

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

19 December 2018 (\*)

(Reference for a preliminary ruling — Articles 49 and 56 TFEU — Freedom of establishment and freedom to provide services — Games of chance — Concession for management of the computerised Lotto and other fixed-odds numerical games according to the sole concessionaire model — Restriction — Overriding reasons in the public interest — Proportionality)

In Case C-375/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 11 May 2017, received at the Court on 21 June 2017, in the proceedings

**Stanley International Betting Ltd,**

**Stanleybet Malta ltd.**

v

**Ministero dell'Economia e delle Finanze,**

**Agenzia delle Dogane e dei Monopoli,**

interveners:

**Lottomatica SpA,**

**Lottoitalia Srl,**

THE COURT (Second Chamber),

composed of A. Prechal, President of the Third Chamber, acting as President of the Second Chamber, C. Toader (Rapporteur), and A. Rosas, Judges,

Advocate General: E. Sharpston,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 6 June 2018,

after considering the observations submitted on behalf of:

- Stanley International Betting Ltd, by R. Jacchia, F. Ferraro, A. Terranova and D. Agnello, avvocati,
- Stanleybet Malta ltd., by D. Agnello and M. Mura, avvocati,
- Lottoitalia Srl, by F. Satta, R. Mastroianni, S. Fidanzia, A. Gigliola, R. Baratta and A. Romano, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino and P.G. Marrone, avvocati dello Stato,

- the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents, and P. Vlaemminck, R. Verbeke and J. Van den Bon, advocaten,
- the Portuguese Government, by L. Inez Fernandes, M. Figueiredo, A. Silva Coelho and P. de Sousa Inês, acting as Agents,
- the European Commission, by H. Tserepa-Lacombe and by G. Gattinara and P. Ondrůšek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 September 2018,

gives the following

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 49 and 56 TFEU, of the principles of non-discrimination, transparency and proportionality and 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).
- 2 The request has been made in proceedings between Stanley International Betting Ltd, a company registered in the United Kingdom, and Stanleybet Malta Ltd., its subsidiary established in Malta (together, ‘Stanley’), on the one hand, and the Ministero dell’Economia e delle Finanze (Ministry of Economy and Finance, Italy) and the Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Agency, Italy) (‘the ADM’), on the other, concerning the legality of the procedure for a public procurement contract organised for the purpose of the award, in Italy, of the concession for management of the computerised lottery and other fixed-odds numerical games (‘the Lotto’).

### Legal context

#### *European Union law*

- 3 Recital 1 of Directive 2014/23 states:

‘The absence of clear rules at Union level governing the award of concession contracts gives rise to legal uncertainty and to obstacles to the free provision of services and causes distortions in the functioning of the internal market. ... An adequate, balanced and flexible legal framework for the award of concessions would ensure effective and non-discriminatory access to the market to all Union economic operators and legal certainty, favouring public investments in infrastructures and strategic services to the citizen. Such a legal framework would also afford greater legal certainty to economic operators and could be a basis for and means of further opening up international public procurement markets and boosting world trade. ...’

- 4 Article 51 of that directive, entitled ‘Transposition’, provides in the first phrase of the first sentence of paragraph 1:

‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016.’

- 5 According to Article 54 of that directive, entitled ‘Entry into force’:

‘This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Directive shall not apply to the award of concessions tendered or awarded before 17 April 2014.’

#### *Italian law*

*Law No 528 of 2 August 1982 on the regulation of lotto games and staff working for them*

- 6 Under Article 1 of legge n. 528 — Ordinamento del gioco del lotto e misure per il personale del lotto (Law No 528 on the regulation of lotto games and staff working for them), of 2 August 1982 (GURI No 222, of 13 August 1982), the exercise of the Lotto is reserved to the State, the Lotto service being managed by the ADM.

*Law No 190/2014*

- 7 Article 1, paragraph 653, of legge n. 190 — Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilità 2015) (Law No. 190 on provisions for the formation of the annual and multiannual State budget (Stability Act 2015)), 23 December 2014 (ordinary supplement to GURI No 300 of 29 December 2014, ‘Law No 190/2014’) provides:

‘In view of the expiry of the existing concession, in order to ensure the protection of the public interest in the activity of games [sales], management of the computerised ‘Lotto’ and other fixed-odds numerical games, for their sales, either by means of the concessionaire network ... or remotely, is awarded as a concession, following a call for tender organized by the [ADM], in observance of European and national principles and rules, to a company qualified and experienced in the management or [games] sales, whose head office is located in one of the states of the European Economic Area, and which satisfies the criteria required in terms of moral, technical and economic reliability, chosen through an open, competitive and non-discriminatory selection procedure. The procedure provides for the following essential conditions:

- (a) duration of the nine-year concession, non-renewable;
- (b) selection based on the criterion of the most economically advantageous tender and, for the price component, the basic value of the contract, for tenders in excess of EUR 700 million;
- (c) payment of the price indicated in the tender of the first ranked tenderer in the amount of EUR 350 million at the time of the award in 2015, then EUR 250 million in 2016 at the time when the lottery service is taken over by the successful tenderer, and the balance in 2017, before 30 April of that year;
- (d) the successful tenderer’s ability to use the telecommunications network to supply services, direct or indirect, other than the sales of ‘Lotto’ [games] and other fixed-odd numerical games, provided that the [ADM] considers them compatible with the actual sales;
- (e) remuneration of the service for the concessionaire equal to 6 per cent of value of sales;
- (f) obligation to upgrade the network system and gaming terminals to the highest standards of quality that guarantee the highest degree of security and reliability in accordance with the investment plan that forms an integral part of the technical offer;
- (g) obligation on the tenderer to pay the State on an annual basis the sums which were not in the end invested according to the plan covered in point (f);
- (h) obligation for each competitor to make a payment, on their participation in the selection procedure, in favour of the [ADM] of an amount equal to the remuneration referred to in paragraph 654, with the right to its refund solely for unsuccessful tenderers for the concession.’

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

- 8 It appears from the file before the Court that, in Italy, the lottery is organised by the State under a dual system of concessions, the first dealing with the games sales, entrusted to a plurality of sales outlets on the basis of a multi-concessionaire model, the second for the services of drawing lottery numbers, and the computerised management of the sales network, which was previously awarded directly to Lottomatica SpA.

- 9 Approaching the end of that last award, namely 8 June 2016, the ADM was entrusted with the task of organising the call for tenders for a new concession, the general conditions of which were laid down in Article 1(653) of Law No 190/2014.
- 10 A notice of invitation to tender was published for that purpose in the *Official Journal of the European Union* on 17 December 2015 and in the *Gazzetta ufficiale della Repubblica italiana* on 21 December 2015. The notice set the deadline for the submission of tenders as 16 March 2016 and stated, for the amount of the concession, a sum corresponding to the sales recorded during the year 2014, namely EUR 6 600 000 000.
- 11 In addition to the essential conditions established by the call for tenders, the specifications provided in paragraph 5.3, as a condition of economic and financial standing to be fulfilled by the tenderers, total turnover achieved of at least EUR 100 million for management activities or games sales in the period 2012-2014 or 2013-2015.
- 12 As regards the technical ability requirements, paragraph 5.4(a) of the tender specifications required ‘total sales, in each of the last three closed financial years in the three-year period 2012-2014 or the three-year period 2013-2015, equivalent to at least [EUR 350 million] for sales, in relation to games of the kind played through games terminals’, and stated that ‘[i]n circumstances in which the tenderer has been active in the sector for fewer than three years but for at least 18 months, the value of the sales will be linked proportionally to the actual sales period.’
- 13 Under paragraph 11 of the tender specifications, it was the responsibility of the tenderer to submit an investment plan, an organisational plan and a development plan.
- 14 The economic tender consisted, according to paragraph 12.4 of the specifications, of ‘bids in excess of the minimum amount which is the basic contract value, equal to EUR 700 million’, it being specified that tenders in excess thereof had to be formulated with a minimum amount of EUR 3 million. Paragraph 15.3 of the tender specifications provided that the contract would be awarded on the basis of the best-value-for-money criterion.
- 15 The model concession contract for the management of the Lotto (‘the model contract’) stated in Article 22(1) that ‘upon expiry of the concession, the concessionaire shall transfer to the [ADM], without any burden falling upon the latter and at its request, all of the tangible and intangible assets constituting the network comprising the physical sales outlets, and ownership of the whole computerised system as well, including the availability of premises, equipment, the latter to include the terminals at all of the sales outlets, facilities, structures, programmes, archives and any other items necessary for the complete functioning, management and functionality of the system itself as it results from the last inventory approved by the ADM.’
- 16 Article 30 of that model contract, which defined the grounds for revocation and withdrawal of the concession, stated in paragraph 2:
- ‘ADM, for the purpose of protecting the interests of the public treasury and consumers, withdraws the concession ... also in cases where:
- ...
- (h) any type of offence in relation to which indictment is provided for and which, because of its nature, seriousness, method of commission and connection with the activity for which the concession was awarded, the [ADM] considers such as to preclude the concessionaire possessing the requisite reliability, professionalism and moral quality ...;
- ...
- (k) the concessionaire infringes the rules on the prevention of irregular, unlawful and covert gaming and, in particular, where the concessionaire itself, or a company controlled by or linked to it, wherever located, markets in Italian territory other games comparable to computerised Lotto and

the other fixed-odds numerical games, without possessing the requisite licence, or comparable to other games prohibited under Italian law.

