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Italian state beach concessions and Directive 2006/123/EC, in the European context

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DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Italian state beach concessions and Directive 2006/123/EC, in the European context

STUDY

Abstract

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee. This paper analyses the Italian regulation framework on beach concessions within a compared European framework. It illustrates pending issues and the potential consequences of the judgment of the EU Court of Justice, C-458/14 e C-67/15, which may impose a comprehensive beach reform that cannot be delayed any further. The models adopted by other EU member states and Italy for managing coastal property are here compared, in order to verify their functionality and effectiveness.

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LIST OF ABBREVIATIONS

AA.VV.	Variou Authors (VV.AA.)
Act. jur. droit franç.	Acte juridique droit français
Ad. Plen.	Adunanza Plenaria
AGCM	Autorità Garante della Concorrenza e del Mercato
ANAC	Autorità Nazionale Anti Corruzione
Art.	Article
AVCP	Autorità di Vigilanza sui Contratti Pubblici
BOE	Boletín Oficial de Estado
Cass. civ.	Cassazione civile
c.c.	Codice civile
CGPPP	Code général de la propriété des personnes publiques
cit.	citato/a
Cod. nav.	Codice della navigazione
Cons. Stato	Consiglio di Stato
Cos	Greece's Council of State
Cost.	Costituzione della Repubblica italiana
d.d.l.	Disegno di legge
Dig. disc. pubbl.	Digesto discipline pubblicistiche
Dir. mar.	Il diritto marittimo

Dir. proc. amm.	Diritto processuale amministrativo
Dir. trasp.	Diritto dei trasporti
d.l.	Decreto legge
d.m.	Decreto ministeriale
d.lgs.	Decreto legislativo
d.P.C.M.	Decreto del Presidente del Consiglio dei Ministri
Enc. dir.	Enciclopedia del diritto
Foro amm. CDS	Il Foro amministrativo – Consiglio di Stato
Foro amm. TAR	Il Foro amministrativo - TAR
Foro it.	Il Foro italiano
Giur. merito	Giurisprudenza di merito
Giust. civ.	Giustizia civile
GIZC	Gestione integrata zone costiere
G.U.	Gazzetta ufficiale della Repubblica italiana
Ibid.	Ibidem
Id.	Idem
l.	Legge
l. cost.	Legge costituzionale
lett.	Letter
l.r.	Legge regionale
mq	Metri quadrati

MRPEE	Ministry for the Reconstruction of Production, Environment and Energy (February-August 2015)
OG	Ordonnance général (France)
op.	Opera
p.	Page
P.A.	Public Administration
par.	Paragraph
PCMAC	Plan - Framework for the Coherent Management of Attica Coasts
Práct. urb	Práctica urbanística
Publ. Proc. Law Rev.	Public Procurement Law Review
R.D.	Regio Decreto
Reg. Cod. Nav	Regolamento Codice della navigazione
Rev. Adm. Públ.	Revista de Administração Pública
Rev. esp. Der. Adm	Revista española de Derecho administrativo
Riv. giur. edil.	Rivista giuridica dell'edilizia
Riv. it. dir. pubbl. comunit.	Rivista italiana di diritto pubblico comunitario
Riv. trim. dir. eur	Rivista trimestrale di diritto europeo
Riv. trim. dir. pubbl.	Rivista trimestrale di diritto pubblico

sez.	Sezione
SPA	Strategic Plan for Athens
Urb. app.	Urbanistica e appalti
CJEU	Court of Justice of the European Union (CJEU)
OJEC	Official Journal of the European Communities
OJ	Official Journal of the European Union
OECD	Organisation for Economic Co-operation and Development
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union (Rome Treaty)
TEC	Treaty on the European Union
EU	European Union
IUCN	International Union for Conservation of Nature
UNCED	United Nations Conference on Environment and Development

Executive SUMMARY

Background

The topic of beach concessions appears to have a complex regulatory framework, which is object of tensions not only in Italy but also in other member states of the European Union.

Italy's regulatory framework for beach concessions is rather complex, especially in terms of responsibilities, procedures and criteria for determining parameters. Over recent years, also following intensive interventions by the European Commission against several Italian legislative actions, a number of corrective measures have been implemented and overlapped, starting from the original regulatory framework of the Codice della Navigazione (Italian Navigation Code) (R.D. 30 March 1942, no. 327) up to the recent *"Disegno di legge recante delega al Governo per la revisione e il riordino della normativa relativa alle concessioni demaniali marittime lacuali e fluviali ad uso turistico ricreativo"* (Bill of law delegating power to the government to review and reorganize the legal framework for the granting of concessions of State-owned maritime, lakeside and waterway property used for touristic and recreational purposes), approved by the Council of Ministers on 27 January 2017, envisaging a competitive selection procedure for concessionaires, thus surpassing automatic concession renewal.

Regulating this topic involves several issues, which are just as important as its economic impact within the tourism industry.

The main issues relate to: assigning and performing administrative duties, the concession management system (not only in terms of competition but also in terms of choosing the concessionaire and the duration of the concession), the quality and cost of touristic/beach based services, the functioning of systems for an integrated control of coasts (both in administrative and environmental terms), the economic development of the sector and the free use of beaches. Further specific issues relate to the complex topic of environmental protection, inevitably leading to confrontation with other related interests in terms of State-owned property.

Aim

- The aim of this project is to provide an impact assessment of Italian legislation in terms of beach concessions in order to establish the degree of adjustment of the national administrative system to the principles established by EU law, with particular reference to the protection of competition and the equal treatment of companies operating in the industry.
- The main issue to be addressed is the need to identify an allocation procedure which can reconcile the transparency obligations deriving from the EU with property ownership within the member states.
- This complex issue will be analysed in a historical-legal context, especially in terms of the events that characterised both domestic and EU regulatory frameworks. Moreover, the models adopted by other Member States to manage coastal property will also be analysed, in order to verify their functionality and effectiveness.
- Particular attention will be paid to the possible consequences of the recent judgment by the EU Court of Justice, sect. V, 14 July 2016, Promoimpresa e Melis C-458/14 and C-67/15, which may impose - not only for Italy - a comprehensive beach reform that cannot be delayed any further.

1. BEACH CONCESSIONS: NATIONAL AND EUROPEAN LAW*

1.1. Preamble: the need to verify the level of adjustment of the national system to EU principles in terms of beach concessions for touristic and recreational purposes

The aim of this project is to provide an impact assessment of the Italian regulatory framework in terms of beach concessions. The topic of beach concessions appears to have a complex regulatory framework, which is object of tensions not only in Italy but also in other member states of the European Union.

Italy's regulatory framework for beach concessions is rather complex, especially in terms of responsibilities, procedures and criteria for determining parameters.

Over recent years, also following intensive interventions by the European Commission against several Italian legislative actions, a number of corrective measures have been implemented and overlapped, starting from the original regulatory framework of the Codice della Navigazione (Italian Navigation Code)[1], up to the recent *"Disegno di legge recante delega al Governo per la revisione e il riordino della normativa relativa alle concessioni demaniali marittime lacuali e fluviali ad uso turistico ricreativo"* (Bill of law delegating power to the government to review and reorganize the legal framework for the granting of concessions of State-owned maritime, lakeside and waterway property used for touristic and recreational purposes), approved by the Council of Ministers on 27 January 2017, envisaging a competitive selection procedure for concessionaires, thus surpassing automatic concession renewal[2].

Regulating this topic involves several issues, which are just as important as its economic impact within the tourism industry[3]. Among these issues, the main one is to identify an allocation procedure which can reconcile the transparency obligations deriving from the EU with property ownership within the member states against a European case-law that tends to prioritise the former, also to the detriment of allocation to private concessionaires.

Other issues relate to: assigning and performing administrative duties; the concession management system (not only in terms of competition but also in terms of choosing the concessionaire and the duration of the concession), the quality and cost of touristic/beach based services, the functioning of systems for an integrated control of coasts (both in administrative and environmental terms), the economic development of the sector, the free use of beaches.

Further specific issues relate to the complex topic of environmental protection, inevitably leading to confrontation with other related interests in terms of State-owned property.

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* C. BENETAZZO is the author of Chapters 1, 2, 4 and 5; S. GOBBATO is the author of Chapter 3.

[1] Royal Decree no. 327 of 30 March 1942.

[2] See Article 1(1)(a) of draft law cit., available at www.senato.it.

[3] According to data provided by sector operators, there are approximately 30,000 Italian companies and around 600,000 operators (including those in related industries) operating in seaside establishments and their related State-owned property concessions. It is, however, extremely difficult and, to a certain extent, impossible to have detailed and organic data, subdivided by region and then by municipality: see the WWF dossier entitled: "Spiagge italiane: bene comune, affare privato", at http://www.wwf.it/?6341.

The regulatory framework on beach concessions has thus led to several problems of interpretation and controversy, especially over recent years. However, as described later on, the most disruptive intervention came from an EU infringement procedure (no. 2008/4908) in relation to State-owned beach property[4], even though this respected the already consolidated line of the State Council[5] and complied with the provisions of the AGCM (Italian anti-trust agency).

As a result of said procedure, an extension of current State-owned beach property for touristic and recreational purposes was granted up until 2020[6], however only «upon repeal of the preferential right as per art. 37, second paragraph, point two, of the codice della navigazione». However, this measure was not considered to be sufficient by European institutions, so an additional formal notice was sent to the Italian Government in relation to said infringement procedure, with a particular focus on the automatic renewal of concessions, which had not been subject to modifications. Therefore, the Government, through a new process, had to present an amendment to EU Law 2010 in order to modify Law Decree no. 400 of 5 October 1993 and abrogate the forecasts on the automatic renewal of concessions, at the same time as committing to reform the topic.

The complexity of this topic is thus broadly confirmed by the several institutional interventions that were necessary to respect the provisions of the community infringement procedure. This is demonstrated by the parliamentary debate on the restructuring and consideration of a legislative framework for the sector: this debate led to the aforementioned Bill of law of 27 January 2017.

