Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

18 September 2019*

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Directive 2004/18/EC – Coordination of procedures for the award of public works contracts, public supply contracts and public service contracts – Public works concession contracts – Extension of the duration of an existing concession for the construction and operation of a motorway without publication of a contract notice)

In Case C-526/17,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 4 September 2017,

European Commission, represented by G. Gattinara, P. Ondrůšek and A. Tokár, acting as Agents,

applicant,

v

Italian Republic, represented by G. Palmieri, acting as Agent, and V. Nunziata, E. De Bonis and P. Pucciariello, avvocati dello Stato,

defendant,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, C. Lycourgos, E. Juhász (Rapporteur), M. Ilešič and I. Jarukaitis, Judges,

Advocate General: E. Sharpston,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 12 December 2018,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2019,

gives the following

Judgment

1 By its application, the European Commission requests that the Court declare that, by extending the concession for the A12 Livorno-Civitavecchia motorway (Italy) from 31 October 2028 to 31 December 2046 without publishing a contract notice, the Italian Republic has failed to fulfil its obligations under

* Language of the case: Italian.

Articles 2 and 58 of 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 (OJ 2004 L 134, p. 114), as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007 (OJ 2007 L 317, p. 34; 'Directive 2004/18').

Legal context

2 Article 1(2)(b) of Directive 2004/18 defines 'public works contracts' as 'public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority'. Under that provision, a 'work' is 'the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function'.

3 Annex I to that directive, entitled 'List of the activities referred to in Article 1(2)(b)', includes the construction of highways, roads, airfields and sports facilities (Class 45.23 according to the Statistical Classification of Economic Activities in the European Community (NACE)), which includes, as a class, the construction of highways.

4 Article 1(3) of that directive defines 'public works concession' as 'a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the work or in this right together with payment'.

5 Under Article 2 of Directive 2004/18, entitled 'Principles of awarding contracts':

'Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.'

6 Under Article 56 of that directive, the rules governing public works concessions are to apply to all public works concession contracts concluded by the contracting authorities where the value of the contracts is equal to or greater than EUR 5 150 000.

7 Article 58 of the directive, entitled 'Publication of the notice concerning public works concessions', provides:

'1. Contracting authorities which wish to award a public works concession contract shall make known their intention by means of a notice.

2. Notices of public works concessions shall contain the information referred to in Annex VII C and, where appropriate, any other information deemed useful by the contracting authority, in accordance with the standard forms adopted by the Commission pursuant to the procedure in Article 77(2).

3. Notices shall be published in accordance with Article 36(2) to (8).

4. Article 37 on the publication of notices shall also apply to public works concessions.'

8 Under Article 80(1) of Directive 2004/18, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive no later than 31 January 2006.

Background to the dispute

The 1969 concession contract

9 On 23 October 1969, a public works concession contract ('the 1969 concession contract') was entered into between Azienda Nazionale Autonoma delle Strade SpA ('ANAS'), the contracting authority responsible for motorway concessions, and Società Autostrada Tirrenica SpA ('SAT'), an economic operator. Article 1 of that contract provides that the objective thereof is the construction and operation of the motorway from Livorno to Civitavecchia, with a total length of approximately 237 km.

10 Article 5 of the 1969 concession contract provides in particular, in paragraph 1, that the construction of sections by the concessionaire must comply with the time limits set out in the general works implementation plan and, in paragraph 2, that that concessionaire has the option of bringing forward the construction of the sections without, however, having the right to bring forward the corresponding consideration. Under Article 5(3), following approval of the implementation plans, the concessionaire must commence the works for the construction of the tranches on the dates set in the general works implementation plan and deliver the complete works within the time limits provided for in the respective special specifications. Under Article 5(4), at the request of the concessionaire, and for reasons not attributable to it, ANAS can extend the time limits for the presentation of each project, as regards both the start and the end of the works relating to that project. Article 5(5) provides that, in the latter case, the date of expiry of the concession can be postponed for a period not exceeding the extension granted in accordance with the preceding paragraph, and Article 5(6) provides that the management of the works is to be governed by the provisions relating to State works and by the general specifications.

11 Article 7 of the 1969 concession contract provides that the concession is to terminate at the end of the 30th year following the point at which operation of the entire motorway commences. However, without prejudice to the provisions set out in Article 5(5) and (6) of that contract, the period cannot exceed the 30th year from the date on which the works described in the general works implementation plan referred to in Article 5(1) and (2) of that contract are completed.