...'

17 By decision of 16 May 2016, the concession was awarded to Lottoitalia Srl, which participated in the selection procedure as part of a temporary consortium comprising of Lottomatica and three other companies.

18 Stanley is active in Italy in the fixed-odds betting industry, by means of operators known as 'data transmission centres' ('DTCs'), which provide sports betting services.

19 Having taken the view that it had been prevented from participating in the tender for the concession for management of the Lotto, Stanley brought before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court of Lazio, Italy) an action for annulment of the acts of the selection procedure, challenging the compatibility with EU law of Article 1(653) of Law No 190/2014 and certain conditions for participation in the call for tenders provided for in the tender specifications and in the model contract.

20 By judgment of 21 April 2016, the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court of Lazio) dismissed Stanley's action.

21 According to that court, Lotto differs significantly from other games because it is the only game in which the State bears the economic risk and which is characterised by the distinction made between the phase of games sales and that of game management. Those differences justify the choice of the sole concessionaire model for management of the Lotto, a model which reduces the costs linked to coordinating the activities of multiple concessionaires and which promotes less competition within the marketplace and, hence, responsible game management.

22 That court took the view that the criteria for participation in the call for tenders were appropriate and proportionate to the subject of the contract, insofar as the statistics showed that the sales of fixed-odd numerical games during the last five years were more than EUR 6 billion a year, generating a turnover for the concessionaire of around EUR 400 million. Moreover, that court specified that at least 15 operators in the sector fulfilled those criteria.

23 Stanley brought an action for that judgment to be varied before the Consiglio di Stato (Council of State, Italy).

24 In support of that action, Stanley challenges the compatibility with EU law of the application to the Lotto, unlike other games, prediction games and betting, of the sole concessionaire model. It submits that the conditions for participation in the tender, in particular the basic contract value, and the cases which might lead to the withdrawal of the concession were excessive and constituted a means of dissuasion from participation. It claims that the gratuitous devolution of the network, at the end of the concession, to ADM is contrary to the case-law resulting from the judgment of 28 January 2016, *Laezza* (C-375/14, EU:C:2016:60).

25 Taking the view that the dispute in the main proceedings raises a question of the interpretation of EU law to which the case-law does not, as it stands, provide an answer, the national court considers it necessary to make a reference to the Court of Justice in that regard.

26 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must EU law — in particular, the right of establishment and the freedom to provide services, and the principles of non-discrimination, transparency, freedom of competition, proportionality and consistency — be interpreted as precluding rules, such as those laid down by Article 1, paragraph 653, of Law [No 190/2014] and the relevant implementing acts that provide for an exclusive *mono-concessionaire* model for management of the Lotto, but not for other games, prediction games and betting?

- (2) Must EU law — in particular, the right of establishment, the freedom to provide services and [Directive 2014/23], and the principles of non-discrimination, transparency, freedom of competition, proportionality and consistency — be interpreted as precluding a concession notice that stipulates a much higher basic contract value unjustified in relation to the requirements concerning economic and financial standing and technical and organisational ability, of the type set out in paragraphs 5.3, 5.4, 11, 12.4 and 15.3 of the concession documents for the award of the Lotto concession?
- (3) Must EU law — in particular, the right of establishment, the freedom to provide services and [Directive 2014/23], and the principles of non-discrimination, transparency, freedom of competition, proportionality and consistency — be interpreted as precluding rules that impose a de facto choice between being awarded a new concession and continuing to exercise the freedom to provide various betting services on a cross-border basis, a choice of the kind that results from Article 30 of the model contract, the effect being that the decision to participate in the tender for the award of the new concession would involve abandoning the cross-border activity, even though the legality of that activity has on several occasions been recognised by the [Court]?’