The following pages aim to provide a brief but comprehensive insight into the different pending issues and potential repercussions of the recent judgment by the EU Court of Justice, sect. V, 14 July 2016, Promoimpresa e Melis, C-458/14 e C-67/15[7], which may impose - not only for Italy - a comprehensive beach reform that cannot be delayed any further.

[4] See Chapter 3, §§ 3.1. and 3.3.

[5] Council of State, section VI, 23 July 2008, no. 3642, in *Foro amm.-CDS* 2008, p. 2123.

[6] With Legislative Decree no. 179 of 18 October 2012, converted into Law no. 221 of 17 December 2012.

[7] Available at http://curia.europa.eu.

The aim of this project is thus to provide an impact assessment of the Italian regulatory framework in terms of beach concessions, in order to establish the degree of adjustment of the National administrative system to the principles established by EU law, in particular with reference to the protection of competition and equality of treatment for companies operating in the industry. This complex issue will be analysed in a historical-legal context, especially in terms of the events that characterised both domestic and EU regulatory frameworks, up until the most recent developments on the issue. Moreover, the models adopted by other Member States to manage coastal property will also be analysed. In fact, these models - during this phase of uncertainty - may provide suggestions for the national legislature on how to amend the national system in order to bring it closer to Community legislation and that of other EU member states which has proven to be functional in terms of effectively managing State-owned beach property. While performing this analysis, regulatory and case-law evolution will be taken into consideration, as will relevant legislation and the outcomes of a recent international conference on the topic, held at the University of Padova, in which all the authors of this paper participated as speakers[8].

1.2. Concessions and contracts: from qualitative distinction in terms of instrumentality (art. 14, paragraph 3, Legislative decree no. 163/2006) to the autonomous definition of concession contracts, based on the transfer of «operational risk» to the concessionaire

In this regard, due to the complexity of the legal framework of reference, often characterised by a "stratification" and "overlapping" of sources, it is appropriate to start by analysing the distinguishing features of the notion of "concession" rather than "contract", which, for a long time, has not been covered by the Italian regulatory framework.

The lack of a precise definition of concession and of a clear distinction between work and concession contracts, has led to a case being presented before the EU Court of Justice[9] and the national court[10]. Even the National Anti-corruption Agency (ANAC - previously AVCP), after several petitions on tender procedures, has been invited to rule on the preliminary issue of the correct legal definition of the contract[11], regardless of the *nomen iuris* given to the contracting entity[12].

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[8] Relates to the Study Conference entitled "*Le concessioni demaniali marittime tra vincoli U.E. ed autonomia degli Stati*", which took place at the Law School of the University of Padua on 25 May 2017. The proceedings will shortly be published.

[9] Recital 18 of the Directive 2014/23/EU takes explicitly into account such operational uncertainties.

[10] On the distinction between public service contracts and public service concessions, see resolution no. 46 of 4 May 2011 of the Authority for the Supervision of Public Contracts for Works, Services and Supplies (AVCP), at www.anticorruzione.it. Similarly, see also AVCP resolution no. 22 of 8 May 2013, at www.anticorruzione.it. Such guidance is now transposed into national law: see, for example, Civil Court of Cassation, section 1, no. 12252 of 27 May 2009, in *Giust. civ.*, 2010, I, p. 1179; Id., section VI, 6 May 2015, n. 9139, in *Foro it.*, 2016, I, p. 995; Id., section 1, no. 24824 of 9 December 2015, in *Foro amm.*, 2016, p. 11.

[11] Article 30(2) of Legislative Decree no. 163/2006, stipulates that "In the public service concession, the consideration in favour of the concessionaire consists solely in the right to functionally operate and economically exploit the service. For tender procedures, the granting entity also establishes a price, whereby the concessionaire is obliged to apply to users prices that are lower than those corresponding to the sum of the service charge and normal business profits, that is, where it is necessary to ensure that the concessionaire achieves economic and financial equilibrium of investments and related operations in connection with the quality of the service to be provided".

[12] In particular, the European Commission noted in its interpretative communication of 12 April 2000, C 121/3, that "the first thing to determine is whether the building of structures and carrying out of work on behalf of the grantor constitute the main subject matter of the contract, or whether the work and building are merely incidental to the main subject matter of the contract". As pointed out by European courts, what counts is the "main subject

The topic at hand was important on a practical-operational level, since the "Codice dei contratti pubblici" (Code of public contracts) approved in 2006 (Legislative decree of 12 April 2006, no. 163) envisaged a weak regulatory framework for the provision of services[13], while the Code itself contained precise provisions in terms of the concession of works.

In fact, establishing whether the object of the contested tender procedure was the awarding of a «service contract » or a «service concession» meant establishing whether this had to be subject to the provisions of the Code «in full» or "simply" comply with the principles in terms of public contracts (a similar problem arose for the "mixed" cases of work contracts and service concessions).

In the absence of a clear regulatory framework, the distinguishing feature standing out at EU level was a qualitative one: in other words, the comprehensive legislation of the Code was deemed applicable where the main object of the contract was the building of structure or the performance and provision of works (and service provision was ancillary and marginal)[14], this criterion is referred to by art. 14, paragraph 3, Legislative Decree no. 163/2006 on mixed contracts (according to which the «main object of the contract is represented by works if the amount of said works exceeds 50%, except for when, depending on the characteristics of the contract, the works are merely ancillary compared to the services or supplies that represent the main object of the contract»)[15] and, today, it is referred to by art. 170 of the new code of public contracts, which refer to the «highest estimated value».

The recent European Directive 2014/23/EU[16] on the awarding of concession contracts, implemented with the new code of public contracts (approved through Legislative Decree no. 50 of 18 April 2016,), fills in the gap in terms of definition and regulatory framework. In fact, for the first time, service concessions are subject to a broad and articulated regulatory framework, in line with the existing one on awarding concessions in ordinary sectors, leading to fewer legal cases, higher competitiveness, higher quality of community services and lower costs for public administration[17]. Moreover, the Directive has provided a precise definition, without unintelligible cross-references, of the notion of a "contract"[18], the

matter of the contract": in this sense, see CJEU, 26 May 2011, *European Commission v Spain*, C-306/08, and note by A. BROWN, *The application of the EU procurement rules to land regeneration projects: further clarification from the Court of Justice in Commission v Spain (C-306/08) concerning Valencian land-use regulations*, in *Publ. Proc. Law Rev.*, 2011, 5, NA185. On the distinction between works concessions and services concessions, see also CJEU, 15 October 2009, *Acoset SpA*, C-196/08, EU:C:2009:628, paragraph 45.

[13] See also paragraph 2, which explicitly includes public works concessions among mixed contracts.

[14] Directive 2014/23/EU of the European Parliament and of the Council, of 26 February 2014, on the award of concession contracts, OJEU L 94 of 28.3.2014, pp. 1–64.

[15] See the specific provisions of Articles 164 et seq. of the new Code of public procurement (Legislative Decree no. 50 of 18 April 2016).

[16] In Directive 2004/18/EC, public works concessions and public services concessions are defined with references to the definition of the contract; namely, as contracts with the same characteristics as a public works contract (as a public service contract) except for the fact that the consideration for the works (the services) to be carried out consists either solely in the right to exploit the work (the services) or in that right together with a price; see also Article 3(12) and Article 30(2) of Legislative Decree no. 163/2006, cit.

[17] See, in particular, recital 11 of Directive 2016/23/EU. It therefore seems clear that the main feature – and element of differentiation compared with the contract – of a concession is the right to exploit the works or services.

[18] M. RICCHI, in *La nuova Direttiva comunitaria sulle concessioni e l'impatto sul Codice dei contratti pubblici*, in *Urb. app.*, 2014, p. 741 et seq., notes how the notion of "operational risk" was not unknown to national law: former Article 143(9) of Legislative Decree no. 163/2006 indicated the necessity for the public administration, in

concession of works and the concession of services, thus providing a more clear answer to that controversial question: the distinction between contract and concession[19]. Under this profile, the most important new feature is the «definition of the consequences of the awarding of a concession, in other words the necessary content of a concession contract: i.e. the transfer to the concessionaire of the operational risk related to the management of works or services»[20]. Such principle is accurately adopted by the new code of public contracts: in particular art. 3, paragraph 1, lett. uu) and vv).

1.3. The internal system for the management of State-owned maritime property: from the concession contract model to integrated coastal zone management

If, in some respects, the new European provisions seem to resolve several implementation problems regarding public service concessions, there remain, to date, considerable uncertainties surrounding the system of state concessions for the carrying out of economic activities linked to the use of public assets, such as, for example, the maritime concessions for the "management of seaside establishments" (under Article 1 of Legislative Decree no. 400 of 5 October 1993, converted into Law no. 494 of 4 December 1993), which are of fundamental importance for the economies of many Italian regions[21].

To fully understand the scope of European guidelines and the most recent developments in Italian case-law on the subject,[22] it seems appropriate to mention briefly the classification of assets relating to coastal zones, the applicable conditions, and the types of conceivable use regarding them.

The latter have found a complete definition by enacting the Civil Code of 1942 which, in Article 822(1) identifies the category of "State-owned maritime property", consisting of the

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concessions intended for direct use (so-called "cold", in which the *main payer* is the public administration with periodic payment to the contractor) to ensure that the "economic and financial risk of the management of the work" is met by the concessionaire. In doctrine, on such profiles, see G.F. CARTEI, *Interesse pubblico e rischio: il principio di equilibrio economico finanziario nella finanza di progetto*, in G.F. CARTEI AND M. RICCHI (edited by), *Finanza di Progetto - Temi e prospettive*, Naples, 2010, p. 3 et seq.; S. Fantini, *Il partenariato pubblico-privato, con particolare riguardo al project financing ed al contratto di disponibilità*, at www.giustizia-amministrativa.it. According to the EU Commission, though, this risk is not identifiable in the abstract. It is necessary to look at the work carried out and, in particular, the allocation of risk of demand for the work by users: see *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, Brussels, 7.12.2010, SEC(2010) 1545 final, pp. 75-76. See in the same sense the *Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalised PPP (IPPP),* 2008/C 91/02. See also the study commissioned by the European Parliament in 2010, where the critical issues that emerged and the interpretative difficulties of the EU Court of Justice and the EU Commission are highlighted: A. RÖSENKOTTER – A.C. SEIDLER – T. WUERSIG, *Concessions, paper requested by European Parliament's Committee on Internal Market and Consumer Protection, Policy Department A: Economic and Scientific Policies, IP/A/IMCO/NT/2009-12*, at www.europarl.europa.eu.