12 The concession awarded by the 1969 concession contract was approved and made enforceable on 7 November 1969.

The 1987 addendum

13 On 14 October 1987, ANAS and SAT signed an addendum to the 1969 concession contract ('the 1987 addendum').

14 Article 14 of that addendum provides that 'the duration of the present concession is set at 30 years from the date on which the entire motorway is open to traffic'.

The 1999 contract

15 On 7 October 1999, ANAS and SAT concluded a contract ('the 1999 contract'), Article 2 of which is entitled 'Subject matter'.

16 Under Article 2(1) thereof, that contract is to govern as between the concession-granting authority and the concessionaire the operation of the 36.6 km section between Livorno and Cecina, open to traffic on 3 July 1993 and forming an integral part of the A12 Livorno -Civitavecchia motorway, the concession for the construction and operation of which had been granted to SAT.

17 Under Article 2(2) of that contract, the activities and tasks necessary for operation of the motorway are entrusted to the concessionaire, in accordance with the terms and conditions set out in the contract and with Article 14 of Legge n. 531, Piano decennale per la viabilità di grande comunicazione e misure di riassetto del settore autostradale (Law No 531 introducing a ten-year plan for the viability of major roads and restructuring measures in the highway sector) of 12 August 1982 (GURI No 223 of 14 August 1982).

18 Article 2(3) of that contract provides that 'when the legal and factual conditions for the continuation of the construction programme in respect of which a concession has been granted are met, an addendum shall be concluded to establish a contractual framework for the construction and operation of the two further sections: Cecina-Grosseto and Grosseto-Civitavecchia'.

19 Article 23 of the 1999 contract, entitled 'Duration of the concession', provides, in paragraph 1, that 'the concession shall expire on 31 October 2028'.

The 2009 single agreement

20 On 11 March 2009, ANAS and SAT signed a standard agreement ('the 2009 single agreement'), Article 1(4) of which provides that 'the parties agree that they have no right, interest or claim, actual or prospective, in respect of [the 1999 contract] or any act or measure adopted prior to the conclusion of the present agreement'.

21 Article 2 of that single agreement, entitled 'Subject matter', provides, in paragraph 1, that 'the present single agreement shall govern fully and exclusively the relationship between the concession-granting authority and the concessionaire as regards the design, construction and operation of all the works previously allocated under the concession contract concluded with ANAS on 7 October 1999:

(a) A12 Livorno-Cecina (Rosignano), 36.6 km

(open to traffic on 3 July 1993);

(b) Cecina (Rosignano)-Grosseto, 110.5 km;

(c) Grosseto-Civitavecchia, 95.5 km,

	totalling 242.6 km'.

22 Article 4 of that single agreement, entitled 'Duration of the concession', provides, in paragraph 1, that 'taking account of the periods when the execution of the works was suspended, as referred to in the preamble and Article 143 of Legislative Decree No 163/2006, the concession for the completion of the Cecina (Rosignano)-Civitavecchia motorway shall terminate on 31 December 2046. …'.

The pre-litigation procedure

23 In 2009, a complaint was sent to the Commission regarding the extension, from 31 October 2028 to 31 December 2046 provided for by the 2009 single agreement, of the duration of the concession relating to the A12 motorway from Livorno to Civitavecchia.

24 The Commission and the Italian authorities communicated with each other in that respect, although no solution was reached.

25 Following fruitless contact on several occasions with the Italian authorities, the Commission sent, on 22 April 2014, a letter of formal notice to the Italian Republic pursuant to Article 258 TFEU, requesting that that Member State submit its observations as regards that extension, which, it claimed, may have infringed Articles 2 and 58 of Directive 2004/18.

26 Since the Commission did not consider the replies to that letter of formal notice to be satisfactory, it sent a reasoned opinion to the Italian Republic on 17 October 2014.

27 After that reasoned opinion was sent, discussions took place between the Commission and the Italian Republic, having as their objective a possible reduction of the duration of the concession at issue and the possibility of launching a competitive tendering procedure with respect to the works to be carried out under that concession.

28 By letter sent to the Italian Republic on 8 March 2016, the Commission called on that Member State to take all the measures necessary to comply with the reasoned opinion by ending that concession on 31 October 2028, as provided for in the 1999 contract.