## Consideration of the questions referred

### *Admissibility*

- 27 Lottoitalia and the Italian Government submit that the reference for a preliminary ruling must be declared inadmissible in so far as the order for reference merely reproduces the questions proposed by Stanley, without substantiating either the reasons which led the national court to refer questions to the Court or the need for these.
- 28 In that regard, it should be borne in mind that, according to settled case-law, questions on the interpretation of EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 8 September 2016, *Politanò*, C-225/15, EU:C:2016:645, paragraph 22 and the case-law cited).
- 29 According to settled case-law, the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for the national court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 22 January 2015, *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 27 and the case-law cited).
- 30 In the present case, the reference for a preliminary ruling sufficiently defines the legal and factual context of the dispute in the main proceedings. In addition, the information provided by the referring court as to the relevance of the questions referred for the purpose of ruling on that dispute makes it possible to assess the scope of those questions and to provide a useful answer to those questions, which the written observations submitted by the Belgian and Portuguese Governments also confirm.
- 31 Moreover, as stated in paragraph 3 of the recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2018, C 275, p. 1) the jurisdiction of the Court of Justice to give a preliminary ruling on the interpretation or validity of EU law is exercised exclusively on the initiative of the national courts and tribunals, whether or not the parties to the main proceedings have expressed the wish that a question be referred to the Court. In so far as it is called upon to assume responsibility for the subsequent judicial decision, it is for the national court before which a dispute has been brought — and for that court or tribunal alone — to determine, in the light of the particular circumstances of each case, both the need for a request for a preliminary ruling in order to enable it to deliver its judgment and the relevance of the questions which it submits to the Court.

32 In those circumstances, the reference for a preliminary ruling is admissible.

### *Substance*

33 By its three questions, the referring court questions, in essence, the compatibility of the national rules at issue in the main proceedings and of certain provisions of the relevant implementing acts with Articles 49 and 56 TFEU and the principles of non-discrimination, transparency and proportionality and with the provisions of Directive 2014/23.

### *Temporal applicability of Directive 2014/23*

34 As a preliminary point, it should be observed that, according to settled case-law, established in the field of public procurement and applicable by analogy as regards service concessions, the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time (see, by analogy, judgment of 7 April 2016, *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83 and the case-law cited).

35 In the present case, the invitation to tender at issue in the main proceedings was published in the *Official Journal of the European Union* on 17 December 2015, that is before the expiry on 18 April 2016 of the period for the transposition of Directive 2014/23, without it being otherwise apparent, as the Advocate General stated in point 30 of her Opinion, that such transposition has already been carried out in national law at the time of that publication.

36 In those circumstances, Directive 2014/23 is not applicable *ratione temporis* to the case in the main proceedings.

### *The first question*

37 By its first question, the national court seeks, in essence, to ascertain whether Articles 49 and 56 TFEU must be interpreted as precluding national rules, such as those at issue in the main proceedings, which provide, for the concession for management of the Lotto, a sole concessionaire model, unlike other games, prediction games and betting, to which a multiple concessionaire model applies.

38 As the Court has repeatedly held, legislation of a Member State, such as that at issue in the main proceedings, which makes the exercise of an economic activity subject to a licensing requirement and which specifies situations in which the licence is to be withdrawn, constitutes an obstacle to the freedoms guaranteed in Articles 56 TFEU and 10 TFEU (judgments of 16 February 2012, *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraph 70, and of 22 January 2015, *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 46).

39 That is the case where a sole concessionaire or multiple concessionaire model is used. Therefore, as the Advocate General pointed out in point 43 of her Opinion, the decisions to make the activity in question subject to obtaining a concession and to following a public procurement procedure in accordance with the sole concessionaire model must be assessed having regard to those articles.

40 For the purpose of that assessment, it should be recalled that, in the absence of harmonisation in the field of games of chance at EU level, the Member States remain free to set the objectives of their policies in this respect, while enjoying a wide discretion as regards choosing the level of consumer protection and the preservation of order in society which they deem the most appropriate, the restrictive measures that the Member States impose must satisfy the conditions laid down in the case-law of the Court as regards inter alia their justification by overriding reasons in the general interest and their proportionality (see, to that effect, judgment of 8 September 2016, *Politanò*, C-225/15, EU:C:2016:645, paragraphs 39 and 40 and the case-law cited).

41 Consequently it is necessary to determine whether such a restriction may be allowed as a derogation, on grounds of public policy, public security or public health, as expressly provided for under Articles 51 and 52 TFEU, which are also applicable in the area of freedom to provide services by

virtue of Article 62 TFEU, or justified, in accordance with the case-law of the Court, by overriding reasons in the public interest (judgment of 22 January 2015, *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 47 and the case-law cited).

