ECLI:EU:C:2023:301

Provisional text

JUDGMENT OF THE COURT (Third Chamber)

20 April 2023 (*)

(Reference for a preliminary ruling – Services in the internal market – Directive 2006/123/EC – Assessment of validity – Legal basis – Articles 47, 55 and 94 EC – Interpretation – Article 12(1) and (2) of that directive – Direct effect – Unconditional and sufficiently precise nature of the obligation for Member States to apply an impartial and transparent selection procedure to potential candidates and of the prohibition on automatic renewal of an authorisation granted for a given activity – National legislation providing for the automatic extension of concessions for the occupation of State-owned maritime property)

In Case C-348/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Puglia, Italy), made by decision of 11 May 2022, received at the Court on 30 May 2022, in the proceedings

Autorità Garante della Concorrenza e del Mercato

v

Comune di Ginosa,

other parties:

L'Angolino Soc. coop.,

Lido Orsa Minore di AB,

La Capannina Srl,

Sud Platinum Srl,

Lido Zanzibar Srl,

Poseidone Srl,

Lg Srls,

Lido Franco di GH & C. Snc,

Lido Centrale Piccola Soc. coop. arl,

Bagno Cesena Srls,

E.T. Edilizia e Turismo Srl,

Bluserena SpA,

Associazione Pro Loco 'Luigi Strada',

M2g Raw Materials SpA,

JF,

D.M.D. Snc di CD & C. Snc,

Ro.Mat., di MN & Co Snc,

Perla dello Jonio Srl,

Ditta Individuale EF,

Associazione Dopolavoro Ferroviario Sez. Marina di Ginosa,

Al Capricio Bis di RS,

LB,

Sib Sindacato Italiano Balneari,

Federazione Imprese Demaniali,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, M. Safjan, N. Piçarra, N. Jääskinen and M. Gavalec (Rapporteur), Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Autorità Garante della Concorrenza e del Mercato and the Italian Government, by G. Palmieri, acting as Agent, and by P. Palmieri, avvocato dello Stato,

– the Comune di Ginosa, by G. Misserini, avvocato,

– Sud Platinum Srl, Lido Zanzibar Srl, Poseidone Srl, Lg Srls and E.T. Edilizia e Turismo Srl, by I. Loiodice, N. Maellaro and F. Mazzella, avvocati,

– Sib Sindacato Italiano Balneari, by A. Capacchione, S. Frandi and B. Ravenna, avvocati,

– the Netherlands Government, by M.K. Bulterman and A. Hanje, acting as Agents,

– the Finnish Government, by A. Laine and H. Leppo, acting as Agents,

– the European Parliament, by M. Menegatti and L. Stefani, acting as Agents,

– the Council of the European Union, by A.-L. Meyer and S. Scarpa Ferraglio, acting as Agents,

– the European Commission, by L. Armati, V. Di Bucci, L. Malferrari and M. Mataija, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the validity of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36), as well as the interpretation of Article 12 of that directive and of Articles 49 and 115 TFEU.

2 The request has been made in proceedings between the Autorità Garante della Concorrenza e del Mercato (Competition and Markets Authority, Italy) (‘the AGCM’) and the Comune di Ginosa (Municipality of Ginosa, Italy) concerning the latter’s decision to extend, in its territory, concessions for the occupation of State-owned maritime property until 31 December 2033.

Legal context

European Union law

Primary law

3 Article 47 EC was in Chapter 2 of Title III of the EC Treaty, entitled ‘Right of establishment’, and provided, in paragraph 2 thereof:

‘[In order to make it easier for persons to take up and pursue activities as self-employed persons], the Council [of the European Union] shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. The Council, acting unanimously throughout the procedure referred to in Article 251, shall decide on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect

to training and conditions of access for natural persons. In other cases the Council shall act by qualified majority.’

4 Article 55 EC was in Chapter 3 of Title III of the EC Treaty, entitled ‘Services’, and was worded as follows:

‘The provisions of Articles 45 to 48 shall apply to the matters covered by this chapter.’

5 Article 94 EC, to which, in essence, Article 115 TFEU corresponds, provided:

‘The Council shall, acting unanimously on a proposal from the [European] Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.’

Directive 2006/123

6 Recitals 1, 5, 12, 64 and 116 of Directive 2006/123 state:

‘(1) … The elimination of barriers to the development of service activities between Member States is essential in order to strengthen the integration of the peoples of Europe and to promote balanced and sustainable economic and social progress. …

…

(5) It is therefore necessary to remove barriers to the freedom of establishment for providers in Member States and barriers to the free movement of services as between Member States and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of those two fundamental freedoms of the [EC] Treaty. …

…

(12) This Directive aims at creating a legal framework to ensure the freedom of establishment and the free movement of services between the Member States …

…

(64) In order to establish a genuine internal market for services, it is necessary to abolish any restrictions on the freedom of establishment and the free movement of services which are still enshrined in the laws of certain Member States and which are incompatible with Articles 43 and 49 [EC] respectively. …

…

(116) Since the objectives of this Directive, namely the elimination of barriers to the freedom of establishment for providers in the Member States and to the free provision of services between Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 [EC]. …’

7 Under Article 1(1) of that directive:

‘This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.’

8 Article 12 of that directive, entitled ‘Selection from among several candidates’, is worded as follows:

‘1. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity, Member States shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.