[19] Article 105 of Legislative Decree no. 112 of 31 March 1998, has transferred to the Regions the functions relating to "the award of concessions of assets of state inland navigation property, State-owned maritime property and territorial sea areas for purposes other than the supply of energy sources": see paragraph 2, letter l).

[20] Article 105 of Legislative Decree no. 112 of 31 March 1998, has transferred to the Regions the functions relating to "the award of concessions of assets of state inland navigation property, State-owned maritime property and territorial sea areas for purposes other than the supply of energy sources": see paragraph 2, letter l).

[21] Article 105 of Legislative Decree no. 112 of 31 March 1998, has transferred to the Regions the functions relating to "the award of concessions of assets of state inland navigation property, State-owned maritime property and territorial sea areas for purposes other than the supply of energy sources": see paragraph 2, letter l).

[22] See, in particular, Chapters 2 and 3.

seaside, beaches, ports and harbours. Together with the assets of State-owned water properties and those of military ownership, the State-owned maritime property assets have been placed in the overall category of "State-owned property", characterised by their belonging to the state[23].

However, the definition of a complete and organic State-owned maritime property system is due to the same sector regulations contained in the Italian "Codice della navigazione". The Code has primarily operated a specification and extension of the notion of State-owned maritime property contained in the Civil Code, identifying in Article 28 further categories of assets, according to a principle of continuity and contiguity of the coasts with respect to a specific destination, referred to as "public uses of the sea"[24]. Regarding the definition of the notion of "public use"[25], the same Code has accentuated the power of choice of public administration through identifying the legal arrangement of the concession, which, pursuant to Article 823(1) of the Italian Civil Code, mitigates the banning of rights in favour of third parties on State-owned maritime property, given the inalienability of such goods[26].

With specific regard to the new award of concessions, Article 36(1) of the "Codice della navigazione" states that "maritime authorities, in accordance with the requirements of public use, may grant the occupation and use, also exclusively, of State-owned property and territorial sea areas for a certain period of time", while Article 37 provides/provided for two "grounds for preference", to which the granting of new concessions is subject when there are "multiple competition applications". The first, still in force, consists of the "greatest guarantees of productive use of the concession"[27]. The other particular ground for preference provided for in paragraph 2 of Article 37 mentioned above, has traditionally adopted the term "preferential right", i.e. the right of the outgoing concessionaire to be preferred in a competitive procedure compared with other applicants for the concession: as is known, this right was expunged from national law as from 2008, following Italy's infringement procedure[28].

Regarding use, the start-up phase of the regulation was largely influenced by the original destination of State-owned maritime property to the defence and safety needs of the

[23] See Article 822 of the Italian Civil Code, which states: "The seashore, beach, bays, ports, rivers, streams, lakes and other waters defined as public by the applicable laws, and works intended for national defence, belong to the State and form part of the public domain".

[24] On the subject, see M. BOLCINA, *La regolazione statale in materia di concessione di spiaggia. Dall'unità del codice della navigazione alla frammentazione del quadro regolatorio*, in M. DI BENEDETTO (edited by), *Spiagge in cerca di regole*, Bologna, 2011, p. 23 et seq. See also the G. COLOMBINI article *Lido e spiaggia*, in *Dig. disc. pubbl.,* volume IX, Turin, 1994, p. 262 et seq., where definitions of seaside and beach can be found.

[25] On the legal regime applicable to public assets, see, *ex multis*: A.M. SANDULLI, article *Beni pubblici*, in *Enc. dir.*, 1959, V, 277 et seq.; M.S. GIANNINI, *I beni pubblici*, Rome, 1963, p. 58 et seq.; Id., *Manuale di diritto amministrativo*, Naples, 1989, 755 et seq.; S. Cassarino, *La destinazione dei beni degli enti pubblici*, Milan, 1962; S. CASSESE, *I beni pubblici. Circolazione e tutela*, Milan, 1969; V. CERULLI IRELLI, *Proprietà pubblica e diritti collettivi*, Padua, 1983; Id., article *Beni pubblici*, in *Dig. disc. pubbl.*, II, Turin, 1987, 273 et seq.; Id., *I beni pubblici nel codice civile: una classificazione in via di superamento*, Milan, 1989; V. CAPUTI JAMBRENGHI, article *Beni pubblici (uso dei)*, in *Dig. disc. pubbl.*, II, Turin, 1987, 304 et seq.; L. BENVENUTI, *La frontiera marina*, Padua, 1988.

[26] On the subject, see, M. D'ALBERTI, *Le concessioni amministrative. Aspetti della contrattualità delle pubbliche amministrazioni*, Naples, 1981. For a reconstruction of the function of the concession in the theory of public assets see, among others, S. CASSESE, *I beni pubblici. Circolazione e tutela*, cit., p. 206 et seq.

[27] Article 37(1), Codice della navigazione.

[28] As will be explained better in Chapter 3, §§ 3.1. and 3.2.

State[29], both from the traditional suitability of the beach and seaside to uses linked to commercial navigation and fishing. So that, initially, the conception of public assets prevailed, intended as a means of administrative action necessary for the direct and immediate exercise of a public function[30], with the consequent assertion that the concession systems determined an "exceptional" type of use of the asset, which does not conform to its normal use[31].

The primacy of the principle of "land reserve" compared with public property has been subject to review following the establishment of the theory of collective property[32], which, with specific reference to State-owned maritime property assets, identified collective fruition as the form of main use[33].

In more recent times, the progressive disappearance of activities linked to commercial navigation and fishing from the list of activities existing on state coastal property assets, coupled with the sustained increase of the new reality represented by mass tourism[34], has led to a modification of the function of State-owned maritime property, which has strengthened the acceptance of economic uses, considered to be compatible with the primary destination of State-owned maritime property assets for public use.

Although leisure and tourism uses have been recognised by Italian law since Royal Decree no. 726 of 1 December 1885[35], the first true recognition in legislative terms of the evolution of the conception of uses of State-owned maritime property was with Legislative Decree no. 400 of 5 October 1993, converted into Law no. 494 of 4 December 1993, listing the activities for which it was possible to grant State-owned maritime property concessions for purposes other than the provision of public services and the carrying out of port or productive activities[36].

These indications have been interpreted as a sign of the passage from a static phase of public maritime property to a more "dynamic" phase, characterised by "a more evident and incisive economic use of the property itself" and, at the same time, focused on the

[29] "A defence problem, both in the most historic sense of military defence, and in the more technical sense of defence of land territory and especially of inhabitants from violence at sea": F. BENVENUTI, *Il demanio marittimo tra passato e futuro*, in *Rivista del diritto della navigazione*, 1965, 154, now in *Scritti giuridici*, volume III, Milan, 2006, 2397.

[30] The theory of State-owned property as a necessary means for exercising the functions of the State and territorial bodies was originally held by E. GUICCIARDI, *Il demanio*, Padua, 1934.

[31] On this point see G. ZANOBINI, *Corso di diritto amministrativo*, volume IV, Milan, 1958, 30 et seq.

[32] M.S. GIANNINI, *I beni pubblici*, Rome, 1963 et seq.

[33] The theory of collective ownership is combined with the tripartition of the category of uses of public assets, divided into *direct* uses, *general* uses and *specific* uses; categories that are identifiable due to the public interests served by the assets, "according to their varying nature", states A.M. SANDULLI, *Manuale di diritto amministrativo*, volume II, XV edition, Naples, 1989, 785, where it is maintained that "often, through specific uses allowed by means of concession, a primary (or supporting) function of the public asset is carried out, and that the uses for which a certain permissive act is envisaged do not substantially differ from the common use".

[34] On the subject, see, M. OLIVI, *Profili evolutivi dei beni demaniali marittimi*, in *Dir. mar.*, 2004, 795 et seq.

[35] Which explicitly provided for the "unnecessary uses of lakeside beaches" (Articles 8 and 28).

[36] The list referred to in Article 1 of Law no. 494 of 4 December 1993 indicated the following activities: management of beach establishments; catering operations and serving of beverages, pre-cooked food and monopoly goods; hire of boats and general floating vessels; operation of sports and leisure facilities; commercial businesses; services of another nature and operation of facilities for residential use.

definition of an "Integrated coastal management strategy"[37], aimed not only at improving management but also "promoting the implementation of a vast range of legislation and policies in these areas", in line with the same European objectives[38].

1.3.1 Regional and local regulation, between planning and management: the division of State and regional responsibilities and public property federalism

As noted in the previous paragraph, a substantial unity of the government on the matter was established in the Codice della navigazione, as stated in Article 30, in which the subject in charge of the use of State-owned maritime property was identified within the transport and navigation authorities[39], and which, in turn, found peripheral articulation by dividing the State coastline into various districts[40]. The same Code also provided for several variants in terms of the duration and act of concession, in relation to the different level of invasiveness of installations on state property[41].

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[37] The policy of integrated coastal zone management was established in the 1970s in the United States, where the *Coastal Zone Management Act* (1972) was adopted. The principles expressed therein were incorporated into Agenda 21, the plan of action for sustainable development signed in Rio de Janeiro in 1992 at the United Nations Conference on Environment and Development. On the subject, see for example: United Nations Conference on Environment and Development (UNCED), *Agenda XXI*, 1992; OECD, *Recommendation of the Council on Integrated Coastal Zone Management*, 23 July 1992 – C(92)114; J.R. CLARK, *Integrated management of coastal zones*, Fao Fisheries Technical Paper no. 327, 1992; P. POST, C. LUNDIN, *Guidelines for integrated coastal zone management*, The World Bank, Washington, 1996; Conseil de l'Europe, *Modèle de loi sur la gestion durable des zones cotières et Code de conduit européen des zones cotières* (Sauvegarde de la nature no. 101), 2000.