- 42 In the present case, as regards the objectives pursued by the rules at issue in the main proceedings, the Italian Government maintains that the choice of a sole concessionaire model was, in particular, a response to the need to channel the game into a controlled system and to an approach of responsible management by restricting competition within that particular market. The Italian Government adds that reasons of a technical nature also made such a choice necessary, since the alternative model, namely the multi-concessionaire model, would have required a dual level of control by means of an entity having to coordinate and unify the activities of different concessionaires, and that that structure would have led to increased costs.
- 43 In this respect, as the Court has previously pointed out in its case-law on games of chance, consumer protection and the prevention of both fraud and incitement to squander money on gambling can be categorised as overriding reasons of public interest justifying restrictions on fundamental freedoms deriving from Articles 49 and 56 TFEU (see, to that effect, judgment of 22 January 2015, *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, point 48 and the case-law cited).
- 44 In contrast, as is also clear from the Court's case-law, administrative inconvenience as well as economic reasons do not constitute grounds that can justify a restriction on a fundamental freedom guaranteed by EU law (see, to that effect, judgment of 30 June 2011, *Zeturf*, C-212/08, EU:C:2011:437, paragraphs 48 and 52 and the case-law cited).
- 45 However, the identification of the objectives in fact pursued by the national legislation is, in the context of a case referred to the Court under Article 267 TFEU, within the jurisdiction of the referring court (judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 47 and the case-law cited).
- 46 It is also for the referring court, while taking account of the information provided by the Court, to determine whether the restrictions imposed by the Member State concerned satisfy the conditions laid down in the Court's case-law as regards their proportionality (judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 48 and the case-law cited).
- 47 In the present case, if one of the objectives of the rules at issue in the main proceedings is, as the Italian Government has stated, to reduce competition in the particular market for the management of the Lotto, then the sole concessionaire model appears to be able to achieve that objective.
- 48 It follows from the Court's case-law that, unlike the introduction of free, undistorted competition in a traditional market, the presence of that kind of competition in the very specific market of games of chance, that is to say, between several operators authorised to run the same games of chance, is liable to have detrimental effects, owing to the fact that those operators would be led to compete with each other in inventiveness to make what they offer more attractive than what their competitors offer, and thereby to increase consumers' expenditure on gaming and the risks of their addiction (judgment of 30 April 2014, *Pfleger and Others*, C-390/12, EU:C:2014:281, paragraph 46 and the case-law cited).
- 49 Moreover, since the choice of the methods of organisation and control of the activities of managing and practicing games of chance falls to the national authorities within the limits of their discretion, the fact that a Member State has chosen for the concession for management of the Lotto a system with a sole concessionaire, unlike the prevailing situation in the same Member State, as regards the organisation of the market for other games of chance, cannot, in itself, have an effect on the assessment of the proportionality of the rules at issue in the main proceedings, which must be assessed solely in the light of the objectives which they pursue.
- 50 Such a divergence in legal regimes is not, in itself, capable of affecting the suitability of such a sole concessionaire model for achieving the objective of preventing citizens from being incited to squander money on gambling and of combating addiction to the latter, for which it was established (see, by analogy, judgment of 28 February 2018, *Sporting Odds*, C-3/17, EU:C:2018:130, paragraph 23 and the case-law cited).



51 However, a system of dual organisation of the market for games of chance may be contrary to Article 56 TFEU if it is found that the competent authorities pursue policies seeking to encourage participation in games of chance other than those covered by the sole concessionaire model rather than to reduce opportunities for gambling and to limit activities in that area in a consistent and systematic manner so that the aim of preventing incitement to squander money on gambling and of combating addiction to the latter, which was at the root of the establishment of the sole concessionaire model, can no longer be effectively pursued by means of the sole concessionaire model (see, by analogy, judgment of 28 February 2018, *Sporting Odds*, C-3/17, EU:C:2018:130, paragraph 24 and the case-law cited).

52 Such a dual system, on the other hand, is compatible with Article 56 TFEU, since the referring court establishes that the rules restricting the freedom to provide services actually pursued, in a consistent and systematic manner, the objectives relied on by the Member State concerned (see, to that effect, judgment of 28 February 2018, *Sporting Odds*, C-3/17, EU:C:2018:130, paragraph 33).

53 Having regard to all of those considerations, the answer to the first question must be that Articles 49 and 56 TFEU must be interpreted as not precluding national rules, such as those in the case in the main proceedings, which provide, for the concession for management of the Lotto, a sole concessionaire model, unlike other games, prediction games and betting, to which a multiple concessionaire model applies, provided that the national court establishes that the national rules actually pursued, in a consistent and systematic manner, the objectives relied on by the Member State concerned.

#### *The second question*

54 By the second question, the national court asks, in essence, whether Articles 49 and 56 TFEU and the principles of non-discrimination, transparency and proportionality must be interpreted as meaning that they preclude national rules and the relevant implementing acts, such as those at issue in the main proceedings, which provide, for the concession for management of the Lotto, a high contract basic value relating to other requirements concerning economic and financial standing and technical and organisational ability.