2. In the cases referred to in paragraph 1, authorisation shall be granted for an appropriate limited period and may not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider.

3. Subject to paragraph 1 and to Articles 9 and 10, Member States may take into account, in establishing the rules for the selection procedure, considerations of public health, social policy objectives, the health and safety of employees or self-employed persons, the protection of the environment, the preservation of cultural heritage and other overriding reasons relating to the public interest, in conformity with Community law.’

9 Article 44 of Directive 2006/123, entitled ‘Transposition’, provides, in the first subparagraph of paragraph 1 thereof:

‘Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 28 December 2009.’

Italian law

The Shipping Code

10 Article 37 of the Codice della Navigazione (Shipping Code), approved by regio decreto n. 327 (Royal Decree No 327) of 30 March 1942 (GURI No 93 of 18 April 1942), provided for a procedure for the comparative assessment of candidates only in the event that several applications for the grant of a concession were submitted in respect of the same State-owned property. It followed, however, from the second sentence of the second paragraph of that Article 37 that a preferential right had to be granted to the holder of the concession, which thus enjoyed a right of ‘continuation’ or ‘renewal’.

Decree-Law No 194/2009

11 Article 1(18) of decreto-legge n. 194 – Proroga di termini previsti da disposizioni legislative (Decree-Law No 194 on the extension of time limits laid down by legislative provisions) of 30 December 2009 (GURI No 302 of 30 December 2009), converted into law, with amendments, by legge n. 25 (Law No 25) of 26 February 2010 (Ordinary Supplement No 39 to GURI No 48 of 27 February 2010) (‘Decree-Law No 194/2009’), provided for an extension of the duration of concessions of State-owned maritime property used for touristic and recreational purposes existing on the date on which that decree-law entered into force until 31 December 2015. That extension

was subsequently extended until 31 December 2020 by Article 34k of decreto-legge n. 179 – Ulteriori misure urgenti per la crescita del Paese (Decree-Law No 179 laying down further urgent measures for the growth of the country) of 18 October 2012 (Ordinary Supplement No 194 to GURI No 245 of 19 October 2012), converted into law, with amendments, by legge n. 221 (Law No 221) of 17 December 2012 (Ordinary Supplement No 208 to GURI No 294 of 18 December 2012). In the version applicable to the dispute in the main proceedings, Article 1(18) of Decree-Law No 194/2009 provides, inter alia:

'… during the procedure for the review of the legal framework for the grant of concessions of State-owned maritime, lakeside and waterway property used for touristic and recreational purposes, … and with a view to the abolition of the preferential right laid down in the second sentence of the second paragraph of Article 37 of the Shipping Code, the duration of concessions existing at the date of entry into force of the present decree … and due to expire at the latest on 31 December 2018 shall be extended until 31 December 2020 …'

Legislative Decree No 59 of 26 March 2010

12 Decreto legislativo n. 59 – Attuazione della direttiva 2006/123/CE relativa ai servizi nel mercato interno (Legislative Decree No 59 implementing Directive 2006/123/EC on services in the internal market) of 26 March 2010 (Ordinary Supplement No 75 to GURI No 94 of 23 April 2010), which transposes Directive 2006/123 into Italian law, provides, in Article 16 thereof:

'1. In the event that the number of authorisations available for a given activity involving the provision of services is limited for reasons connected with the scarcity of natural resources or technical capacity available, the competent authorities shall adopt a procedure for selection from among the potential candidates and ensure that the criteria and rules designed to guarantee that the procedure is impartial are determined in advance and published in accordance with the formal requirements laid down in their own rules.

…

4. In the cases referred to in paragraph 1, the authorisation shall be granted for a limited period and cannot be renewed automatically or confer any advantage on a provider whose authorisation is about to expire or on any other person, even if justified by reason of particular links with the former.

…'

Law No 145/2018

13 Article 1(675) to (680) of legge n. 145 – Bilancio di previsione dello Stato per l'anno finanziario 2019 e bilancio pluriennale per il triennio 2019-2021 (Law No 145 on the estimated State budget for the 2019 financial year and the multiannual budget for the three-year period from 2019 to 2021 inclusive) of 30 December 2018 (Ordinary Supplement No 62 to GURI No 302 of 31 December 2018) ('Law No 145/2018') required the competent authorities to carry out, within two years, a series of preliminary tasks necessary for preparing the reform of concessions for the occupation of State-owned maritime property, such as mapping the coastline, identifying existing concessions and the various types of structures existing on State-owned property, and identifying the investments made, the depreciation periods, the fees and the duration of the concessions.