[38] By express provision of Article 295 of the TEU (from 1 December 2009, Article 345 of the TFEU), The European Union is not allowed to interfere directly in rules that regulate the ownership of coastal assets in Member States, but it can, by exercising responsibilities conferred on it in the treaties and in accordance with the principles of proportionality, have an impact on the exercise of owners' rights. Based on this competence, the European Union – as has been done by various international organisations – has devoted special attention to the state of coastal zones and the problems related to their structure and management. More specifically, in 1995 the European Community launched a programme to understand and experiment elements and instruments capable of stimulating sustainable development along the European coastline [*Demonstration Programme on Integrated Coastal Zone Management*, announced in the Commission Communication COM(95). See also the Communication from the Commission to the Council and the European Parliament on Integrated Coastal Zone Management: a strategy for Europe [COM(2000) 547 final]. The Communication closes with an annex which lists and describes the (eight) principles of Integrated Coastal Zone Management (including: attention to the distinctive physical, social, cultural, institutional and economic characteristics of the areas concerned and the consequent specificity of management measures; support and involvement of all relevant administrative bodies at the various territorial levels and all interested parties). In its concluding remarks, the Communication emphasises that the eight principles are "fundamental components of good governance" and a broader adoption of such principles could also bring benefits to coastal zones. Along these lines there is a recommendation of the European Parliament and the Council of 30 May 2002 concerning the implementation of Integrated Coastal Zone Management in Europe (2002/413/EC).

[39] Ministry of Transport and the Merchant Navy.

[40] In accordance with Article 16 of the Codice della navigazione, the broadest districts are the maritime areas, headed by the maritime directors. The zones, in turn, are subdivided into compartments, led by the compartment heads, and the compartments are subdivided into sub-districts, which are subordinate to the sub-district heads.

[41] In the case of concessions involving installations that were not difficult to remove, i.e. where no demolition of works was necessary, a licence was issued by the compartment head and renewals were granted without any particular formalities. The licence was not subject to any approval, and according to established practice, lasted for one year. In contrast, for hard-to-remove installations, a concession (so-called concessions-contract) was granted after a particularly laborious investigation. The concession procedure envisaged the issuing of a formal decree by the maritime director, after which the compartment head gave the concessionaire possession of the State-owned property asset (Article 34 of the Codice della navigazione) for a period not exceeding four years. The issuing procedure by means of formal act was for all concessions between four and fifteen years. In this latter case, the Ministry of Transport and Navigation issued concessions by decree: on these aspects, see C. ANGELONE, *Profili evolutivi della disciplina delle concessioni demaniali marittime ad uso turistico e ricreativo: durata, finalità, competenze*, in *Dir. trasp*, 1999, p. 806 et seq.; M. BOLCINA, *op. cit.*, p. 26 et seq.

The unity of this discipline, of a purely state nature, reflected the reserve ratio between State and state property.

With the entry into force of the Italian Constitution, the principle of autonomy was established (Article 5 of the Constitution). This principle favoured the subsequent emergence of the centrality of the concept of territory intended as a regional dimension[42], mainly because of the allocation of planning jurisdiction to the Regions, in the sense of encompassing "everything that concerns the entire use of the territory"[43]. The first act of this "break-up" of unity of regulation of State-owned maritime property is represented by the issuing of Presidential Decree no. 616/1977 with which, in Article 59, the administrative functions delegated to the Regions include "the coastline, the overlooking state-owned property, areas of river and lake state property, where use is for leisure and tourism purposes", whilst keeping the functions of maritime navigation, national security and customs police under State administration. More specifically, in the subsequent Article 60 it is stated that the above-mentioned delegation should not have been applied to "ports and areas of pre-eminent national interest in relation to the interests of national security and the needs of maritime navigation", and that under Article 59(2), the identification of such areas should have taken place with a Prime Ministerial decree to be issued, subject to the opinion of the Regions concerned, by 31 December 1978.

After almost twenty years, and following successive extensions, the areas of pre-eminent national interest were identified and excluded from regional mandate with the Prime Ministerial decree of 21 December 1995, making the said delegation operational from 1 January 1996[44]. Pending the *regionalisation* of administrative functions, the Regions formulated a situation of "pooling" of the structures of maritime Authorities and, in particular, the port authorities, with the consolidation of the administrative practice of stipulating special free conventions[45].

On the matter, therefore, intervened the amendments made by Law no. 59 of 15 March 1997 (so-called "Bassanini Law"), concerning the delegation to the Government for the issuing of one or more legislative decrees with regard to the transfer of competencies from the State to the Regions and Municipalities. As far as this is concerned, the delegation has been implemented with Article 105(2)(*l*), of Legislative Decree no. 112/98 of 31 March 1998, no. 112/98, which conferred to the Regions the functions related to the granting of

[42] On the subject, see S. LICCIARDELLO, *Demanio marittimo ed autonomie territoriali*, in A. POLICE (edited by), *I beni pubblici: tutela, valorizzazione e gestione*, Milan, 1986, p. 182 et seq.

[43] As stated in the Constitutional Court's judgment no. 239 of 29 December 1982, in *Foro amm*., 1983, II, 103.

[44] For an overview of the distribution of administrative competencies on State-owned maritime property assets, refer to M. DE BENEDETTO, *Criticità amministrative*, in *Analisi d'impatto della regolamentazione. Il caso delle concessioni di demanio marittimo a uso turistico-balneare*, April 2009, no. 22, Servizio per la qualità degli atti normativi del Senato, p. 11. See also L. SALAMONE, *Concessioni demaniali e Titolo V della Costituzione: la Corte costituzionale demolisce il D.P.C.M. 21 December 1995. Il nuovo vademecum delle funzioni amministrative*, in *Dir. mar.*, 2008, p. 904 et seq.

[45] Article 8 of Law no. 647 of 23 December 1996 took note of the Regions' failure to set up offices responsible for the direct management of delegated activities, regulating the "pooling" of the Port Authorities, called upon to exercise the functions of State-owned maritime property intended for leisure and tourism use in a "functional relationship" with regional authorities: see C. ANGELONE, *Le concessioni demaniali marittime ad uso turistico e ricreativo: diritti del concessionario, situazioni concessorie, competenze*, in *Regioni e demanio marittimo*, Milan, 1999, 33 et seq. and R. TRANQUILLI LEALI, *Il demanio turistico-ricreativo: problematiche attuali e nuovi profili di gestione*, in *Regioni e demanio marittimo*, Milan, 1999, p. 102 et seq.

concessions on State-owned maritime property assets and territorial sea areas for purposes other than the supply of energy sources.

The decentralisation of competencies at regional and municipal level has been confirmed definitively after the reform of Title V of the Constitution[46], which, on the one hand, allocated the generality of administrative functions to the Municipalities, except for unitary operational requirements. Furthermore, the new wording of Article 117(4) of the Constitution allocates exclusive legislative competencies for tourism to the Regions. Under the provisions of Law no. 135[47] of 29 March 2001, a national tourism policy was defined at the Unified Conference[48], through the indication of principles and objectives to enhance and develop the tourism system, to be implemented at a regional level by means of laws and other developer and planner acts[49].

The framework of competencies and allocations relating to State-owned maritime property is still being developed, following approval of Legislative Decree no. 85 of 28 May 2010, laying down measures for the allocation to Municipalities, Provinces, Metropolitan cities and Regions of their own heritage, in implementation of Article 19 of Law no. 42 of 5 May 2009 (so-called "federalismo demaniale")[50]. The above-mentioned Legislative Decree no. 85/2010 has established the transfer of a series of state-owned assets to territorial bodies, on the request of the latter, based on the identification and inclusion in special lists by the Agenzia del demanio. The identified assets may be transferred within the available assets of the territorial bodies, irrespective of the legal regime to which these are subject, except for State-owned maritime property assets, for which maintenance of the application of safeguards under current legislation is provided, namely the Civil Code, the Codice della navigazione, regional, state and European law, "with particular regard to those that protect competition"[51]. More specifically, it is established that the ownership of such assets may be transferred from the State to territorial bodies, while preserving the character of inalienability. Therefore, the substantive regime does not seem to be touched at the moment, while the really significant aspect is that of dominical rights: modification of the ownership licence would be dependent on publication of the Prime Ministerial transfer Decrees in the Italian Official Gazette of transfers, which will happen "in the state of fact and law in which the assets are found" and with the "takeover in all active and passive relationships related to the assets transferred", with the consequent criticalities that are

[46] Implemented by Constitutional Law no. 3 of 18 October 2001.

[47] "Framework law on tourism".

[48] The Unified Conference, established by Legislative Decree no. 281 of 28 August 1997, consists of the State-Regions Conference and the State-Local Authorities Conference, i.e. Regions, Provinces, Municipalities and Mountain Communities, and has the task of promoting cooperation between State activities and self-government, and discussing subject areas and tasks of mutual interest.

[49] On this point, see M. BOLCINA, *op. cit.*, 30; in the same sense G. TACCOGNA, *Gli strumenti giuridici al servizio di una politica per la gestione integrata e lo sviluppo sostenibile della costa*, in *Quaderni Regionali*, 2007, p. 858 et seq.

[50] For an initial analysis of the measures subject to "federalismo demaniale" refer to V. NICOTRA, F. Pizzetti, *Federalismo demaniale: il primo passo nell'attuazione del federalismo fiscale*, at www.astrid-online.it.

[51] See Article 4(1) of Legislative Decree no. 85/2010.

described in this paper (e.g. litigation, testing of transparency procedures, supervision and controls, etc.)[52].

1.3.2. The distribution of competencies in individual regional regulations

The analysis of regional regulations concerning State-owned maritime property is, of course, more articulated, given that, in virtue of the progressive regulatory and administrative decentralisation, as described above, most of Italy's regions have, in the past decade, reviewed and updated their reference framework.

First of all, in accordance with the principle of "vertical subsidiarity"[53] and in compliance with the "Bassanini" reform, functions related to the granting of concessions are generally assigned to the Municipalities. In many instances, the latter are called upon to organise their activities according to a planning logic to be carried out in accordance with urban development plans. By browsing through the individual territorial laws, there are many references to variously named municipal plans.[54].