55 In that regard, it must be observed that both the requirement of a concession contract and the conditions for participation set out in the relevant invitation to tender, which include the basic contract value, are capable of making the exercise of the freedoms guaranteed in Articles 49 and 56 TFEU less attractive, and must therefore be justified and satisfy the requirements arising from the principle of proportionality.

56 It is also settled case-law that, when awarding licences such as that at issue in the main proceedings, the licensing authority has an obligation of transparency consisting inter alia in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the licences to be opened up to competition and the impartiality of the procurement procedures to be reviewed (judgment of 16 February 2012, *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraph 72 and the case-law cited).

57 In that context, the purpose underlying the principle of transparency, which is a corollary of the principle of equality, is essentially to ensure that any interested operator may take the decision to tender for contracts on the basis of all the relevant information and to preclude any risk of favouritism or arbitrariness on the part of the licensing authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner to, first, make it possible for all reasonably informed tenderers exercising ordinary care to understand their exact significance and interpret them in the same way and, second, to circumscribe the contracting authority's discretion and enable it to ascertain effectively whether the tenders submitted satisfy the criteria applying to the relevant procedure (judgment of 16 February 2012, *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraph 73 and the case-law cited).

58 The contract value constitutes an essential element of information which, in observance of the principle of transparency, must be included, at least as an estimate, in the call for tenders. As noted in essence by the Advocate General in point 59 of her Opinion, the estimated contract value must, moreover, be based on objective criteria.

- 59 In the present case, if it is true, as Stanley points out, that the basic contract value at issue in the main proceedings amounted, in accordance with Article 1(653)(b) of Law No 190/2014, to EUR 700 million, which is approximately double the economic and financial standing requirement laid down in paragraph 5.3 of the tender specifications, it is important to note that the latter condition, which referred only to the sales which the economic operator had achieved in the past, is not such as to lead to inferences as to the objective nature of the estimated contract value.
- 60 As the Advocate General stated in points 61 and 62 of her Opinion, that value must also be assessed in relation to the very high amount of the concession, namely EUR 6 600 million a year, and to the annual remuneration of the concessionaire's service equal to 6% of sales, that is around EUR 400 million, as well as the possibility for prospective tenderers to participate in the procedure as a collective. Moreover, on the latter point, it is clear from the judgment of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court of Lazio) of 21 April 2016 that at least 15 operators in the sector fulfilled this criterion in order to participate in the call for tenders.
- 61 In addition, Article 1(653)(c) of that law provided for a staggered payment of the price indicated in the tender of the first-ranked tenderer in three instalments during the years 2015 to 2017.
- 62 In view of the foregoing, it appears that the basic contract value at issue in the main proceedings has been formulated in a clear, precise and unambiguous manner and that it appears to be objectively justified.
- 63 It should nevertheless be added that, as is clear from the case-law cited in paragraph 46 of the present judgment, the final assessment of the proportionality of the national rules at issue in the main proceedings is a matter for the national court. The same applies to the conformity of that legislation with the principle of transparency.
- 64 In the light of those considerations, the answer to the second question must be that Articles 49 and 56 TFEU and the principles of non-discrimination, transparency and proportionality must be interpreted as meaning that they do not preclude national rules and the relevant implementing acts, such as those at issue in the case in the main proceedings, which provide, for the concession for management of the Lotto, a high basic contract value, provided that that value is formulated in a clear, precise and unambiguous manner and that it is objectively justified, which is for the national court to determine.

### *The third question*

- 65 The third question raised by the referring court appears to rest on the assumption that the Court has recognised in its case-law the lawfulness of the management of activities relating to games of chance under the freedom to provide services by means of DTCs.
- 66 In that regard, it should be noted that the Court has validated the use of the system of concessions in the sector of games of chance, considering that it may constitute an efficient mechanism enabling operators active in the sector of games of chance to be controlled with a view to preventing the exploitation of those activities for criminal or fraudulent purposes (see, to that effect, judgment of 12 September 2013, *Biasci and Others*, C-660/11 and C-8/12, EU:C:2013:550, paragraph 24 and the case-law cited).
- 67 Although the Court found that certain provisions of the calls for tenders for the award of concession contracts for services related to games of chance were incompatible with EU law, it did not rule on the legality of the management of activities linked to games of chance under the rules on the freedom to provide services by means of DTCs as such.
- 68 In view of that clarification, it is appropriate to reword the third question in the sense that, thereby, the national court asks, in essence, whether Articles 49 and 56 TFEU and the principles of non-discrimination, transparency and proportionality must be interpreted as precluding a provision, such as that at issue in the main proceedings, contained in a model concession contract relating to a call for tenders and which provide for the withdrawal of the concession for management of the Lotto:

- for any type of offence in relation to which indictment is provided for and which, because of its nature, seriousness, method of commission and connection with the activity for which the concession was awarded, the contracting authority takes the view that it is such as to preclude the concessionaire possessing the requisite reliability, professionalism and moral quality;
  - or if the concessionaire infringes the rules on the prevention of irregular, unlawful and covert gaming and, in particular, where the concessionaire itself, or a company controlled by or linked to it, wherever located, markets other games comparable to the Lotto without possessing the requisite licence.
- 69 As was noted in paragraphs 38 to 40 of the present judgment, national legislation which makes the exercise of an economic activity subject to a licensing requirement and which specifies situations in which the concession is to be withdrawn constitutes an obstacle to the freedoms guaranteed by Articles 49 and 56 TFEU. Withdrawal clauses must, therefore, in order to be declared compatible with those articles, be justified by overriding reasons in the public interest and satisfy the proportionality test. Those clauses must, moreover, respect the principle of transparency reiterated in paragraphs 56 and 57 of the present judgment.
- 70 It is in the light of those considerations that the third question referred should be answered.
- 71 As regards, in the first place, the withdrawal clause of the concession contract by reason of the referral to a court provided for in Article 30(2)(h) of the model contract, it is clear from the case-law of the Court that, in the specific field of games of chance, the exclusion of an economic operator by reason of the commission of an offence in relation to the subject matter of the activity granted as a concession may, in principle, be considered to be a measure justified by the objective of the fight against crime (see, to that effect, judgment of 16 February 2012, *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraph 76 and the case-law cited).
- 72 However, the withdrawal of a concession being a particularly serious measure for the concessionaire, the latter must be able to assess with certainty the likelihood of such a penalty being imposed on it. To that end, it is necessary that the circumstances in which that penalty can be applied be formulated in a clear, precise and unambiguous manner (see, to that effect, judgment of 16 February 2012, *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraphs 77 and 78).
- 73 In the present case, the clause in Article 30(2)(h) of the model contract appears, subject to the assessments of the referring court, to meet those requirements.
- 74 It must be observed that, first, as the Advocate General stated in point 73 of her Opinion, that clause succinctly but clearly describes the conditions that must be fulfilled before the ADM decides to declare the withdrawal, so that a reasonably well-informed and normally diligent tenderer exercising ordinary care would not have difficulty in understanding its scope and application.
- 75 Second, the conditions for referral to a court being governed by Italian law by the provisions of the Code of Criminal Procedure, those conditions are, therefore, accessible and predictable for all operators.
- 76 As regards whether that clause also satisfies the requirements of the principle of proportionality, it is settled case-law that restrictions imposed by national legislation must not go beyond what is necessary to attain the end in view (judgment of 6 November 2003, *Gambelli and Others*, C-243/01, EU:C:2003:597, paragraph 72). Therefore, although the contracting authorities must, in principle, be able to rule on the withdrawal of a concession contract in the event that the reliability of the concessionaire is called into question, in particular, because of the commission of an offence related to the subject matter of the activity for which the concession is granted, that option must nevertheless be strictly limited so that it is proportionate to the objective of the fight against crime.
- 77 In the present case, the discretion available to the ADM in order to withdraw the concession contract on the basis of the clause provided for in Article 30(2)(h) of the concession model is subject to a double condition. First, withdrawal requires the prior intervention of a judicial authority independent of the contracting authority, which, following a request by the public prosecutor, issues an indictment

based on sufficiently reliable evidence gathered in the context of a criminal investigation. Second, withdrawal assumes that the offence committed is related to the subject matter of the activity for which the concession was granted.