14 Article 1(682) and (683) provides:

‘682. The concessions … which are in existence on the date of entry into force of this Law shall be valid for a period of 15 years from the date of entry into force of this Law …

683. In order to ensure the protection and conservation of the Italian coasts granted under concession, as fundamental touristic resources of the country, and to protect employment and the income of undertakings that are in serious difficulty owing to the damage caused by climate change and by the extraordinary disasters resulting therefrom, the concessions referred to in paragraph 682, which were in existence on the date of entry into force of [Decree-Law No 194/2009], and concessions granted after that date … shall be valid for a period of 15 years from the date of entry into force of this Law …’

Decree Law No 34 of 19 May 2020

15 Article 182(2) of decreto-legge n. 34 – Misure urgenti in materia di salute, sostegno al lavoro e all’economia, nonche’ di politiche sociali conesse all’emergenza epidemiologica da COVID-19 (Decree-Law No 34 on urgent measures in the field of health, support for work and the economy, and social policies following the epidemiological situation linked to COVID-19) of 19 May 2020 (Ordinary Supplement No 21 to GURI No 128 of 19 May 2020), converted into law, with amendments, by legge n. 77 (Law No 77) of 17 July 2020 (Ordinary Supplement No 25 to GURI No 180 of 18 July 2020), provides:

‘Without prejudice to the provisions regarding concessionaires laid down in Article 1(682) et seq. of [Law No 145/2018], for the purposes of reviving the tourism sector and in order to limit the direct and indirect damage caused by the epidemiological emergency linked to COVID-19, the competent authorities may not initiate or continue, with regard to concessionaires which intend to continue their activity through the use of maritime, lakeside and waterway property, the administrative procedures for the devolution of immovable property, referred to in Article 49 of the Shipping Code, or for the grant or award, by public tendering procedures, of areas subject to concessions on the date of entry into force of the Law converting this Decree. …’

Law No 118/2022

16 Legge n. 118 – Legge annuale per il mercato e la concorrenza (Law No 118, the Annual Law on the market and competition) of 5 August 2022 (GURI No 188 of 12 August 2022) (‘Law No 118/2022’) provides, in Article 3 thereof:

‘1. The following shall continue to have effect until 31 December 2023 or until the period referred to in paragraph 3, whichever is later, if they exist on the date of entry into force of this Law on the basis of extensions or renewals also provided for under [Law No 145/2018] and decreto-legge n. 104 [(Decree-Law No 104)] of 14 August 2020 [(Ordinary Supplement No 30 to GURI No 203 of 14 August 2020)], converted into law, with amendments, by legge n. 126 [(Law No 126)] of 13 October 2020 [(Ordinary Supplement No 37 to GURI No 253 of 13 October 2020)]:

(a) concessions of State-owned maritime, lakeside and waterway property for touristic, recreational and sporting activities …

…

3. Where there are objective reasons which prevent the closure of the selection procedure before 31 December 2023, in connection, for example, with the existence of an ongoing dispute or with objective difficulties linked to the completion of the procedure itself, the competent authority may,

by reasoned decision, postpone the expiry of existing concessions for the period strictly necessary to close the procedure and, in any event, not beyond 31 December 2024. Until that date, the occupation of the State-owned area by the outgoing concessionaire is, in any event, also legitimate under Article 1161 of the Shipping Code.

…

5. With effect from the date of entry into force of this Law, the following shall be repealed:

(a) paragraphs 675, 676, 677, 678, 679, 680, 681, 682 and 683 of Article 1 of [Law No 145/2018];

…'

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

17 The Municipality of Ginosa, by a decision of 24 December 2020, rectified by a subsequent decision of 17 February 2021 (together, 'the decision at issue'), adopted, inter alia, a preliminary declaratory notice intended to inform all holders of concessions for the occupation of State-owned maritime property within the jurisdiction of that municipality that those concessions would be extended, in accordance with the provisions of Article 1(682) and (683) of Law No 145/2018 and Article 182 of Decree-Law No 34 of 19 May 2020, converted into law, with amendments, by Law No 77 of 17 July 2020 (together, 'the national provisions automatically extending the concessions').

18 Taking the view that the decision at issue infringed Articles 49 and 56 TFEU, as well as Article 12 of Directive 2006/123, the AGCM issued a reasoned opinion to the Municipality of Ginosa reminding it of the requirement for a prior public procurement procedure in order to ensure compliance with the principles of competition and freedom of establishment. The AGCM stated, inter alia, that the national provisions automatically extending the concessions were inconsistent with Directive 2006/123, so that all State bodies were required to disapply them.

19 After the Municipality of Ginosa refused to comply with that opinion, the AGCM brought an action before the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Puglia, Italy), which is the referring court, seeking annulment of the decision at issue and of all the declarations or certificates of extension issued subsequently.

20 The Municipality of Ginosa and the other parties to the main proceedings claim that, since Directive 2006/123 is not 'self-executing', Law No 145/2018 must be applied in order to safeguard the principle of legal certainty. They further submit that the essential conditions for the application of that directive, relating to the scarcity of the natural resource in question and, consequently, to the limited number of authorisations available, are not fulfilled in the coastal territory of that municipality, since many other areas are available in addition to those in respect of which concessions have already been granted. They claim that the existence of certain cross-border interest has not been proven either.

21 Moreover, according to the Municipality of Ginosa and the other parties to the main proceedings, the general refusal to extend concessions for the occupation of State-owned maritime property entailed by the mere disapplication of Law No 145/2018 manifestly infringes the right to property of businesses and the principle of the protection of legitimate expectations, with no provision being made for compensation of investments made or business assets. Nor, they add, does that refusal make it possible to assess on a case-by-case basis the depreciation periods of the

investments made or the specific situations in which duly authorised masonry structures have been built on State-owned property.

22 The referring court notes in those various respects that, originally, it was only in the event that several applications for the grant of a concession related to the same State-owned property that Article 37 of the Shipping Code required the organisation of a procedure for the comparative assessment of the candidates for the grant of that concession. However, in such a case, under the second sentence of the second paragraph of that article, the holder of that concession enjoyed a right of continuation or renewal. In 1993, the automatic renewal of existing concessions every six years was introduced and, in 2006, the maximum duration of a concession over State-owned property was set at 20 years.