Without prejudice to what has been mentioned above with regard to the tendency to allocate said functions to the Municipalities, there is no lack of regional contexts in which alternative paths can be found[55].

Take, for example, the Piedmontese law that distinguishes, with regard to public lake property, between municipal or regional competence according to municipal or regional "interest", covered by the single concession[56]; "original" provisions are found in Friulian law, where the Region is only liable for concessions of regional interest, and those of a duration longer than fifteen years[57].

Even more peculiar is the Ligurian regulation that provides for an articulated procedure obliging Municipalities to involve the Region before granting individual concessions. The

[52] Among the regional experiences, a positive example of "federalismo demaniale" is the Veneto case, where the procedure initiated in 2010 for the transfer of State-owned property assets to the Region and the Municipalities has almost reached its conclusion.

[53] Internally, the principle of *subsidiarity* is defined by Article 118 of the Constitution as a criterion for assigning administrative functions to ensure uniform operation at levels of government higher than the municipal level. The provision is wholly consistent with Article 5.3 TEU, according to which there are three criteria on which the principle is based: 1) sufficiency, effects and scale (i.e. insufficiency of state action); 2) necessity of reaching safer effects; 3) necessity of operating at a higher level. The principle of subsidiarity can be intended not only in the "vertical" sense (namely the distribution of power between centre and periphery), but also "horizontal" (in the relationships between public authorities and civil society organisations).

[54] Take, for example, the provisions in the laws of the following Regions: Veneto (Regional Law no. 9 of 6 April 2001), Emilia Romagna (Regional Law no. 9 of 31 May 2002), Abruzzo (Regional Law no. 141 of 17 December 1997, as amended by Regional Law no. 42 of 4 December 2006, and Regional Law no. 12 of 29 May 2007), Puglia (Regional Law no. 17 of 23 June 2006), Calabria (Regional Law no. 17 of 21 December 2005) and Sardinia (Regional Law no. 9 of 12 June 2006).

[55] As noted by F. GUALTIERI, *La regolazione regionale e locale, tra pianificazione e gestione*, in M. DI BENEDETTO (edited by), *Spiagge in cerca di regole*, cit., p. 84.

[56] Articles 96 and 98 of Regional Law no. 44 of 26 April 2000.

[57] Article 5(2) of Regional Law no. 22 of 13 November 2006, as amended by Article 40(1) of Regional Law no. 10 of 21 April 2017.

Region is then called to issue a *nulla osta* regarding projects presented by Municipalities for the use of coastline[58].

Further peculiarities are identifiable with regard to public tendering procedures for the selection of concessionaries, in which there are some particularly "virtuous" and noteworthy regional experiences, which are better explained below[59].

1.4. The applicability of the principles of competition to concessions of public assets: "Teleaustria" case-law and the European Commission's position in favour of maximising the "right to transparency"

The hitherto described peculiar nature of concessions of public assets, aimed at the carrying out of so-called leisure and tourism activities pursuant to Article 1 of Legislative Decree no. 400/1993 (converted in Law no. 494/1993, above), is also reflected in their legal system.

The latter would, indeed, seem to be excluded from the scope of the new "Codice dei contratti pubblici" (Code of public procurement) (Legislative Decree no. 50/2016), becoming assimilated to rentals of immovable property; this is also confirmed by recital 15 of Directive 2014/23/EU, which reads: "certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land or any public property, in particular in the maritime, inland ports or airports sector, whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services, should not qualify as concessions within the meaning of this Directive"[60]. And, even more clearly, Article 17 of the new Code states: "The provisions of this code shall not apply to contracts and service concessions: a) having as their object the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property or concerning rights thereon". The same Code states, however, in Article 4, several principles of competition protection, such as "cost effectiveness, efficiency, impartiality, equal treatment, transparency, proportionality, publicity", which provide a framework also for contracts, not included in the Code (not only the concessions, but also "leases", "concessions of public funds"), which – as noted in the Council of State's opinion on the

[58] In particular, within the context of the Plan for the use of State-owned maritime property, approved by resolution no. 18 of 9 April 2002 of the Regional Council, when Municipalities receive applications for new concessions in free areas or intend to proceed with the transformation of free areas into equipped free beaches, they must present to the Region a project detailing suitable use that ensures the consistency and quality of the free beaches and equipped free beaches that are currently present along the municipal coastline, as well as future plans for beaches. Based on this documentation, the Region will issue a *nulla osta* within sixty days indicating the conditions to be met for the issue of possible new concessions.

[59] We refer, for example to the experiences of Veneto or Friuli-Venezia Giulia, to which Chapter 5, §§ 5.2., 5.3 is dedicated.

[60] In this sense, the CJEU on 25 October 2007, in the case *Ministero delle Finanze-Ufficio IVA di Milano v CO.GE.P. Srl,* C-174/06, EU:C:2007:634, which, albeit in relation to a taxation issue [interpretation of Article 13B(b)], of the Sixth Directive of the Council of 17 May 1977, 77/388/EEC, on the harmonisation of the laws of Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (GU L 145, 1)], has explicitly held that "a legal relationship such as that at issue in the main proceedings, under which a person has been granted the right to occupy and use, including exclusively, public property, namely areas of State-owned maritime property, for a specified period and against payment, is covered by the concept of 'leasing or letting of immovable property' within the meaning of that article". Application of the Directive 2014/23/EU to beach concessions is also excluded in the recent CJEU judgment of 14 July 2016, *Promoimpresa e Melis*, C-458/14 and C-67/15, EU:C:2016:558, on which see § 3.4.

draft of Legislative Decree no. 50/2016 – "for future implementation, they could be included"[61].

It is therefore fundamental to check the constraints that derive from such principles and what implications there are for domestic law.[62]. To this end, it is firstly necessary to take account of the case-law of the Court of Justice from which, evidently and decisively, emerges the legal value of several principles set out in the EC Treaty and the Community freedoms at the centre of the European single market[63]. In this regard, it is particularly interesting to recall the consolidated opinion of the Court of Justice, which since the well-known *Teleaustria* case[64] has stated that the principles of public evidence, as general principles dictated in a direct and *self–executing* way by the Treaty[65], are also valid for contracts and cases other than those specifically contemplated[66].

This obligation does not necessarily extend up to the imposition of a European disclosure system, similar to what is provided for by the various directives on public contracts. It is, however, necessary that when choosing a private concessionaire, the contracting entity must adopt mechanisms, although not identified in this case under EU law, that carry out the mentioned principles in the manner chosen by the Member States, to avoid phenomena of direct or indirect discrimination.

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[61] Council of State, Special Commission, opinion of 1 April 2016, no. 855, 14, at www.giustamm.it, no. 4/2016.

[62] On the subject of European contract law, see, for example, M. PROTTO, *Aspetti sostanziali e processuali degli appalti di servizi di rilevanza comunitaria*, in *Urb. e app.*, 1999, p. 223 et seq; A. CARULLO, *Appalti pubblici*, *Enc. Dir.*, vol. V, Milan, 2001, p. 84 et seq.; R. CARANTA, *I contratti pubblici*, Turin, 2004, p. 112 et seq.; D. MARRAMA, *L'organismo di diritto pubblico e gli appalti di servizi e di forniture sottosoglia*, in *Dir. proc. amm.*, 2004, p. 550 et seq.

[63] This refers, in particular, to the TFEU rules that monitor and guarantee good functioning of the common market, i.e: the rules that prohibit any discrimination on grounds of nationality [Article 12(1), ex Article 6(1)], and the rules relating to the free movement of goods (Article 28 – ex 30 – et seq.), the freedom of establishment (Articles 43 – ex 52 – et seq.) and the freedom to provide services (Articles 49 – ex 59 – et seq.).

[64] This refers to the CJEU judgment of 7 December 2000, *Telaustria Verlags GmbH*, C-324/98, EU:C:2000:669, in *Urb. app.*, 2001, 487, with note by F. LEGGIADRO, *Applicabilità delle direttive comunitarie alla concessione di servizi pubblici*, which, although referring to the award of a public service contract, contains general principles that can be extended to all cases involving public procurement and that describe an important part of the so-called community public contract law, equipped with great potential for expansion beyond the public services concessions sector to any kind of public selection procedure. In the same sense, see CJEU, 10 November 2011, *Norma-A SIA v Latgales planosanas regions*, C-348/10, in *Urb. app.*, 2012, 287 with note by R. CARANTA, *La Corte di Giustizia ridimensiona la rilevanza del rischio di gestione*; Plenary Assembly - Council of State, 7 May 2013, no. 13, in *Urb. app.*, 2013, p. 915, with note by G.F. NICODEMO, *Concessione di servizi: nuove regole per l'affidamento. Il new deal dell'Adunanza Plenaria*; Council of State, section V, 14 April 2008, no. 1600, in *Foro amm.-CDS*, 2008, 4, II, p. 1107. In general, for the effects of European legislation on the regulation of public services, see S. BATTINI - G. VESPERINI, *Introduzione*, in S. BATTINI - G. VESPERINI (edited by), *I limiti globali ed europei alla disciplina nazionale dei servizi*, Milan, 2008.

[65] According to the Court, the fact that EU procurement rules are immediately enforceable under Article 81 of the TEC (now Article 101 TFEU) essentially implies that these rules are merely enforcing, with reference to certain contracts, of general principles that are universally recognised.

[66] On this specific subject, for a careful analysis of EU case-law see S. VALAGUZZA, *L'evidenza pubblica come criterio di interpretazione restrittiva della giurisdizione amministrativa negli appalti sotto soglia: alcune perplessità* (note to Council of State, section V, 18 November 2004, no. 7554), in *Dir. proc. amm.*, pp. 524-526. On the same subject, note the research by P. CASSIA, *Contracts public set principe communautaire d'égalité de traitement*, in *Riv. trim. dir. eur.*, 2002, p. 413 et seq. and J. BENGOETXEA, *The Legal Reasoning of The European Court of Justice*, Oxford, 1993, p. 233 et seq., which distinguishes between first-level criteria of interpretation that refer to the criterion of literal interpretation (a contextual interpretation based on the scope of application of the law) and second-level interpretative criteria that allow for an extensive interpretation.