- 78 In the light of the foregoing, a clause such as that contained in Article 30(2)(h) of the model contract does not appear to go beyond what is necessary to achieve the objective pursued, namely the fight against crime, which is, nevertheless, for the national court to determine.
- 79 That conclusion is not weakened by paragraph 81 of the judgment of 16 February 2012, *Costa and Cifone* (C-72/10 and C-77/10, EU:C:2012:80), according to which an exclusion of the contract by the withdrawal of the concession should, in principle, be considered proportionate to the objective of combating crime only if it is based on a judgment having the force of *res judicata* and concerns a sufficiently serious offence.
- 80 Indeed, if, in principle, withdrawal occurs, automatically, when a judgment having the force of *res judicata* has been pronounced because of the commission of an offence in connection with the subject matter of the activity for which the concession was granted, that fact does not exclude the possibility of conferring on the contracting authority the power to pronounce the withdrawal in the absence of a final judgment under conditions strictly regulated by law.
- 81 As regards, in the second place, the withdrawal clause provided for in Article 30(2)(k) of the model contract, the prohibition on marketing in Italy other games comparable to Lotto without having obtained the requisite licence therefor, or other games prohibited by the Italian law referred to therein also constitutes a measure intended to combat irregular gambling, which certainly constitutes a legitimate objective.
- 82 Subject to the determination which it is for the national court to carry out, the terms of that clause appear to be drafted with a sufficient degree of clarity. Similarly, such a clause appears appropriate to achieve the objective pursued in the present case without exceeding what is necessary to achieve it.
- 83 It should be added, however, that in examining the proportionality of those clauses, the referring court must also take into account the fact that the withdrawal of the concession contract of an economic operator cannot be regarded as proportionate in the case where the national legislation provides neither an effective legal remedy nor compensation for any loss suffered in the event that such withdrawal subsequently proves to be unjustified (see, by analogy, judgment of 16 February 2012, *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, paragraph 81).
- 84 Thus, in so far as an operator which has actually supplied services and is removed from the contract because of the withdrawal clauses in dispute, or a tenderer who is subject to a withdrawal decision on the basis of those clauses has an effective right of appeal against such removal or withdrawal, and that the interested party may obtain compensation for any harm suffered if such removal or withdrawal subsequently proves to be unjustified, including infringement of EU law, such clauses must be considered to satisfy the requirements deriving from the principle of proportionality.
- 85 In the light of those considerations, the answer to the third question is that Articles 49 and 56 TFEU must be interpreted as not precluding a provision, such as that at issue in the main proceedings, contained in a model concession contract relating to a call for tenders and which provides for the withdrawal of the concession for management of the Lotto:
- for any type of offence in relation to which indictment is provided for and which, because of its nature, seriousness, method of commission and connection with the activity for which the concession was awarded, the contracting authority takes the view that it is such as to preclude the concessionaire possessing the requisite reliability, professionalism and moral quality,
  - or if the concessionaire infringes the rules on the prevention of irregular, unlawful and covert gaming and, in particular, where the concessionaire itself, or a company controlled by or linked to it, wherever located, markets other games comparable to the Lotto without possessing the requisite licence,

provided that those clauses are justified and are proved to be proportionate to the objective pursued and comply with the principle of transparency, which is for the national court to determine in the light of the guidance set out in the present judgment.

## Costs

86 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 (Second Chamber) hereby rules:

1. **Articles 49 and 56 TFEU must be interpreted as not precluding national rules, such as those at issue in the main proceedings, which provide, for the concession for management of the computerised Lotto and other fixed-odds numerical games, a sole concessionaire model, unlike other games, prediction games and betting, to which a multiple concessionaire model applies, provided that the national court establishes that the national rules actually pursue, in a consistent and systematic manner, the objectives relied on by the Member State concerned.**
2. **Articles 49 and 56 TFEU and the principles of non-discrimination, transparency and proportionality must be interpreted as meaning that they do not preclude national rules and the relevant implementing acts, such as those at issue in the case in the main proceedings, which provide, for the concession for management of the computerised Lotto and other fixed-odds numerical games, a high basic contract value, provided that that value is formulated in a clear, precise and unambiguous manner and that it is objectively justified, which is for the national court to determine.**
3. **Articles 49 and 56 TFEU must be interpreted as not precluding a provision, such as that at issue in the main proceedings, contained in a model concession contract relating to a call for tenders and which provides for the withdrawal of the concession for management of the computerised Lotto and other fixed-odds numerical games:**
  - **for any type of offence in relation to which indictment is provided for and which, because of its nature, seriousness, method of commission and connection with the activity for which the concession was awarded, the contracting authority takes the view that it is such as to preclude the concessionaire possessing the requisite reliability, professionalism and moral quality,**
  - **or if the concessionaire infringes the rules on the prevention of irregular, unlawful and covert gaming and, in particular, where the concessionaire itself, or a company controlled by or linked to it, wherever located, markets other games comparable to the computerised Lotto and other fixed-odds numerical games, without possessing the requisite licence,**

**provided that those clauses are justified and are proved to be proportionate to the objective pursued and comply with the principle of transparency, which is for the national court to determine in the light of the guidance set out in the present judgment.**

[Signatures]

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\* Language of the case: Italian.



\* Lingua processuale: l'italiano.