29 Considering that the measures necessary to comply with the obligations arising from Directive 2004/18 had not been adopted by the Italian Republic and that the alleged infringement of Articles 2 and 58 of that directive had not been brought to an end, the Commission brought the present action.

The action

Arguments of the parties

Arguments of the Commission

30 By its action, the Commission claims that the Italian Republic has infringed Articles 2 and 58 of Directive 2004/18, as a result of extending, by means of the 2009 single agreement, by over 18 years, namely until 31 December 2046, without publishing a contract notice, the duration of the concession relating to the A12 motorway from Livorno to Civitavecchia, the termination date of which had been set at 31 October 2028 in the 1999 contract.

31 The Commission maintains that the present case concerns a public works concession within the meaning of Article 1(3) of Directive 2004/18, since the concessionaire is remunerated through the operation of the infrastructure which it undertakes to build and that, as the value of that works concession is EUR 66 631 366.93, the threshold laid down in Article 56 of that directive is exceeded. The Commission claims that, in accordance with Article 58(1) of Directive 2004/18, a contract notice should have been published in respect of that works concession. However, no notice was published, either in 1969, when the contract relating to the original concession was concluded, or in 1999, when that concession was extended until 2028.

32 In particular, the Commission, which refers to the judgment of 7 September 2016, *Finn Frogne* (C-549/14, EU:C:2016:634, paragraph 28 and the case-law cited), argues, in the first place, that the deferral of the termination date of the concession at issue from 31 October 2028 to 31 December 2046, which is equivalent to the award of a new concession, as it leads to a material change to an existing works concession, should have been the subject of a contract notice and a competitive tendering procedure, in accordance with Article 58 of Directive 2004/18. According to the Commission, such a material change required the launch of a new competitive tendering procedure, since, if it had been known about in advance, other tenderers would have participated in the call for tenders. Further, according to the judgment of 5 April 2017, *Borta* (C-298/15, EU:C:2017:266,

paragraph 70 and the case-law cited), the fact that no competitive tendering procedure was organised for the award of the original concession means, a fortiori, that a competitive tendering procedure must be launched in the event of a material change to that concession.

33 The Commission adds that, in the present case, the renegotiation of the duration of the concession at issue constitutes, in itself, proof of the material nature of the change and that the parties have clearly expressed their intention to amend the essential terms of that concession, in accordance with paragraph 37 of the judgment of 13 April 2010, *Wall* (C-91/08, EU:C:2010:182). Further, the Commission asserts that, in so far as the concessionaire is remunerated by operating the infrastructure that it has built, an extension of the concession by 18 years allows for an increase in remuneration, which changes the economic balance considerably in favour of the concessionaire.

34 In the second place, the Commission claims that change in essential aspects of a concession without the publication of a contract notice, such as the extension of the concession at issue by 18 years, constitutes an infringement of the principles of equal treatment and transparency under Article 2 of Directive 2004/18. Referring to the judgment of 22 April 2010, *Commission* v *Spain* (C-423/07, EU:C:2010:211, paragraph 56), it notes that, with specific regard to a works concession relating to the construction and operation of a motorway, the publication obligation requiring contracting authorities to make known their intention to award the concession ensures a level of competition considered satisfactory by EU legislature in the field of public works concessions.

35 As regards the Italian Republic's arguments, the Commission disputes, first, the continuity alleged by that Member State between the 1969 concession contract and the 2009 single agreement, on the ground that the latter constitutes an independent set of rules. According to the Commission, the provisions of the 2009 single agreement must not be interpreted in the light of the 1969 concession contract. The extension introduced by that single agreement concerns the 'existing concession' at the time that agreement was concluded, that is to say, the concession governed by the 1999 contract.

36 Further, according to the Commission, even though the original concession was concluded at a time when EU law did not lay down any rules on the matter, any amendment or revision of that original concession should be assessed in the light of the provisions of EU law which have entered into force in the meantime (judgment of 27 October 2005, *Commission* v *Italy*, C-187/04 and C-188/04, not published, EU:C:2005:652).

37 Secondly, the Commission disputes the relevance of the alleged difficulties resulting from the performance of the original concession and the various amendments to national legislation, and states that if the need arose to carry out important construction works not provided for by the 1999 contract, that also called for a competitive tendering procedure by means of the publication of a contract notice. Moreover, according to the Commission, it is not logical to rely on the existence of material changes to the concession at issue, resulting from the increase in the investments to be made, a rise in tariffs of 51.42% and the need to increase the duration of the concession, while at the same time claiming that the subject matter of that concession has remained unchanged since 1969. Further, the assertion that the 30-year period set out in the original concession was a 'floating' period, which was to start to run only after the completion of the works, is at odds with the principle of transparency and the effectiveness of Directive 2004/18.

