervening parties:

Lucia Sanfilippo,

THE COURT (First Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, C. Toader, A. Rosas, L. Bay Larsen and M. Safjan, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Italian.

after considering the observations submitted on behalf of:

– Unareti SpA, by G. Caia, A. Clarizia, M. Midiri and S. Colombari, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and F. Sclafani, avvocato dello Stato,

– the European Commission, by O. Beynet, G. Gattinara and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of EU law on public service concessions and the principle of legal certainty.

2 The request has been made in proceedings between Unareti SpA and the Ministero dello Sviluppo Economico (Ministry for Economic Development, Italy), the Presidenza del Consiglio dei Ministri — Dipartimento per gli Affari Regionali (Prime Minister's Office — Department of Regional Affairs, Italy), Autorità Garante per l'Energia Elettrica il Gas e il Sistema Idrico — Sede di Milano (Authority for Electricity, Gas and Water — Milan Office, Italy), Presidenza del Consiglio dei Ministri — Conferenza Stato Regioni ed Unificata, (Prime Minister's Office — State Council for the Regions, Italy), Ministero per gli affari regionali — Dipartimento per gli affari regionali e le autonomie (Ministry of Regional Affairs — Department of Regional Affairs and the Autonomous Provinces, Italy), and Conferenza Unificata Stato Regioni e Enti Locali (Legal context Unified State Council for the Regions and Local Authorities, Italy) in an action seeking the annulment of, first, decreto ministeriale n. 74951 recante 'Approvizione del documento "Linee Guida su criteri e modalità applicative per la valutazione del valore del rimborso degli impianti di distributzione del gas naturale"' (Ministerial Decree No 74951 approving the document 'Guidelines on the criteria and application methods for assessing the reimbursement value of natural gas distribution plants') of 22 May 2014 (GURI No 129 of 6 June 2014) and, second, decreto ministeriale n. 106, regolamento recante modifica al decreto del 12 novembre 2011, n. 226, concernente i criteri di gara per l'affidamento del servizio di distribuzione del gas natural (Ministerial Decree No 106, regulation amending the decree dated 12 November 2011, No 226, concerning the tender criteria for the assignment of the natural gas distribution service) of 20 May 2015 (GURI No 161 of 14 July 2015).

Legal framework

European Union law

3 Article 24 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94) provides:

'Member States shall designate, or shall require undertakings which own or are responsible for distribution systems to designate, for a period of time to be determined by Member States, having regard to considerations of efficiency and economic balance, one or more distribution system operators …'

Italian law

4 Article 14 of decreto legislativo n. 164, attuazione della direttiva n. 98/30/CE recante norme comuni per il mercato interno del gas naturale, a norma dell'articolo 41 della legge 17 maggio 1999, n. 144 (Legislative Decree No 164 implementing Directive 98/30/EC laying down common rules for the internal market in natural gas, pursuant to Article 41 of Law No 144 of 17 May 1999) of 23 May 2000 (GURI No 142 of 20 July 2000), provides that the distribution of natural gas is, in principle, a public service activity awarded by the local authorities to concession holders by means of competitive tender procedures for a period not exceeding 12 years.

5 With regard to existing distribution concessions for natural gas which have not been awarded by a public tendering procedure, Article 15(5) of that legislative decree provides:

'With regard to gas distribution activities, concessions in existence on the date of entry into force of this decree, and also those entrusted to companies created by the transformation of current operators, shall continue until the date of expiry provided for, if that date falls before the time limits fixed by paragraph 7 for the transitional period. Existing concessions for which no expiry date has been set, or for which an expiry date has been set after the end of the transitional period, shall continue until the end of the transitional period. In the latter case, the holders of existing concessions will be paid a reimbursement value by the new operator … calculated in accordance with the terms of the agreements or contracts and, if this cannot be determined from the wishes of the parties, with the criteria referred to in Article 24(a) and (b) of regio decreto n. 2578 [approvazione del testo unico della legge sull'assunzione direta dei pubblici servizi da parte dei comuni e delle province (Royal Decree No 2578 approving the single text of the law on the direct assumption of public services by municipalities and provinces) (GURI No 52 of 4 March 1926) of 15 October 1925]. Calculation of the profit lost due to the early termination of the operator relationship shall be excluded.'