23 After the Commission opened infringement procedure No 2008/4908, the Italian Republic adopted Decree-Law No 194/2009, Article 1(18) of which repealed the second sentence of the second paragraph of Article 37 of the Shipping Code and extended the existing concessions until 31 December 2012. That expiry date was subsequently postponed to 31 December 2015 by a law of 26 February 2010.

24 In view of those amendments and the Italian authorities' commitment to comply with EU law, the Commission decided, on 27 February 2012, to close that infringement procedure.

25 In spite of that, at the end of 2012, concessions for the occupation of State-owned maritime property were extended for five years, that is, until 31 December 2020. Furthermore, in view of that approaching expiry date and the fact that Italian law had not been brought into line with Directive 2006/123, Article 1(682) and (683) of Law No 145/2018 once again extended the concessions in force until 31 December 2033.

26 In the view of the referring court, the latter extension of concessions for the occupation of State-owned maritime property constitutes a clear infringement of Directive 2006/123 and, in any event, of Article 49 TFEU. Against that background, some municipalities applied Law No 145/2018 and granted the extension until 31 December 2033, while others refused to do so, without, however, applying EU law. Others still granted that extension, only to order that it be annulled afterwards in the exercise of their powers of self-supervision. Lastly, some municipalities favoured not responding to requests for the extension of concessions submitted to them. Such a situation gives rise to legal uncertainty and has negative repercussions on the economy of the entire sector in question.

27 The referring court infers from the judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558), that, without any selection procedure for potential candidates, the national provisions automatically extending the concessions are incompatible both with Article 12(1) and (2) of that directive and with Article 49 TFEU, provided, in the latter case, that those concessions are of certain cross-border interest. Article 12 of that directive cannot, however, have the effect of ousting conflicting national rules, since Article 12(3) expressly leaves it to the Member States to lay down the rules governing the selection procedure.

28 On that point, the referring court disagrees with the Consiglio di Stato (Council of State, Italy), which, by two judgments, No 17 and No 18, of 9 November 2021, delivered in plenary session, held that the Court of Justice had expressly recognised, in the judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558), that Article 12 of Directive 2006/123 was self-executing. Furthermore, the referring court considers that the limitation in time of the effects of those two judgments, decided by the Consiglio di Stato (Council of State), is not

consistent with recognition of the direct effect of Directive 2006/123. Although that solution is presumably intended to enable the Italian legislature to adopt national legislation specifically implementing that directive, it resulted in a further automatic and general extension of the expiry date of existing concessions over State-owned property from 31 December 2020 until 31 December 2023.

29 Lastly, the referring court also does not share the choice of the Consiglio di Stato (Council of State) to classify Directive 2006/123 as a liberalisation directive, not as a harmonisation directive, and therefore considers that, in accordance with Article 115 TFEU, that directive should have been adopted unanimously rather than by a majority of the votes of the Council.

30 In those circumstances, the Tribunale amministrativo regionale per la Puglia (Regional Administrative Court, Puglia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Directive 2006/123 valid and binding on the Member States, or is it invalid inasmuch as, being a harmonisation directive, it was adopted only by a majority vote, rather than unanimously, in breach of Article 115 [TFEU]?

(2) Does Directive 2006/123 … lay down, objectively and in the abstract, sufficiently detailed rules and consequently preclude the exercise of any discretion by national legislatures, this being the minimum requirement for that directive to be regarded as self-executing and immediately applicable?

(3) *In the event that Directive 2006/123 is held to be non-self-executing*, is the effect of mere exclusion or merely preventive disapplication of national law compatible with the principle of legal certainty even where it is impossible for a national court to interpret national law in conformity with EU law or, on the contrary, may or must national law apply in such a situation, without prejudice to the specific penalties provided for under EU law for the failure by a [Member] State to fulfil its obligations under the Treaty of Accession (Article 49 [TFEU]) or for failure to implement [that] directive (infringement proceedings)?

(4) Does the *direct effect* of Article 12(1), (2) and (3) of Directive 2006/123 amount to recognition of the self-executing nature or immediate applicability of that directive or, in the case of a harmonising directive such as Directive 2006/123 (*"[it must be considered] that Articles 9 to 13 of Directive 2006/123 provide for exhaustive harmonisation"* ([judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558)]), must it be understood as requiring a [Member] State to adopt harmonisation measures which are not merely general but binding as to their content?

(5) May or must the classification of a directive as self-executing or otherwise and, in the case of classification of a directive as self-executing, the merely preventive disapplication of national law, be regarded as falling within the exclusive jurisdiction of the national courts (which have been provided, for that purpose, with specific mechanisms to aid interpretation, such as making a reference to the Court of Justice for a preliminary ruling or seeking a ruling on constitutionality) or as falling also within the remit of the officials or heads of individual municipalities?

(6) *In the event that Directive 2006/123 is instead held to be self-executing*, given that Article 49 [TFEU] has been held to preclude the automatic extension of concessions over or authorisations concerning State-owned maritime property for tourism and recreational use only *"in so far as those*

concessions are of certain cross-border interest", is the fulfilment of that condition a prerequisite also for the application of Article 12(1) and (2) of [that] directive?