38 Thirdly, according to the Commission, the Italian Republic misinterprets the scope of the judgment of 19 June 2008, *pressetext Nachrichtenagentur* (C-454/06, EU:C:2008:351), by disregarding the obligation incumbent on it in the present case to hold a competitive tendering procedure, on the ground that the new provisions of the 2009 single agreement are intended to balance the contractual relationship in the light of the original concession.

39 Fourthly, the Commission maintains that there is no need, in the present case, to balance a reciprocally binding relationship, since, under a concession, where the concessionaire is remunerated by operating the infrastructure and assumes the risk associated with the operation, maintaining the contractual balance would remove that risk completely and alter the subject matter of the concession contract. Moreover, as regards the possible justification for the lack of a competitive tendering procedure at the time when the 2009 single agreement was concluded by the 'need to guarantee contractual balance', the Commission claims that the judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558), relied on by the Italian Republic, is not relevant to the present case, since it concerns whether it is possible to subject to principles deriving from the TFEU concessions which, until the entry into force of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), were not covered by any directive, whereas Directive 2004/18 was in force at the time the 2009 single agreement was concluded. Referring to the judgment of 4 June 2009, *Commission* v *Greece* (C-250/07, EU:C:2009:338, paragraph 38), the Commission argues that Directive 2004/18 does not contain derogations from the principle of equal treatment based on an alleged need to 'guarantee contractual balance', but that it lays down other exceptions to that principle, which must be interpreted strictly. Further, the Commission asserts that it is apparent from the judgment of 14 November 2013, *Belgacom* (C-221/12, EU:C:2013:736, paragraph 40) that the principle of legal certainty cannot be relied on in order to justify an extension to an agreement which is contrary to the principles of equal treatment and non-discrimination and the obligation of transparency deriving therefrom.

Arguments of the Italian Republic

40 The Italian Republic describes the chronology of the relevant facts in detail. It explains, in particular, that for a period of 13 years, SAT was unable to begin the planned works, since legislative acts provided that the award of concessions for the construction of motorways was to be suspended and for the general suspension of the construction of new motorways or motorway sections, so that it was only in 1982 that SAT was authorised to proceed with the works relating to the A12 motorway, within the limits of the appropriations allocated and on condition that the public holding in the capital of the concessionaire company was changed. That Member State adds that it was in that context that ANAS and SAT signed the 1987 addendum, which confirmed that the duration of the concession was fixed at 30 years from the date on which the entire motorway opened to traffic. Thus, that addendum enabled the section from Livorno to Cecina, which represents only approximately 15% of the total length of the A12 motorway, to be completed.

41 The Italian Republic asserts that the objective of the 2009 single agreement is to replace the 1969 concession contract and the acts which amended it, by updating and revising the contractual terms in force in 2009 and by providing for the full completion of the A12 motorway.

42 As regards the substance, the Italian Republic submits that the Commission's action is based on an incorrect factual premiss, in so far as that institution is of the opinion that the 1999 contract related to the works and the operation of the entire length of the A12 motorway between Livorno and Civitavecchia.

43 The Italian Republic maintains that Article 23(1) of the 1999 contract fixed the date of expiry of the concession at 31 October 2028 only in respect of the section from Livorno to Cecina. By virtue of Article 2(1) thereof, that contract governed only the operation of that 36.6 km section, which was open to traffic on 3 July 1993, and not that of the other sections of the A12 motorway, the completion of which had been suspended.

44 As regards the remaining part of the A12 motorway, according to the Italian Republic, Article 2(3) of the 1999 contract clearly provided that, when the legal and factual conditions for the continuation of the construction programme were met, a special addendum was to be concluded in order to establish the contractual framework for the construction and operation of the Cecina-Grosseto and Grosseto-Civitavecchia sections.

45 According to the Italian Republic, the 2009 single agreement was concluded on the basis of that latter provision, when the conditions for completion of the entire A12 motorway were satisfied.

46 In addition to relying on that alleged incorrect factual premiss, the Italian Republic puts forward several arguments to show that the Commission's action is unfounded.

47 In the first place, it claims that, in the present case, no 'extension' of the concession by 18 years has been decided on.