6 Article 24 of Royal Decree No 2578 of 15 October 1925 provides, as part of the rules on municipalities terminating concessions for services, that the following criteria are to be taken into consideration:

'(a) the industrial value of the plant and related movable and fixed equipment, taking account of the amount of time that the equipment has been in service and any refurbishment of the plant or equipment, and also any clauses in the concession contract concerning the ownership of that equipment on expiry of the concession;

(b) advance payments or subsidies granted by the municipalities, and also the amount of proportional registration duties paid in advance by the concession holders and any premiums paid to the municipalities granting the concession, always taking account of the elements mentioned in (a) above'.

7 Article 5(2) and (3) of Decreto n. 226 del ministro dello sviluppo economico e del ministre per i rapporti con le regioni e la coesione territoriale recante regolamento per i criteri di gara e per la valutazione dell'offerta per l'affidamento del servizio della distribuzione del gas naturale, in attuazione dell'articolo 46bis del decreto legge 1 ottobre 2007 n. 159, convertito in legge, con modificazioni, dalla legge 29 novembre 2007, n. 222 (Decree No 226 of the Minister for Economic Development and Minister for Relations with the Regions and Territorial Cohesion, governing the tender criteria and the evaluation of tenders with regard to the award of public service distribution of natural gas, implementing Article 46bis of the Decree Law No 159 of 1 October 2007, converted into law, with amendments, by Law No 222 of 29 November 2007) of 12 November 2011 (Ordinary Supplement to the GURI No 22 of 27 January 2012), in its original version, states:

'2. The value of the reimbursement paid to holders of concessions coming to an end, for which no expiry date has been set, or for which a natural expiry date has been set that is after the end date of the service specified in the new invitation to tender, shall be calculated as stipulated in the

agreements or contracts, in accordance with the provisions of Article 15(5) of Legislative Decree No 164 of 23 May 2000, as amended, particularly in cases where the contract ends before the natural expiry date.

3. When the method for calculating the amount of the reimbursement payable to the holders referred to in paragraph 2 cannot be determined from the contract documents, including the case in which those documents state in a general manner that the reimbursement value should be at market prices, the criteria referred to in Article 24(4)(a) and (b) of Royal Decree No 2578 of 15 October 1925 shall be applied in accordance with the terms specified in paragraphs 5 to 13, limited to the portion of the plant owned by the operator for which, on the natural expiry of the concession, it is not provided that it will devolve free of charge to the local authority granting the concession.'

8 Article 4(6) of decreto-legge n. 69 convertito, con modificazioni, dalla legge 9 agosto 2013 n. 98, disposizioni urgenti per il rilancio dell'economia (Decree-Law No 69 converted into law, with amendments, by Law No 98 of 9 August 2013, introducing urgent provisions for the revival of the economy), of 21 June 2013 (Ordinary Supplement to GURI No 144 of 21 June 2013), provides that, in order to facilitate the conduct of tender procedures for the award of a contract for gas distribution, and to cut costs for the local authorities and undertakings, 'the Ministry of Economic Development may issue guidelines on the criteria and methods for assessing the reimbursement value of natural gas distribution plants, in accordance with Article 5 of Decree No 226 of 12 November 2011'.

9 The 'Guidelines on the criteria and application methods for assessing the reimbursement value of natural gas distribution plants mentioned by Decree-Law No 69 of 21 June 2013 were adopted by Ministerial Decree No 74951 of 22 May 2014.