In this sense, it is also the position of the European Commission, which since the "Interpretative communication on concessions under Community law" of 12 April 2000[67], besides confirming the applicability of the principles of public evidence to the concessions of assets, independently of the name of the case, and therefore from its internal qualification in public and private terms[68], has further pointed out that when public administrations intend to proceed with entrusting assets through administrative concessions, they must make known, with appropriate forms of disclosure, not only their intention to pursue with a concession, but also all the information required for potential concessionaires to be able to evaluate their interest and participate in the procedure, such as an indication of the selection and allocation criteria, object of the concession and performance expected from the concessionaire[69].

EU law, therefore, does not seem to introduce such a principle of competition, rather a "right to transparency" (which translates into a "duty" for domestic law).

[67] Published in OJEC no. 121/5 of 29 April 2000, on which see A. BARONE – U. BASSI, *La comunicazione interpretativa sulle concessioni nel diritto comunitario: spunti ricostruttivi*, in *Foro it.*, 2000, IV, p. 389 ss.; C. GUCCIONE, *La comunicazione interpretativa della Commissione sulle concessioni nel diritto comunitario*, in *Giorn. dir. amm.*, 2000, p. 1253 et seq.; F. LEGGIADRO, *Comunicazione interpretativa della Commissione sulle concessioni nel diritto comunitario*, in *Urb app.*, 2000, p. 1071 et seq. and, by the same author, *Concessione e appalto: il nocciolo duro della distinzione*, *therein*, 2007, p. 1430 et seq.; L. QUARTA – D. SPINELLI, *Appalti pubblici europei: la comunicazione interpretativa della Commissione in tema di concessioni*, in *Riv. it. dir. pubbl. comunit.*, 2000, p. 585 et seq.; R. VILLATA – L. BERTONAZZI, *Servizi di interesse generale*, in M.P. CHITI – G. GRECO (edited by), *Trattato di diritto amministrativo europeo*, *Parte speciale*, IV, Milan, 2007, p. 1791 et seq.

[68] In this respect, the communication points out that the rules of the Treaty to ensure good functioning of the common market are in general also relevant to concessions, even though this is not explicitly mentioned. In the same communication, it is noted that the same goes for concessions of public assets, where "community indifference to the name of the case, and therefore from its internal qualification in public or private terms" stands out.

[69] These requirements are now specifically established in Article 171 of the new Code of public procurement for the concession of works and services.

2. MANAGEMENT MODELS, DURATION AND RENEWAL OF CONCESSIONS

2.1. Adhesion of Italian case-law to Community guidelines regarding the applicability of the principles of transparency in the concessionaire selection process; the peculiar hypothesis of management through in-house companies

The conclusions reached at Community level are fully shared by the national courts. The Council of State has on several occasions had the chance to align itself with the orientation expressed by the Court of Justice of the European Union, acknowledging the principles of protection of competition that transcend the scope of application of the individual directives[70]. Specifically, according to recent rulings of the Council of State, the submission to open public principles can be assumed in the circumstance that the concession of a public asset brings with it an opportunity for revenue generation for subjects operating in the market, imposing a competitive procedure underpinned by the above-mentioned principles of transparency and non-discrimination[71]. Some of these rulings, besides confirming with in-depth arguments the importance of such principles for the concession of public assets "of economic importance", have pointed out that EU competition protection regulations are not only applied in the case of the in-house model, where the direct award of operations is legitimate because there is a relationship of "delegazione organica" between the public body and asset operator that does not constitute a real difference between the parties[72]. Moreover, as described below[73], the "public" system of beach

[70] Pursuant to the criteria set out by the EU Court of Justice, several rulings of the Council of State maintain that for the application of principles of competition, it is immaterial whether the case is attributable to the sector of public contracts or concessions since, in this respect, the concession differs from the public contract only in terms of the remuneration procedures of the work of the concessionaire (see, in this sense, for example, Council of State, section IV, 25 January 2005, no. 168, in Council of State, 2005, I, 178; Id., section V, 31 May 2007, no. 2825, in *Foro amm.- CDS*, 2007, 1532). It should also be noted that the interpretative communication of the European Commission of 12 April 2000 (on this, see Chapter 1, § 1.4), has been duly reproduced, two years later, by circular no. 3944 of 1 March 2002 of the Department for European Policies of the Presidency of the Council of Ministers, in relation to *Procedure di affidamento delle concessioni di servizi e di lavori*, in G.U. no. 102 of 3 May 2002.

[71] In particular, the Plenary Assembly – Council of State, with sentence no. 5 of 25 February 2013, in *Foro it.*, 2013, III, 250, with long footnote by A. TRAVI, has determined that, in the case of award of concessions of public assets – considering the scarcity of resources or when there are quotas – the competitive procedure best guarantees all the opposing interests at stake, including freedom of economic initiative and effective competition among economic operators. Among the many judgments in this respect, even before the Plenary Assembly, see Council of State section VI, 2 March 2001, no. 1206, in *Foro amm.- CDS*, 2001, 614; Id., section IV, 15 February 2002, no. 934, *therein*, 2002, 390; Id., section V, 18 November 2004, no. 7554, *therein*, 2004, 3243; Id., section VI, 25 January 2005, no. 168, cit., *therein*, 2005, 178; Id., section VI, 10 January 2007, no. 30, *therein*, 2007, 161. In the same sense, see, more recently, Council of State, section IV, 13 March 2014, no. 1243, in *Foro amm.*, 2014, 812 et seq.; Id., section V, 5 December 2014, no. 6029, at www.giustizia-amministrativa.it, where it is stated that "the concession of public assets subject to economic exploitation by private entities must be conducted following public tendering procedures". The position of the administrative court of first instance is consistent with this: see, for example, Liguria Regional Administrative Court, Genoa, section II, 28 May 2008, no. 1132, *therein*, 1265; Campania Regional Administrative Court, Naples, section VII, 6 December 2008, no. 21241, in *Giur. merito*, 2009, 1378, and Sardinia Regional Administrative Court, section I, 5 February 2010, no. 140, in *Riv. giur. edil.*, 2010, I, 976.

[72] There was significant application of the principles so far mentioned in the *Lignano Sabbiadoro* case (decided by the Council of State, section VI, 25 January 2005, no. 168, in Council of State, 2005, I, 178), with regard to the conflict that arose over the allocation of a stretch of sandy shore and connected stretch of water for leisure and

management – through direct award to local institutions or public legal persons – is mainly used in France.

2.1.1. Decision of the Council of State, section V, no. 5193/2016 and the differentiation of the management activities of seaside establishments based on services offered

In this regard, however, we should note a recent ruling by the Council of State[74], which clearly stated that the management of seaside establishments comes under the public services of economic importance and, in particular, among the "*different tourism services*" disciplined by the Ministerial Decree of 31 December 1983. In support of such an approach, the Council of State draws attention to some of the provisions of the new Consolidate Law on state-controlled companies (approved with Legislative Decree no. 175 of 18 August 2016) – specifically Article 4(1 and 2) – which provide for the establishment, by public administrations, of companies exclusively for certain purposes, including the "management of a service of general economic interest through a partnership contract under Article 180 of Legislative Decree no. 50 of 2016 […]".

This is, however, a slightly excessive affirmation if the aim is to attribute a general scope. It appears to be hardly sustainable that the management of the services in question "due to their typical features"[75] falls under the local public services of economic importance. Indeed, it should be considered that the management activities of public beaches are differentiated from one another and not attributable to a single type of service. A study commissioned by the Lazio Region in 2003 to the companies *Eurobuilding, Nomisma and Studi Economici SpA* classified seaside establishments into four categories according to the surface areas given in concession: 1) those up to 1697.5 m^2; 2) those up to 2378 m^2; 3) those up to 3589.80 m^2 and 4) those above this surface area[76]. The larger establishments are also those with a greater "footprint" from an urban planning point of view. Sometimes these are outright walled "citadels": swimming pool, gym, sauna, bar, restaurant, shops, as well as the usual changing rooms, cabins, bathrooms and showers, deckchairs and beach umbrellas.

As far as the type of services offered is concerned, there are certainly primary services (such as those related to the cleaning of beaches and safety of bathers), the management of which is for the most part entrusted to state-controlled companies through in-house, direct award, for which categorisation in terms of public services may be appropriate[77].

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tourism use. For a deeper analysis of the above-mentioned decision, see B. TONOLETTI, *Beni pubblici e concessioni*, Padua, 2008, 413 et seq. In critical terms, on the configuration of the in-house model with reference to State-owned property concessions, see L. SALAMONE, *Concessioni demaniali, in house providing e società miste: non costituisce titolo preferenziale per il rilascio di una concessione demaniale la pretesa identità tra l'Ente pubblico territoriale e la costituenda società mista*, in *Dir. mar.*, 2008, 2, 493 et seq.

[73] See Chapter 4, § 4.2.

[74] This refers to the judgment of the Council of State, section V, 9 December 2016, no. 5193, cit., at www.giustizia-amministrativa.it.

[75] Council of State, section V, no. 5193/2016, cit.

[76] See WWF dossier entitled "*Spiagge italiane: bene comune, affare privato*", cit., p. 11.

[77] Special attention is paid to coastline operators of a public law nature in Ligurian regional legislation, which expressly recognises the possibility to derogate from the principles of competition in the case of allocation of equipped free beaches to public bodies: see Regional Council resolution no. 512 of 21 May 2004, available at http://www.burl.it/ArchivioFile/B_BUR000039404242000.pdf (Article 6).

However, alongside the so-called "primary" services – managed mainly by state-controlled companies – we should also consider the "secondary" services, which are not secondary from an economic point of view as they play an absolutely primary, or even better, "strategic" role for many tourism areas (such as the activities of hiring deckchairs and beach umbrellas, pedalos or other recreational boating vessels, and food services, cultural, recreational and various other activities in seaside establishments): in most cases, such services are not managed by state-owned companies, but third-party subjects (usually private operators), even through direct award, in compliance with the plans for the use of beaches as drawn up by the Municipalities and approved by the Region[78].