48 The Italian Republic submits that the 'floating' termination date 30 years from the 'the point at which operation of the entire motorway commences', as defined in Article 7 of the 1969 concession contract, has never been reached. Moreover, the 2009 single agreement concerns works all of which were already anticipated in the original 1969 concession and contains only a necessary revision of the provisions of the 1969 concession contract for the purpose of the full completion of the A12 motorway and in order to guarantee the original contractual balance.

49 The Italian Republic submits that the 2009 single agreement governs the entire concession as regards the design, implementation and operation of all the works already awarded in the previous contracts. It claims that that single agreement provides for the completion of the motorway in question, unlike the 1999 contract, which included only a reservation in that regard. Further, the judgment of 27 October 2005, *Commission* v *Italy* (C-187/04 and C-188/04, not published, EU:C:2005:652) cannot be transposed to the present case because the case which gave rise to that judgment concerned a new agreement regarding the execution of new works, whereas the present case concerns the same works as those referred to in the 1969 concession contract.

50 According to the Italian Republic, the Commission is wrong to conclude that there is 'a material change to the existing concession' in the present case. According to that Member State, the subject matter of that concession has not changed as compared to that originally defined and the conclusion of the 2009 single agreement resulted from an obligation, introduced in 2006 by regulatory and legislative acts, to include all the contractual terms of each motorway concession in a single legal document, which summarises, revises and represents a novation of the previous contracts. The Italian Republic specifies that it is Decreto-legge n. 262 – Disposizioni urgenti in materia tributaria e finanziaria (Decree-Law No 262 introducing urgent provisions regarding tax and financial matters) of 3 October 2006 (GURI No 230 of 3 October 2006), converted into law, with amendments, by Legge n. 286 (Law No 286) of 24 November 2006 (Ordinary Supplement to GURI No 277 of 28 November 2006) and subsequently amended by Article 1(1030) of Legge n. 296 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (finanziaria 2007) (Law No 296 relating to provisions as regards the annual and pluriannual budget of the State (Finance Law for 2007)) of 27 December 2006 (Ordinary Supplement to GURI No 299 of 27 December 2006) which laid down new provisions in the field of motorway concessions.

51 Consequently, the Italian Republic submits that the Commission is wrong to rely on the provision in the 2009 single agreement under which the parties may not assert any 'right, claim, interest or expectation' on the basis of acts or measures predating the conclusion of that agreement in order to show the lack of continuity with the original concession and that legal relationships prior to 2009 must not be taken into account.

52 The Italian Republic asserts that the 2009 single agreement does not confer any unjustified or additional advantage on the concessionaire. It adds that the tariffs provided for during the period for completion of the investment project had reached a level beyond which the tariff paid by the users would have become socially unsustainable and the infrastructure in question would have had to be abandoned. Consequently, the balance provided for by the 1969 concession contract requires that the termination date of the concession be fixed at the year 2046, which can also be explained by the failure, not attributable to the parties, to complete the project in due time.

53 In the second place, the Italian Republic submits that, given the continuity of the contractual relations which commenced in 1969, Directive 2004/18 is not applicable in the present case.

54 In the third place, and in any event, the Italian Republic maintains that the deferral of the termination date of the concession at issue is justified by the principles of protection of legitimate expectations, respect for contractual obligations (*pacta sunt servanda*) and legal certainty. It submits that those principles require a proper assessment of the economic interest of SAT, a fortiori in a situation which was originally not contrary to EU law. It contends, referring to the judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558, paragraphs 71 to 73), that derogations from the principle of equal treatment may be justified by the need to guarantee contractual balance, in particular from an economic point of view. Further, the Italian Republic maintains that, as they relate to circumstances different from those in the present case, the judgments of 13 April 2010, *Wall* (C-91/08, EU:C:2010:182) and of 5 April 2017, *Borta* (C-298/15, EU:C:2017:266), cannot be transposed to the present case.

Findings of the Court

55 By its action, the Commission requests that the Court declare that the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of Directive 2004/18, on the ground that, by the 2009 single agreement, the concession for the A12 motorway was extended from 31 October 2028 to 31 December 2046, without publication of a contract notice.

56 It is necessary to ascertain whether Directive 2004/18 is applicable to the present case, which is disputed by the Italian Republic, and subsequently, if appropriate, to examine the alleged infringement of those provisions of Directive 2004/18.