10 Article 1(16) of decreto-legge n. 145 convertito, con modificazioni, dalla legge 21 febbraio 2014 n. 9, interventi urgenti di avvio del piano 'destinazione Italia' per il contenimento delle tariffe elettriche e del gas, per l'internazionalizzazione, lo sviluppo e la digitalizzazione delle imprese, nonché misure per la realizzazione di opere pubbliche ed EXPO 2015 (Decree-Law No 145 converted into law, with amendments, by Law No 9 of 21 February 2014 introducing urgent measures to launch the plan 'destination Italy' in order to limit electricity and gas tariffs, for the internationalisation, development and digitalisation of companies, as well as measures for the performance of public works and EXPO 2015), of 23 December 2013 (GURI No 300 of 23 December 2013) amended Article 15(5) of Legislative Decree No 164 of 23 May 2000 by replacing, for the purposes of regulating aspects not regulated by the conventions and contracts concerned, the reference to the criteria referred to in Article 24(a) and (b) of Royal Decree No 2578 of 15 October 1925 by reference to the Guidelines on the criteria and application methods for assessing the amount of reimbursement referred to in Article 4(6) of Decree-Law No 69 of 21 June 2013.

11 Decreto-legge del 24 giugno 2014, n. 91 convertito con modificazioni, dalla legge 11 agosto 2014 n. 116, disposizioni urgenti per il settore agricolo, la tutela ambientale e l'efficientamento energetico dell'edilizia scolastica e universitaria, il rilancio e lo sviluppo delle imprese, il contenimento dei costi gravanti sulle tariffe elettriche, nonché per la definizione immediata di adempimenti derivanti dalla normativa europea (Decree-Law No 91 converted into law, with amendments, by Law No 116 of 11 August 2014 introducing urgent measures for the agricultural sector, environmental protection and energy efficiency of school and university buildings, the relaunch and development of businesses, the containment of costs weighing on the electricity tariffs, as well as the immediate definition of obligations deriving from European law) of 24 June 2014 (GURI No 144 of 24 June 2014), further amended Article 15(5) of Legislative Decree No 164 of 23 May 2000, providing that the reimbursement is to be calculated in accordance with the provisions of conventions and contracts 'provided that they were stipulated before the date of entry into force' of Decree No 226 of 12 November 2011.

12 Article 5(2) of Decree No 226 of 12 November 2011, as amended by Ministerial Decree No 106 of 20 May 2015, provides that the criterion in the contract for determining the reimbursement value applies 'provided that the contract documents were signed before 11 February 2012 and contain full details of the method, such as the schedule of prices applicable to the different types of asset, to be applied to the updated inventory and the treatment of physical degradation, including the useful life of the different types of assets, so that the reimbursement value can be calculated and checked, including by the authority'. It adds, in paragraph 3, that where the reimbursement value calculation method 'cannot be discerned from contract documents signed before 11 February 2012, including where it is generically stated that the reimbursement value should be calculated on the basis of Royal Decree No 2578 of 15 October 1925, without specifying the method, or that it should be calculated at market prices', the methods specified in Article 5(5) to (13) of Decree No 226 shall be used, 'limited to the portion of the plant owned by the operator that, on the natural expiry of the concession, will not legally devolve free of charge to the local authority granting the concession, with the methods specified in the guidelines on the criteria and application methods for assessing the reimbursement value'.

The dispute in the main proceedings and the question referred for a preliminary ruling

13 It is apparent from the order for reference that Unareti is responsible for public service natural gas distribution in 213 municipalities in Italy, most situated in Lombardy, through a network of approximately 7 650 km with an annual distribution volume of almost 2 billion cubic metres of gas.

14 On 22 May 2014, it brought an action before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy) seeking the annulment of the 'Guidelines on the criteria and application methods for assessing the reimbursement value of natural gas distribution plants' adopted by Ministerial Decree No 74951.

15 It subsequently supplemented its application with forms of order seeking the annulment of Ministerial Decree No 106 of 20 May 2015.