(7) Is it consistent with the aims pursued by Directive 2006/123 and by Article 49 [TFEU] for a national court to find that, generally and in the abstract, there is a certain cross-border interest with reference to the entire national territory or, on the contrary, given the powers, in Italy, of individual municipalities, must such an assessment be understood as relating to the coastal territory of each individual municipality and, therefore, as falling exclusively within the remit of those municipalities?

(8) Is it consistent with the aims pursued by Directive 2006/123 and by Article 49 [TFEU] for a national court to find that, generally and in the abstract, there is a scarcity of resources and available concessions with reference to the entire national territory or, on the contrary, given the powers, in Italy, of individual municipalities, must such an assessment be understood as relating to the coastal territory of each individual municipality and, therefore, as falling exclusively within the remit of those municipalities?

(9) *In the event that Directive 2006/123 is held, in the abstract, to be self-executing*, can such immediate applicability be regarded as pertaining even in a legislative context such as that in Italy, in which Article 49 of the [Shipping Code] (which provides that, on the expiry of a concession, *"all immovable property shall become the property of the State, without any compensation or reimbursement being due"*) operates, and is such a consequence of the self-executing nature or immediate applicability of that directive (particularly with reference to duly authorised masonry structures and concessions over State-owned property that are functionally linked to a tourist business such as a hotel or holiday resort) consistent with the protection of fundamental rights, such as the right to property, which are accorded special protection under EU law and in the Charter of Fundamental Rights [of the European Union]?'

Admissibility of the request for a preliminary ruling

31 The AGCM and the Italian Government have expressed doubts as to the admissibility of the request for a preliminary ruling. In their view, the questions referred to the Court became hypothetical after Law No 118/2022 repealed the national provisions automatically extending the concessions.

32 In that regard, even though those provisions, in particular the provisions of Law No 145/2018, were in fact repealed by Law No 118/2022, the fact remains that, when the Municipality of Ginosa adopted the decision at issue, those provisions were in force and that decision was adopted on the basis of those provisions. Moreover, it is not apparent from the information available to the Court that the repeal of the national provisions automatically extending the concessions deprived that decision of its effects.

33 It follows that the repeal of the national provisions automatically extending the concessions cannot rebut the presumption of relevance attaching to the questions referred by the referring court to the Court of Justice for a preliminary ruling (see, to that effect, judgments of 7 September 1999, *Beck and Bergdorf*, C-355/97, EU:C:1999:391, paragraph 22, and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny*, C-558/18 and C-563/18, EU:C:2020:234, paragraph 43). It does not appear that the interpretation of EU law that is sought bears no relation to the actual facts of the dispute in the main proceedings or its purpose; nor does it appear that the problem is hypothetical (see, by analogy, judgment of 22 September 2022, *Admiral Gaming Network and Others*, C-475/20 to C-482/20, EU:C:2022:714, paragraph 26).

34 Accordingly, the request for a preliminary ruling is admissible.

Consideration of the questions referred

35 The Court considers it appropriate to begin by examining the sixth and seventh questions, as well as the first part of the eighth question, in so far as they relate to the applicability of Directive 2006/123 to the dispute in the main proceedings, then to go on to the first question, which calls the validity of that directive into question, and lastly to consider the second to fifth questions, the second part of the eighth question, and the ninth question, by which the referring court seeks to determine whether Article 12 of that directive has direct effect.

Applicability of Directive 2006/123

Preliminary observations

36 As is apparent from settled case-law, any national measure adopted in a sphere which has been the subject of exhaustive or full harmonisation at EU level must be assessed in the light of the provisions of the harmonising measure and not those of primary law (judgments of 12 October 1993, *Vanacker and Lesage*, C-37/92, EU:C:1993:836, paragraph 9; of 11 December 2003, *Deutscher Apothekerverband*, C-322/01, EU:C:2003:664, paragraph 64; and of 14 July 2016, *Promoimpresa and Others*, C-458/14 and C-67/15, EU:C:2016:558, paragraph 59).

37 In the present case, as is apparent in particular from paragraph 61 of the judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558), Articles 9 to 13 of Directive 2006/123 provide for exhaustive harmonisation concerning the services falling within their scope.

38 In those circumstances, the sixth and seventh questions and the first part of the eighth question will be examined exclusively in the light of Article 12 of that directive.

The sixth question

39 By its sixth question, the referring court asks, in essence, whether Article 12(1) and (2) of Directive 2006/123 must be interpreted as meaning that it applies only to concessions for the occupation of State-owned maritime property which are of certain cross-border interest.

40 In that regard, the Court has already had opportunity to hold, on several occasions, that, in accordance with a literal, historical, contextual and teleological interpretation of Directive 2006/123, the provisions of Chapter III thereof, on freedom of establishment of providers, which include Article 12 of that directive, must be interpreted as meaning that they apply, inter alia, to a situation where all the relevant elements are confined to a single Member State (see, to that effect, judgments of 30 January 2018, *X and Visser*, C-360/15 and C-31/16, EU:C:2018:44, paragraphs 99 to 110, and of 22 September 2020, *Cali Apartments and HX*, C-724/18 and C-727/18, EU:C:2020:743, paragraph 56).

41 It follows that Article 12(1) and (2) of that directive must be interpreted as meaning that it does not apply only to concessions for the occupation of State-owned maritime property which are of certain cross-border interest.