Applicability of Directive 2004/18

57 According to the Italian Republic, Directive 2004/18 cannot be applicable to the relationship between the concession-granting authority and the concessionaire resulting from the concession contract concluded in 1969, that is to say, prior to the development of the Court's case-law on public procurement and the adoption of secondary EU law in that area.

58 In that regard, it must be recalled that, according to the case-law of the Court, the principle of equal treatment and the obligation of transparency deriving therefrom preclude, following the award of a public works concession contract, the concession-granting authority and the concessionaire from making amendments to the provisions of their concession contract in such a way that those provisions differ materially in character from those of the original contract. Such will be the case if the proposed amendments would either extend the scope of the public works concession considerably to encompass elements not initially covered or to change the economic balance of that contract in favour of the concessionaire, or if those changes are liable to call into question the award of the public works concession, in the sense that, had such amendments been incorporated in the

documents which had governed the original award procedure, either another tender would have been accepted or other tenderers might have been admitted to that procedure (see, to that effect, judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraph 28 and the case-law cited).

59 Thus, in principle, a substantial amendment of a public concession contract must give rise to a new award procedure for the contract so amended (see, to that effect, judgment of 7 September 2016, *Finn Frogne*, C-549/14, EU:C:2016:634, paragraph 30 and the case-law cited).

60 For that purpose, it must be noted that, in accordance with the Court's case-law, the applicable EU legislation is that in force at the date of that amendment (see, to that effect, judgment of 11 July 2013, *Commission* v *Netherlands*, C-576/10, EU:C:2013:510, paragraph 54). In that regard, the fact that the original concession contract was concluded prior to the adoption of EU rules on the matter is therefore without consequence.

61 In the present case, the Commission claims that the 2009 single agreement contains material changes as compared to the original public works concession at issue and that, accordingly, the failure to publish a contract notice for the purpose of concluding that single agreement constitutes an infringement of certain provisions of Directive 2004/18.

62 Therefore, since it is common ground between the parties that the public works concession at issue and the 2009 single agreement fall within the material scope of Directive 2004/18, the changes made by that single agreement to the contractual relationship between ANAS and SAT may, in principle, be assessed in the light of the provisions of that directive.

Alleged infringement of Directive 2004/18

63 According to the Commission's application, the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of Directive 2004/18, on the ground that the concession for the A12 motorway from Livorno to Civitavecchia was extended by 18 years, until 31 December 2046, whereas under the 1999 contract that concession was due to expire on 31 October 2028.

64 In that regard, it must be noted that, even though the Commission refers, in its reply, to the 2009 single agreement as an 'independent set of rules' and states that it cannot be regarded as a mere updating or revision of a pre-existing concession, the fact remains that it considers that the fixing, in Article 4(1) of the 2009 single agreement, of the termination date of the concession at issue constitutes an 'extension' of the period previously set by the 1999 contract, that 1999 contract therefore being necessary for the interpretation of the 2009 single agreement.

65 As the Advocate General observed in point 46 of her Opinion, the Commission has not challenged the compliance of the 1999 contract with EU law but only that of the 2009 single agreement.

66 As regards the changes made to the contractual relationship between ANAS and SAT by the provisions of the 1999 contract, the Italian Republic submits that that contract distinguished between the section of motorway already open to traffic at the date of conclusion of that contract and the other sections of the A12 motorway, the construction of which had not yet commenced or been completed at that date.

67 That Member State claims that the 1999 contract governed only the operation of the section from Livorno to Cecina, with a length of 36.6 km, open to traffic in 1993 as part of the A12 motorway from Livorno to Civitavecchia, and that the setting of the termination date of the concession at 31 October 2028, by virtue of Article 23(1) of that contract, related to that section only.

68 That position is supported by the wording of Article 2(1) of the 1999 contract, which states that it 'shall govern as between the concession-granting authority and the concessionaire the operation of the 36.6 km section between Livorno and Cecina, open to traffic on 3 July 1993 and forming an integral part of the A12 Livorno-Civitavecchia motorway, the concession for the construction and operation of which was granted to SAT'.

69 That position is also confirmed by Article 2(3) of that contract, which states that 'when the legal and factual conditions for the continuation of the construction programme in respect of which a concession has been granted are met, an addendum shall be concluded to establish a contractual framework for the construction and operation of the two further sections: Cecina-Grosseto and Grosseto-Civitavecchia'.