16 Unareti submitted, inter alia, that the contested ministerial decrees were contrary to the principle of legal certainty on account of the fact that it could be retroactively deprived of the possibility to refer to the contractual clauses or Royal Decree No 2578 of 15 October 1925 for the calculation of the reimbursement to which it is entitled as the outgoing concessionaire, and be obliged to refer to the 'Guidelines on the criteria and application methods for assessing the reimbursement value of natural gas distribution plants' adopted by Ministerial Decree No 74951 of 22 May 2014, which are unfavourable to it.

17 By a judgment of 14 October 2016, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio) dismissed that action.

18 Unareti brought an appeal against that judgment before the Consiglio di Stato (Council of State, Italy).

19 That court explains that it is required to reconcile the opening of the market in question to competition with the protection of contractual relationships already created. For that purpose that court considers it necessary for the Court to interpret the 'relevant provisions of EU law' and the principle of legal certainty, in particular, with regard to the judgments of 17 July 2008, *ASM Brescia* (C-347/06, EU:C:2008:416, paragraph 71), and of 12 December 2013, *Test Claimants in the Franked Investment Income Group Litigation* (C-362/12, EU:C:2013:834, paragraph 44), in order to know whether they preclude amendments brought by the ministerial decrees challenged.

20 It is in those circumstances that the Consiglio di Stato (Council of State) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'The Court is asked to establish whether those principles and laws preclude national legislation … that provides for retrospective application of criteria for determining the amount of the reimbursements payable to outgoing concession holders, thus affecting previous contractual relationships, or whether the application of those criteria can be justified, including in view of the proportionality principle, by the requirement of protecting other public interests of European importance, relating to the necessity of improving protection for competition within the market in question and of giving greater protection to service users, who could indirectly bear the cost of an increase in the sums payable to outgoing concession holders.'

Admissibility of the request for a preliminary ruling

21 The arguments of the Italian Government that the request for a preliminary ruling is inadmissible because it fails to satisfy the requirements of Article 94 of the Rules of Procedure of the Court must be dismissed from the outset.

22 Pursuant to that article, in addition to the text of the questions referred to the Court for a preliminary ruling, a request for a preliminary ruling must contain: (i) a summary of the subject matter of the dispute and the relevant findings of fact or, at least, an account of the facts on which the questions are based, (ii) the content of any national provisions applicable to the dispute in the main proceedings and, where appropriate, the relevant national case-law, and (iii) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings (judgment of 26 May 2016, *NN (L) International*, C-48/15, EU:C:2016:356, paragraph 22).

23 It is clear from the wording of the order for reference that it satisfies those conditions as it sets out, to the requisite legal standard, the facts of the dispute in the main proceedings, mentioned in paragraphs 13 to 15 of the present judgment and because it informs the Court as to the relevant national legal framework, set out in paragraphs 4 to 12 of the present judgment, which allows the Court to understand the reasons, mentioned in paragraphs 16 to 19 of the present judgment, which led the referring court to seek the interpretation of EU law on public service concessions and the principle of legal certainty in the dispute in the main proceedings.

24 It follows that the reference for a preliminary ruling is therefore admissible.

Consideration of the question referred

25 By its question, the referring court asks essentially whether EU law on public service concessions, read in the light of the principle of legal certainty, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which amends the basic criteria for calculating the amount of the reimbursement to be paid to holders of natural gas distribution concessions awarded without any competitive tendering procedure due to the early termination of those concessions in order to re-allocate them following a competitive tendering procedure.

26 It must be recalled that, with regard to public service concessions, the secondary EU law applicable in the main proceedings, that is Article 24 of Directive 2009/73, merely provides that Member States are to designate, for a period of time to be determined by them having regard to considerations of efficiency and economic balance, one or more distribution plant operators.

27 Furthermore, the Court has held that, even if a public service concession does not fall within the scope of the directives relating to the various categories of public contracts (see, in particular, judgment of 21 July 2005, *Coname*, C-231/03, EU:C:2005:487, paragraph 16), it is clear from primary EU law that public authorities, when they plan to award such a concession, are bound to comply with the fundamental rules of the FEU Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular (see, to that effect, in particular, judgment of 7 December 2000 *Teleaustria and Telefonadress*, C-324/98, EU:C:2000:669, paragraph 60).