There are various reasons that have justified this framework: reasons of social and recreational interest; management by apparently non-profit organisations, i.e. direct management by public bodies and armed forces for the benefit of their respective employees. These cases also include awards of the so-called "equipped beaches", which are not fully-fledged seaside establishments, rather beaches where, on request, it is possible to hire beach equipment.

2.2. Preferential right and automatic extension of state property concessions: the position of the AGCM (Italian Competition Authority) and the Constitutional Court

In view of the system introduced by the Codice della navigazione, characterised by a wide discretion under the authority responsible for granting concessions[79], subsequent legislation has partially disregarded the principles that inspired it, also in order to adapt domestic law to Community principles.

Specifically, Article 1(2) of Legislative Decree no. 400/93, cited above, has introduced a four-year licence, independently of the nature and type of facilities required for the carrying out of activities, without prejudice to the possibility for the concessionaire to request a different duration. This provision was subsequently amended by Article 10 of Law no. 88 of 16 March 2001, which set a term of six years for the duration of concessions, as well as automatic renewal for another six years at each subsequent expiry date: the principle of "normality" of the renewal of concessions has thus been affirmed in the discipline of State-owned maritime property, in view of the "uniqueness" or "abnormality" or "atypical nature" of the extension time of the concession arrangement[80]. Consequently, the discretionary power of the granting authority has been reduced to the exercise of the power of withdrawal, provided for by Article 42(2) of the Codice della navigazione, "for specific reasons concerning the public use of the sea or for other reasons of public interest, at the discretion of the granting authority".

[78] As noted in § 1.3, in the past, concessions were granted on the request of interested parties and plans for the use of beaches, often used to upgrade existing ones, were only approved subsequently.

[79] In this regard, see Chapter 1, § 1.3.

[80] Precisely in these terms, C. ANGELONE *Le concessioni «stagionali» di demanio marittimo per finalità turistico ricreative*, in *Dir. mar.*, 2005, p. 760, shows how the renewal of concession licences is inherent in the very nature of the act and part of the concessionaire's rights, in accordance with Article 8 of the Regional Codice della navigazione, which explicitly provides that such concessions "can be renewed without the burden of investigation, subject to the opinion [...] on the lease payment". On this subject, see also M. BOLCINA, *op. cit.*, p. 38 et seq.

Legislative Decree no. 400/93 has also introduced within the Code the "sub-concession"[81], of both the full concession arrangement and the individual activities pertaining to it, which constitutes a model widely used in the context of management activities of Italian beaches, particularly for establishments with a smaller urban footprint in conformity with the various regional regulations (for example, for the hire of pedalos or other small beach vessels, or for kiosks, bars, etc.). In this way, the "indirect operation" of beach concessions is allowed through the creation of a new legal relationship between concessionaire and sub-concessionaire, in the absence of succession in the principal concession arrangement, by setting as the sole limit the request by the concessionaire for authorisation from the granting authority[82].

The framework of beach concessions was consolidated by Law no. 296 of 27 December 2006 (2007 Finance Act), which set a maximum duration of twenty years for a concession arrangement[83]. In addition to projections on the duration of the concession and the faculty of renewal of the concessionaire, another element characterising the Italian system can be traced back to the original provision of Article 37(2) of the Codice della navigazione[84] on the preference to be given to "previous concessions, already granted, at renewal compared to new cases". This is, as we have seen[85], the so-called preferential right, which by constituting the interest of the "outgoing" concessionaire to be preferred over other candidates, has put a limit on the discretionary powers of public administration in the choice of the subject that, in the case of multiple applications, offers greater guarantees with respect to the guiding principle in Article 37(1) of the Codice della navigazione regarding the "productive use of the concession"[86].

In case-law, the prevailing orientation has been to accept the preference given to the previous concessionaire according to the preferential right, to ensure that all submitted concession applications guarantee equal satisfaction in terms of public interest[87]. Preference for the "outgoing" concessionaire only "gradually and subject to verification of

[81] See Article 45*a* of the Codice della navigazione.

[82] The latter, however, cannot make a discretionary assessment on the technical suitability and reliability of the "sub-concessionaire", but will only ascertain the absence of a criminal record or preventive measures that are incompatible with the use of a public asset: see C. ANGELONE, *Subingresso e subconcessione sul demanio marittimo*, in *Dir. mar.*, 2007, p. 245 et seq.

[83] See Article 1(253).

[84] As previously mentioned, the cited article was repealed following the infringement procedure against Italy, as from 2008. The provision – contained in the quoted paragraph 2, first sentence – has remained in force, and states: "When granting new State-owned maritime property concessions for leisure and tourism activities, preference is given to applications that include non-fixed and completely removable equipment, in order to protect the coastal environment".

[85] In this regard, see Chapter 1, § 1.3.

[86] See F. DI LASCIO, *Concessioni di demanio marittimo e tutela della concorrenza*, in *Foro amm. – TAR*, 2009, p. 796.

[87] Precisely in these terms, Council of State, section VI, 24 December 2009, no. 8716, in *Foro amm. – CDS*, 2010, p. 676 et seq., with note by G. GRUNER, *L'affidamento ed il rinnovo delle concessioni demaniali marittime tra normativa interna e principi del diritto dell'Unione europea*, where it is stated that "application of the principle enshrined in Article 37(2) of the Codice della navigazione, according to which in the case of renewal of a concession of an area of State-owned maritime property, preference must be given to the previous concessionaire (so-called preferential right), is subject to appropriate publication of the renewal procedure and the actual equivalence of conditions offered by the previous concessionaire compared with the other aspirants". In the literature, see C. CALLERI, *Diritto di insistenza e interpretazione dell'art. 37 c. nav.*, in *Dir. trasp.*, 2008, p. 467 et seq.

equal economic-managerial capacities of two or more competitors" is in line with EU law, which, as stated above[88], has shown the need for experimentation of public tendering procedures when issuing of State-owned maritime property concessions, in compliance with the principles of non-discrimination, equal treatment and transparency.

The AGCM has on several occasions set out its views on the regulations regarding beach concessions, and specifically in the report of 20 October 2008, AS481[89], stating the need to open up the sector through modifications to national legislation, aimed at overcoming the mechanisms of automatic extension and establishing tendering or public procedures, as a general rule for the award of beach concessions. According to the AGCM, a reform of this kind could bring economic advantages, both in terms of higher fees offered to the granting authority, and improved service for users[90]. Furthermore, the Constitutional Court has in recent years given and confirmed signs of moving in the direction of a necessary interpretation of the existing regulatory framework that is more coherent with the principle of competition, in line with European indications[91]. Failure to meet community principles of some of the provisions for the granting of State-owned maritime property concessions has led to the opening of infringement procedure no. 2008/4908, launched by the European Commission against the Italian Government, due to violation of Directive 2006/123/EC on services in the internal market (so-called "Bolkestein Directive")[92].

[88] See, on this point, Chapter 1, § 1.4.

[89] In *Bollettino*, no. 39/2008. In the same sense, the opinion of 28 October 1998, AS154, in *Bollettino*, no. 44/1998 as well as that of 11 December 2008, AS491, in *Bollettino*, no. 46/2008 should be noted. These relate to the overall revision of provisions on administrative concessions; more recently, see the opinion of 9 June 2017, AS1395, *Bollettino*, no. 27/2017, whereby the AGCM raised several competition concerns regarding several provisions of the new Regional Law no. of 26 April 2017 of the Friuli-Venezia Giulia region (regarding: publication of requests for concessions of State-owned maritime property areas; duration of concession; sub-concession and applications presented by public bodies). All the documents referred to can be found at www.agcm.it.

[90] See M. DI BENEDETTO, *Imprese costiere, mercato delle concessioni e libera concorrenza*, in N. GRECO (edited by), *Le risorse del mare e delle coste. Ordinamento, amministrazione e gestione integrata*, Rome, 2010, pp. 404-405.

[91] Pending a comprehensive reform of the sector, the Constitutional Court, too, has on a number occasions intervened on the question, declaring several regional provisions as unconstitutional due to non-compliance with EU law [Article 117(1), Constitution]. The provisions in question provided for extensions of State-owned maritime property concessions in favour of current concessionaires. See, for example, Constitutional Court judgment no. 180 of 20 May 2010, in *Giur. cost.* 2010, p. 2161, with note by M. ESPOSITO, *La triade schmittiana à rebours,* which declared the unconstitutionality of Article 1 of Regional Law no. 8 of 23 July 2009 of the Emilia-Romagna region, which provided for the possibility for holders of State-owned property concessions to request extension of the concession for up to a maximum of 20 years after the date of issue, subject to the presentation of an investment plan for enhancing assets. The Court declared the rule unconstitutional as it "unjustifiably restricted the competitive structure of the market of management of State-owned maritime property, encroaching on a State area of competence and violating the principle of equal treatment (also called "of non-discrimination"), from Articles 49 et seq. of the TFEU, relating to freedom of establishment, favouring old concessionaires to the detriment of new aspirants". A similar case concerned Article 16(2) of Regional Law of Tuscany no. 77 of 23 December 2009, which was declared illegal by judgment no. 340 of 26 November 2010 of the Constitutional Court, in *Foro amm.- CDS*, 2011, p. 813 et seq. Article 4(1) of Regional Law of Marche no. 7 of 11 February 2010 and Articles 1 and 2 of Regional Law of Abruzzo no. 3 of 18 February 2010 suffered the same fate, being declared illegal by judgment no. 213 of 18 July 2011 of the Constitutional Court, in *Foro amm.- CDS*, 2012, 9 et seq. Such provisions allowed the holders of valid concessions, who during the validity of the concession would have or had carried out building work, with or without the purchase of equipment and movable property, to request a change in the duration of the concession for a period between 7 and 20 years (from the date of the change).

[92] Directive 2006/123/EC of the European Parliament and of the Council, of 12 December 2006, on services in the internal market, OJEU L 376 of 27.12.2006, pp. 36–68.

3. FROM THE COMMUNITY INFRINGEMENT PROCEDURE TO THE JUDGMENT OF 14 JULY 2016 IN THE *PROMOIMPRESA AND OTHERS* CASE

3.1. Community infringement procedure no. 2008/4908 pursuant to Article 49 TFEU

Italian legislation on concessions of State-owned maritime property was the subject of infringement procedure no. 2008/4908 launched by the European Commission pursuant to Article 226 TEC (current Article 258 TFEU).