70 Moreover, it must be added that, as regards those two other sections, it would be illogical to take the view that the parties to the 1999 contract intended to replace the period of validity of the concession, consisting of an indefinite period for construction and opening of the motorway, the duration of which, based on previous experience, was uncertain due to legislative interventions but could be very long, and of a fixed period of 30 years for the operation of the motorway in question, with a fixed concession period of 29 years up to 31 October 2028, encompassing the periods required for both the construction and opening of the motorway and the operation of the concession.

71 It must be noted that the Commission did not call into question, in its reply or at the hearing, the evidence submitted by the Italian Republic with a view to establishing that not only the section from Livorno to Cecina was affected by the extension provided for by the 2009 single agreement but also the sections from Cecina to Grosseto and Grosseto to Civitavecchia.

72 Consequently, the Commission's action must be dismissed in so far as it concerns the sections of the A12 motorway from Cecina to Grosseto and Grosseto to Civitavecchia, since it has not proved, to the requisite legal standard, that the public works concession as regards those sections was extended by 18 years.

73 However, the Commission challenges Article 4(1) of the 2009 single agreement, in the light of the provisions of Directive 2004/18, in so far as that provision fixes the termination date for the entire A12 motorway, therefore also including the section from Livorno to Cecina, at 31 December 2046.

74 The termination date for the concession, as regards that latter section, open to traffic on 3 July 1993 and involving separate management by the concessionaire, should have therefore remained fixed, in accordance with Article 23(1) of the 1999 contract, at 31 October 2028.

75 It is common ground that the change of the termination date of the concession, which was extended to 31 December 2046 by virtue of the 2009 single agreement, provides SAT with a significant additional period of time to operate the section from Livorno to Cecina and that, as that concessionaire receives its remuneration by operating that section, considerably increases its remuneration.

76 That extension of the original duration of that concession by 18 years and 2 months therefore constitutes, by virtue of the principles referred to in paragraph 58 of the present judgment, a material change to the conditions of the existing concession.

77 Therefore, in so far as it extends the concession in respect of the section of the A12 motorway from Livorno to Cecina from 31 October 2028 to 31 December 2046, Article 4(1) of the 2009 single agreement infringes the equal treatment obligation laid down in Article 2 of Directive 2004/18 and the obligation to publish a contract notice laid down in Article 58 of that directive.

78 That finding cannot be called into question by the arguments put forward by the Italian Republic. Those arguments based on the need to maintain the economic balance of the original concession contract between the parties, in so far as they refer to the concession in its entirety, cannot, in any event, be accepted. Moreover, since the 1999 contract concluded between the concession-granting authority and the concessionaire fixed, as regards the section from Livorno to Cecina, the termination date of the concession at 31 October 2028, by virtue of Article 23(1) thereof, it cannot be maintained that for that section, the deferral of that termination date is necessary for the purposes of compliance with the principles of protection of legitimate expectations, respect for contractual obligations (*pacta sunt servanda*) and legal certainty.

79 In the light of all the above considerations, it must be held that, by extending the concession for the section of the Livorno-Civitavecchia A12 motorway between Livorno and Cecina from 31 October 2028 to 31 December 2046, without publishing a contract notice, the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of Directive 2004/18.

80 The action is dismissed as to the remainder.

Costs

81 Under Article 138(1) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

82 In the present case, the Commission and the Italian Republic have applied, respectively, for the other party to be ordered to pay the costs.

83 Under Article 138(3) of the Rules of Procedure, if it appears justified in the circumstances of the case, the Court may order one party, in addition to bearing its own costs, to pay a proportion of the other party's costs. In the present case, since the Commission's action has been upheld only as regards the section of the Livorno-Civitavecchia A12 motorway from Livorno to Cecina, it is appropriate, in accordance with that provision, to order the Commission to bear, in addition to its own costs, three quarters of the costs of the Italian Republic and the latter to bear one quarter of its own costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. **Declares that, by extending the concession for the section of the A12 Livorno-Civitavecchia motorway between Livorno and Cecina (Italy) from 31 October 2028 to 31 December 2046, without publishing a contract notice, the Italian Republic has failed to fulfil its obligations under Articles 2 and 58 of 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, as amended by Commission Regulation (EC) No 1422/2007 of 4 December 2007;**

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission to bear its own costs and to pay three quarters of the costs of the Italian Republic. The Italian Republic is ordered to bear one quarter of its own costs.**

[Signatures]