28 More specifically, since such a concession is of certain cross-border interest, its award, without any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession and which are located in other Member States (see, to that effect, judgment of 17 July 2008, *ASM Brescia*, C-347/06, EU:C:2008:416, paragraph 59 and the case-law cited).

29 Unless it is justified by objective circumstances, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to indirect discrimination on the basis of nationality, prohibited under Articles 49 and 56 TFEU (see, to that effect, judgment of 17 July 2008, *ASM Brescia*, C-347/06, EU:C:2008:416, paragraph 60 and the case-law cited).

30 Having noted that, it must be observed that the rules set out in paragraphs 26 to 29 of the present judgment relate to the obligations imposed on contracting authorities when awarding a public service concession for natural gas distribution, in particular where it has a certain cross-border interest.

31 That is neither the aim nor the effect of the ministerial decrees challenged in the main proceedings, which concern only the basic criteria for calculating the reimbursement laid down by national law, namely Article 15(5) of the Legislative Decree No 164 of 23 May 2000, in the version applicable in the main proceedings, for the benefit of holders of existing concessions awarded without a prior public tendering procedure and which have been terminated early in order to reallocate them following a public tendering procedure solely on the basis of national law, specifically Article 14 of that legislative decree, since Directive 2009/73 does not contain any objections to the existing gas distribution concessions.

32 It follows that the objection to the existing concessions, the consequences of which are partly determined by the ministerial decrees challenged in the main proceedings, does not derive from the EU law on public service concessions for the distribution of natural gas.

33 Furthermore, the amendment of the basic criteria introduced by those decrees, which aim in certain cases to limit the possibility for the recipient of the reimbursement to refer to the clauses in the concession agreement or to Royal Decree No 2578 of 15 October 1925, cannot in itself constitute a difference in treatment to the detriment of undertakings which might be interested in services, such as those operated by Unareti which are situated in the territory of a Member State other than Italy. Such an amendment to the basic criteria applies without distinction to undertakings with their registered office in Italy and those having their registered office in another Member State.

34 In that context, it should be noted that, although, under EU law, the principle of legal certainty is binding on every national authority, that is only when that authority is responsible for implementing EU law (see, to that effect, judgment of 17 July 2008, *ASM Brescia*, C-347/06, EU:C:2008:416, paragraph 65 and the case-law cited).

35 As stated in paragraphs 32 and 33 of the present judgment, by terminating the existing concessions early and by adopting the ministerial decrees challenged in the main proceedings, the Italian authorities have failed to act in accordance with their obligation to apply EU law.

36 That feature of the case in the main proceedings distinguishes it from those mentioned by the referring court which gave rise to the judgments of 17 July 2008, *ASM Brescia* (C-347/06, EU:C:2008:416, paragraph 71), and of 12 December 2013, *Test Claimants in the Franked Investment Income Group Litigation* (C-362/12, EU:C:2013:834), in which the principle of legal certainty was applicable having regard to the existence of obligations deriving from EU law, pursuant to which the competent national authorities had to, respectively, justify a difference in treatment derogating from the rules mentioned in paragraphs 27 to 29 of the present judgment and reimburse the taxes received in violation of EU law.

37 It is clear from all of the following considerations that the answer to the question referred is that EU law on public service concessions, read in the light of the principle of legal certainty, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which amends the basic criteria for the calculation of the reimbursement to which holders of natural gas distribution concessions awarded without any competitive tendering procedure are entitled on account of the early termination of those concessions in order to reallocate them after being put out for tender.

Costs

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

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

EU law on public service concessions, read in the light of the principle of legal certainty, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which amends the basic criteria for the calculation of the reimbursement to which holders of natural gas distribution concessions awarded without any competitive tendering procedure are entitled on account of the early termination of those concessions in order to reallocate them after being put out for tender.

[Signatures]