The seventh question

42 In view of the answer given to the sixth question, there is no need to answer the seventh question, which is based on the premiss that the applicability of Article 12 of Directive 2006/123 is subject to it being shown that the concession for the occupation of State-owned maritime property at issue is of certain cross-border interest.

The first part of the eighth question

43 By the first part of its eighth question, the referring court asks, in essence, whether Article 12(1) of Directive 2006/123 must be interpreted as precluding an assessment of the scarcity of natural resources and available concessions from being made by combining an abstract and general approach at national level with a case-by-case approach based on an analysis of the coastal territory of the municipality concerned, or whether such an assessment must be made solely on the basis of one or other of those approaches.

44 It is true that, in paragraph 43 of the judgment of 14 July 2016, *Promoimpresa and Others*, C-458/14 and C-67/15, EU:C:2016:558), the Court stated that the fact that the concessions at issue are not granted at national level but at municipal level must be taken into account in establishing whether State land available for economic exploitation is scarce.

45 Nevertheless, that clarification was merely an indication given to the referring court and was explained by the context of the case that gave rise to that judgment.

46 In the light of its wording, Article 12(1) of Directive 2006/123 confers on the Member States a degree of latitude as to the choice of criteria for assessing the scarcity of natural resources. That degree of latitude may lead them to give precedence to an abstract and general assessment that is valid for the entire national territory, but also, conversely, to favour a case-by-case approach that focuses on the situation existing in the coastal territory of a municipality or of the competent administrative authority, or even to combine those two approaches.

47 In particular, the combination of an abstract and general approach at national level and a case-by-case approach based on an analysis of the coastal territory of the municipality concerned seems to be balanced and, therefore, capable at the same time of ensuring compliance with objectives regarding the economic exploitation of the coastline that may be defined at national level, while ensuring that the actual implementation of those objectives in the coastal territory of a municipality remains relevant.

48 In any event, it is crucial that the criteria used by a Member State to assess the scarcity of available natural resources are based on objective, non-discriminatory, transparent and proportionate factors.

49 In the light of the foregoing considerations, the answer to the first part of the eighth question is that Article 12(1) of Directive 2006/123 must be interpreted as not precluding an assessment of the scarcity of natural resources and available concessions from being made by combining an abstract and general approach at national level with a case-by-case approach based on an analysis of the coastal territory of the municipality concerned.

The first question, relating to the validity of Directive 2006/123

50 By its first question, the referring court asks, in essence, whether Directive 2006/123 is valid in the light of Article 94 EC, in so far as that harmonisation directive was not adopted by the Council acting unanimously.

51 That question suggests that that directive is invalid on the ground that it should have been adopted on the basis of Article 94 EC, which provided for unanimous voting in the Council, and not on the basis of the first and third sentences of Article 47(2) EC and Article 55 EC, which provided for qualified majority voting.

52 In that regard, it should be noted, in the first place, that, according to the Court's settled case-law, in the context of the organisation of the powers of the European Union, the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review, such as the aim and the content of the measure. If an examination of an EU measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main or predominant purpose or component. By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases. However, no dual legal basis is possible where the procedures laid down for each legal basis are incompatible with each other (see, to that effect, judgments of 26 March 1987, *Commission* v *Council*, 45/86, EU:C:1987:163, paragraph 11, and of 29 April 2004, *Commission* v *Council*, C-338/01, EU:C:2004:253, paragraphs 54 to 57).

53 In the present case, since Article 94 EC provided for unanimous voting in the Council, while under the first and third sentences of Article 47(2) EC and Article 55 EC, the Council had to act by qualified majority, it was impossible to combine those legal bases.

54 In the second place, according to Article 1(1) thereof, Directive 2006/123 is intended to '[establish] general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services'. That objective of helping to ensure the effectiveness of the freedom of establishment and the freedom to provide services is repeatedly confirmed by the explanatory memorandum to that directive, in particular in recitals 1, 5, 12, 64 or 116 thereof.

55 It is thus clear that, in accordance with Article 47(2) EC, in order to make it easier for persons to take up and pursue activities as self-employed persons, Directive 2006/123 is intended 'for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons'. The same applies to Article 55 EC on services, which refers inter alia to Article 47(2) EC.

56 Furthermore, during the procedure for adopting that directive, no Member State requested, on the basis of the second sentence of Article 47(2) EC, a unanimous vote in the Council, on the ground that the implementation of that directive would have involved an amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons.

57 In the third place, the Council was fully entitled, in accordance with the last sentence of Article 47(2) EC, to which, moreover, Article 55 EC refers, to act by qualified majority.

58 Those provisions conferred on the EU legislature specific power to adopt measures intended to improve the functioning of the internal market (see, by analogy, judgment of 5 October 2000, *Germany* v *Parliament and Council*, C-376/98, EU:C:2000:544, paragraph 87). In accordance with the maxim *lex specialis derogat lex generalis*, if the EC Treaty contains a more specific provision

that is capable of constituting the legal basis for the measure in question, that measure must be founded on such provision (see, by analogy, judgment of 29 April 2004, *Commission* v *Council*, C-338/01, EU:C:2004:253, paragraph 60). The EU legislature was therefore fully entitled to favour the first and third sentences of Article 47(2) EC and Article 55 EC over Article 94 EC.

59 In the light of the foregoing, consideration of the first question has disclosed no factor of such a kind as to affect the validity of Directive 2006/123 in the light of Article 94 EC.

Direct effect of Article 12(1) and (2) of Directive 2006/123

The second and fourth questions

60 As a preliminary point, it should be noted that the national provisions at issue in the main proceedings had the effect of automatically extending the concessions for the occupation of State-owned maritime property in force, so that no selection procedure was organised in the context of those proceedings. The only relevant provisions in the present case are therefore those of Article 12 of Directive 2006/123 relating, first, to the obligation for Member States to apply an impartial and transparent selection procedure to potential candidates and, second, to the prohibition on automatic renewal of an authorisation granted for a given activity. The second and fourth questions must accordingly be regarded as relating to the interpretation of Article 12(1) and (2) of that directive, excluding paragraph 3 of that article.

61 In those circumstances, it must be considered that, by its second and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 12(1) and (2) of Directive 2006/123 must be interpreted as meaning that the obligation for Member States to apply an impartial and transparent selection procedure to potential candidates and the prohibition on automatic renewal of an authorisation granted for a given activity are laid down unconditionally and sufficiently precisely to be regarded as having direct effect.

62 It follows from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against a Member State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, to that effect, judgments of 19 January 1982, *Becker*, 8/81, EU:C:1982:7, paragraph 25; of 17 September 1996, *Cooperativa Agricola Zootecnica S. Antonio and Others*, C-246/94 to C-249/94, EU:C:1996:329, paragraphs 18 and 19; of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 103; and of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 17).

63 The Court has stated that a provision of EU law is, first, unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States other than the measure transposing it into national law and, second, sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms (see, to that effect, judgments of 3 April 1968, *Molkerei-Zentrale Westfalen* v *Lippe*, 28/67, EU:C:1968:17, p. 153; of 26 February 1986, *Marshall*, 152/84, EU:C:1986:84, paragraph 52; and of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 18).

64 Furthermore, the Court has held that, even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it (see, to that effect, judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 19).

65 Even though a directive allows the Member States a degree of latitude when they adopt rules in order to implement it, that does not alter the precise and unconditional nature of its provisions, where the latitude allowed does not make it impossible to determine minimum rights and it is therefore possible to determine the minimum protection which must be provided in any event (see, to that effect, judgments of 14 July 1994, *Faccini Dori*, C-91/92, EU:C:1994:292, paragraph 17; of 3 October 2000, *Simap*, C-303/98, EU:C:2000:528, paragraph 68; and of 14 January 2021, *RTS infra and Aannemingsbedrijf Norré-Behaegel*, C-387/19, EU:C:2021:13, paragraph 49).

66 In the present case, it is apparent from the very wording of Article 12(1) of Directive 2006/123 that, where the number of authorisations available for a given activity is limited because of the scarcity of natural resources, Member States must apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.

67 It is true that the Member States retain a degree of latitude if they decide to adopt provisions intended specifically to ensure the impartiality and transparency of a selection procedure. Nevertheless, by requiring the organisation of an impartial and transparent selection procedure, Article 12(1) of Directive 2006/123 prescribes, unconditionally and sufficiently precisely, content comprising minimum protection in favour of potential candidates (see, by analogy, judgments of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223, paragraph 74, and of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 105).

68 For its part, Article 12(2) of that directive provides, inter alia, that an authorisation, such as a concession for the occupation of State-owned maritime property, is to be granted for an appropriate limited period and may not be open to automatic renewal.

69 That provision has direct effect in so far as it prohibits, in unequivocal terms, the Member States from providing for automatic and general extensions of such concessions, without the Member States having any degree of latitude or possibility of attaching any conditions to that prohibition and without requiring the adoption of an act of the European Union or of the Member States. It is also clear from the case-law of the Court that automatic renewal of those concessions is expressly excluded by Article 12(2) of Directive 2006/123 (see, to that effect, judgment of 14 July 2016, *Promoimpresa and Others*, C-458/14 and C-67/15, EU:C:2016:558, paragraph 50).

70 Thus, in unconditional and sufficiently precise terms, Article 12(1) and (2) of that directive imposes on Member States an obligation to apply an impartial and transparent selection procedure to potential candidates and prohibits them from automatically renewing an authorisation granted for a given activity.

71 The fact that that obligation and that prohibition apply only in cases where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources, which must be determined by reference to a factual situation that is assessed by the

competent authority, subject to review by a national court, cannot call into question the direct effect of Article 12(1) and (2) of Directive 2006/123.

72 Furthermore, it should be borne in mind that the direct effect of unconditional and sufficiently precise provisions of a directive constitutes a minimum guarantee arising from the binding nature of the obligation imposed on the Member States by the effect of directives under the third paragraph of Article 288 TFEU, which cannot justify a Member State's absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive (judgment of 6 May 1980, *Commission* v *Belgium*, 102/79, EU:C:1980:120, paragraph 12). It follows that, notwithstanding the finding that the obligation and the prohibition provided for in Article 12(1) and (2) of Directive 2006/123 have direct effect, the Italian authorities are still required to transpose those provisions into their legal order.

73 Lastly, it should be noted that a preliminary ruling, such as the judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558), clarifies and defines where necessary the meaning and scope of the rule set out in that provision of Directive 2006/123 as it must be, or ought to have been, understood and applied from the time at which it entered into force, that is, in accordance with Article 44 of that directive, from 28 December 2009 at the latest. It follows that that rule as thus interpreted must be applied by the courts even to legal relationships arising and established before that judgment (see, to that effect, judgments of 27 March 1980, *Denkavit italiana*, 61/79, EU:C:1980:100, paragraph 16, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paragraph 77).

74 In the light of the foregoing considerations, the answer to the second and fourth questions is that Article 12(1) and (2) of Directive 2006/123 must be interpreted as meaning that the obligation for Member States to apply an impartial and transparent selection procedure to potential candidates and the prohibition on automatic renewal of an authorisation granted for a given activity are laid down unconditionally and sufficiently precisely to be regarded as having direct effect.

The third question

75 In view of the answer given to the second and fourth questions, there is no need to answer the third question.

The fifth question and the second part of the eighth question

76 By its fifth question and the second part of its eighth question, the referring court asks, in essence, whether the third paragraph of Article 288 TFEU must be interpreted as meaning that the assessment of the direct effect of the obligation and of the prohibition provided for in Article 12(1) and (2) of Directive 2006/123 and the obligation to disapply conflicting national provisions lie with the national courts alone, or also with the administrative authorities, including municipal authorities.

77 On that point, it is sufficient to recall that it follows from the Court's settled case-law that administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the unconditional and sufficiently precise provisions of a directive and to refrain from applying provisions of national law which are inconsistent with them (see, to that effect, judgments of 22 June 1989, *Costanzo*, 103/88, EU:C:1989:256, paragraphs 29 to 33, and of 10 October 2017, *Farrell*, C-413/15, EU:C:2017:745, paragraph 33).

78 In that regard, it should be noted that the statement in paragraph 43 of the judgment of 14 July 2016, *Promoimpresa and Others* (C-458/14 and C-67/15, EU:C:2016:558), according to which it was for the referring court to determine whether the condition relating to the scarcity of natural resources laid down in Article 12(1) of Directive 2006/123 was satisfied, cannot mean that the national courts alone are required to ensure that that condition is satisfied. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources, any administrative authority is required under that provision to organise a selection procedure for potential candidates and to ensure that all the conditions laid down in that provision are satisfied, if necessary by disapplying any incompatible rules of national law.

79 In the light of the foregoing considerations, the answer to the fifth question and the second part of the eighth question is that the third paragraph of Article 288 TFEU must be interpreted as meaning that the assessment of the direct effect of the obligation and of the prohibition provided for in Article 12(1) and (2) of Directive 2006/123 and the obligation to disapply conflicting national provisions lie with the national courts and with the administrative authorities, including municipal authorities.

The ninth question

80 By its ninth question, the referring court asks, in essence, whether Article 12(1) and (2) of Directive 2006/123 must be interpreted as meaning that the direct effect of that provision requires the disapplication of national legislation pursuant to which, on the expiry of a concession, all immovable property built by a concessionaire on the land granted to it under concession is retained by the grantor, without any compensation or reimbursement, and whether the disapplication of that legislation is compatible with Article 17 of the Charter of Fundamental Rights.

81 In that regard, it should be recalled that, according to settled case-law, the spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (judgments of 3 February 1983, *Robards*, 149/82, EU:C:1983:26, paragraph 19; of 16 July 1992, *Meilicke*, C-83/91, EU:C:1992:332, paragraph 25; and of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 60).

82 Accordingly, the Court may refuse to rule on a question referred by a national court for a preliminary ruling where it is quite obvious that the interpretation or assessment of the validity 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 (see, to that effect, judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraph 61, and of 15 July 2021, *The Department for Communities in Northern Ireland*, C-709/20, EU:C:2021:602, paragraph 55).

83 In the present case, the dispute in the main proceedings concerns the extension of concessions, not the question of a concessionaire’s right to obtain, on the expiry of the concession, any compensation for the immovable property that it has built on the land granted to it under concession. Thus, since the referring court has failed to set out the factual and legal material characterising the situation at issue in the main proceedings, the Court is unable to give a useful answer to the ninth question.

84 That question must therefore be declared inadmissible.

Costs

85 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Third Chamber) hereby rules:

1. **Article 12(1) and (2) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market**

must be interpreted as meaning that it does not apply only to concessions for the occupation of State-owned maritime property which are of certain cross-border interest.

2. **Article 12(1) of Directive 2006/123**

must be interpreted as not precluding an assessment of the scarcity of natural resources and available concessions from being made by combining an abstract and general approach at national level with a case-by-case approach based on an analysis of the coastal territory of the municipality concerned.

3. **Consideration of the first question has disclosed no factor of such a kind as to affect the validity of Directive 2006/123 in the light of Article 94 EC.**

4. **Article 12(1) and (2) of Directive 2006/123**

must be interpreted as meaning that the obligation for Member States to apply an impartial and transparent selection procedure to potential candidates and the prohibition on automatic renewal of an authorisation granted for a given activity are laid down unconditionally and sufficiently precisely to be regarded as having direct effect.

5. **The third paragraph of Article 288 TFEU**

must be interpreted as meaning that the assessment of the direct effect of the obligation and of the prohibition provided for in Article 12(1) and (2) of Directive 2006/123 and the obligation to disapply conflicting national provisions lie with the national courts and the administrative authorities, including municipal authorities.

[Signatures]

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* Language of the case: Italian.