With the letter of formal notice dated 29 January 2009, the European Commission specifically informed the Italian Government that it had begun to examine – following receipt of a complaint – some of the rules of the Codice della navigazione and Regional Law no. 22 of 13 November 2006 of the Friuli-Venezia Giulia Region, which raised questions of incompatibility with Article 43 TEC (current Article 49 TFEU) on freedom of establishment.

As for the Codice della navigazione, the European Commission's attention was focused on Article 37(2), second sentence of the Codice della navigazione which – in its wording at the time – provided for the so-called preferential right of the "outgoing" concessionaire, establishing as follows: "[...] Additionally, preference is given to the already granted previous concessions that are at renewal compared with new cases […]".

Article 9(4) of Regional Law no. 22 of 13 November 2006 of the Friuli-Venezia Giulia Region also provided that (*in the definition of the "Plan for use of areas of State-owned maritime property serving leisure and tourism purposes*) "to establish the most productive use of the concession, there will be a comparison of the competitors through the criterion of the most favourable offer, based on at least six of the following criteria selected in advance, and made known when the competition notice is published: […] g) be in the priority situation referred to in Article 37(2), second sentence, of the Codice della navigazione"[93].

In the above-mentioned letter of formal notice, referring briefly to the well-established case-law of the Court of Justice of the European Union regarding Article 49 TFEU, the European Commission points out that legal persons must be able to exercise their freedom of establishment "without being subject to the application of national rules that do not respect the principle of equal treatment. […] The discriminatory measures are only justified on the basis of one of the derogations provided for by Articles 45 and 46 of the EC Treaty [corresponding to current Articles 51 and 52 TFEU], while respecting the principle of proportionality"[94].

[93] Under the provision of Regional Law 22/2006, the Plan for use of State-owned maritime property, approved by Decree no. 320 of 9 October 2007 of the President of the Friuli-Venezia Giulia region, regulated the issue of new public concessions by stipulating that "for concessions intended for non-profit bodies or associations […] criterion g) [i.e on the situation regarding priority indicated in Article 37(2), Codice della navigazione] is obligatory and shall not be less than 30 percent; for concessions for leisure and tourism purposes that are already the subject of concession, criterion g) is obligatory and shall not be less than 10 percent".

[94] To this effect, see the letter of formal notice of 29 January 2009, where, in support of the claim reported here in the text, the Commission quotes the CJEU judgment of 13 July 1993, *Commerzbank*, C- 330/91, EU:C:1993:303, paragraph 14.

This being said, the Commission stated that the conditions for granting concessions provided for by Article 37 of the Codice della navigazione and Article 9 of Regional Law no. 22 of 13 November 2006, while equally applicable to all Italian or foreign companies, privileged the award of State-owned maritime property concessions to companies that already had a concession and that, consequently, were already established – as the case may be – in Italy and in Friuli-Venezia Giulia. According to the Commission, "the rules in question, which confer a preference for the outgoing concessionaire (the so-called preferential right), constitute restrictions on the freedom of establishment and imply discrimination as to their place of establishment, contrary to Article 43 of the Treaty" (now Article 49 TFEU)[95].

As further pointed out in the letter of formal notice, citing the judgment in the *CaixaBank* case[96], the Commission found that the Italian provisions under scrutiny "distort the selection procedure, breaching the principle of equal treatment of the different economic operators and, in practice, making it extremely difficult, if not impossible, for any other competitor to gain access to the concessions. Such provisions therefore dissuade other companies from competing and offering more efficient services for the new concessions, or even impede this"[97].

Having thus identified the incompatibility of Article 37(2), second sentence of the Codice della navigazione and Article 9(4) of Regional Law no. 22 of 13 November 2006 with Article 49 TFEU, the Commission proceeded to consider whether the aforementioned restriction of freedom of establishment could be deemed justified in so far as it is necessary and proportionate to attain the purposes recognised as a valid ground for derogation under Articles 51 and 52 TFEU. When setting out its views on this aspect based on the assessment elements available at the time, the Commission excluded that the "principle of preference towards Italian companies" could be considered justified under Articles 51 or 52 TFEU. Regarding Article 51 TFEU (concerning the activities related to the exercise of the official authority), the Commission pointed out that such derogation "should be restricted to activities that constitute a direct and specific participation in the exercise of official authority […], which does not happen in the case of exploitation of the State-owned maritime property in question"[98]. Furthermore, with reference to Article 52 TFEU (which includes derogations to the freedom of establishment on grounds of public policy, public security and public health), the Commission stated that "there is no element in the present case that justifies recourse to the grounds provided for in Article [52 TFEU]"[99] since the reply given by the Italian Government during the procedure was unable to demonstrate that the national rules at issue were necessary to remedy a "genuine and sufficiently serious threat affecting one of the fundamental interests of society […] with due regard to the principle of proportionality"[100].

[95] To this effect, letter of formal notice of 29 January 2009, paragraphs 8-9.

[96] In the letter of formal notice the Commission specifically quotes the CJEU judgment of 5 October 2004, *CaixaBank*, C-422/02, EU:C:2005:56, paragraph 12.

[97] To this effect, letter of formal notice of 29 January 2009, paragraph 11.

[98] *Ibid*., paragraph 14.

[99] *Ibid*., paragraph 16.

[100] *Ibid*., paragraph 15.

On this basis, therefore, with the letter of formal notice of 29 January 2009, the European Commission reached the conclusion that Italy, by adopting Article 37(2), second sentence of the Codice della navigazione and Article 9(4) of Regional Law no. 22 of 13 November 2006, had failed to fulfil its obligations under Article 49 TFEU, and invited the Italian Government to submit its comments within two months.

3.2. Extension of infringement to Article 12 of Directive 2006/123/EC and subsequent closing of procedure

By letter dated 5 May 2010[101], the European Commission again addressed Italy in the context of procedure no. 2008/4908, taking a position on the incompatibility with European Union law of the legislative changes made in the meantime by the Italian Legislature to the Codice della navigazione (i.e. from 29 January 2009, the date of the letter of formal notice) on the guidelines of State-owned maritime property concessions subject to infringement.

As reported by the Commission in the above-mentioned communication dated 5 May 2010, Italy had, through Legislative Decree no. 194 of 30 December 2009, at first revoked the preferential right of the outgoing concessionaire provided for in Article 37(2), second sentence of the Codice della navigazione, thus remedying the criticalities found by the Commission with regard to the latter provision. Subsequently, however, during the conversion in law of Legislative Decree no. 194 of 30 December 2009[102], the Italian law maker inserted into a rescinding provision already contained in Legislative Decree no. 191 of 30 December 2009[103] a subsection which, through linked referrals to further provisions[104], allowed automatic renewal of State-owned maritime property concessions every six years for six years. In view of the overall content of the Italian legal framework at stake, the Commission considered that the subsequent references made Legislative Decree no. 194 of 30 December 2009 devoid of any "useful effect", given that "the text of Article 1(18) of the above-mentioned conversion law, in its current version, clearly provides for automatic renewal every six years for six years for concessions that are due to expire. This calls into question the entire approach taken by the Decree Law of 30 December 2009"[105].

On these grounds, in the letter dated 5 May 2010, the Commission again expresses its views on compatibility with European Union law of the Italian legal framework governing State-owned maritime property concessions in force at that date. In addition to considering compatibility with Article 49 TFEU, the Commission also expresses its views on compatibility of national law with Article 12 of Directive 2006/123/EC (Services Directive), which should have been transposed by all Member States by 28 December 2009[106].

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[101] C(2010) 2734.

[102] Law no. 25 of 26 February 2010.

[103] In particular, Article 1(18) of Legislative Decree no. 194 of 30 December 2009.

[104] Article 1(19) of the conversion law no. 25/2010 referred to Article 3(4a) of Legislative Decree no. 400 of 5 October 1993 (converted, after amendment, by Law no. 494 of 4 December 1993), which in turn referred to Article 1(2) of the same Legislative Decree no. 400/1993. The final "landing" provision of all these linked referrals, i.e. Article 1(2) of Legislative Decree no. 400/1993, provided that "concessions referred to in paragraph 1, irrespective of their nature or type of installations envisaged for the carrying out of activities, run for a period of six years. At the end of the term they are automatically renewed for a further period of six years, and so on at each expiry date".

[105] To this effect, see European Commission letter of 5 May 2010 C(2010) 2734, p. 2.

[106] *Ibid*., p. 3.

In this regard, the Commission maintains that "concessions of State maritime assets in this procedure constitute authorisations, whose number is restricted according to Article 12 of the above-mentioned Services Directive". Consequently, according to the Commission, the Italian provisions that through linked referrals allowed automatic renewals of six years every six years "confer in this way a privileged position on outgoing providers who can have their concession renewed without an impartial and transparent procedure being applied. The provisions in question dissuade other undertakings from competing and offering more efficient services for new concessions, or even prevent this."[107].

In this context, in the letter dated 5 May 2010, the Commission excludes that the extensions prohibited by Article 12 of Directive 2006/123/EC can benefit from justifications "such as those presented in this case". Without going further into the allowed derogations, the Commission states in the above-mentioned communication that the Italian system that provides for the renewal of concessions in favour of the outgoing operator must be considered contrary to the principle of freedom of establishment under Article 49 TFEU, even if Article 12 of Directive 2006/123/EC is not applicable to the concessions in question. According to the information available at the time, this renewal system did not benefit from the derogations provided by Articles 51 or 52 TFEU or by the case-law of the Court of Justice of the European Union on restrictions to freedom of establishment[108].

In addition, the Commission also expresses its views on the incompatibility of the Italian legal framework with the principle of legal certainty as the "general principle of Community law" which requires that "the rules of law are clear and predictable in their effects"[109]. On this point, the Commission notes that the national provisions in question[110] "create an ambiguous legal context for economic operators", in contrast with the Community principle of legal certainty[111].

In the final remarks of the letter dated 5 May 2010, the Commission states that the Italian legislation which provides for the automatic renewal of concessions was in contrast with Article 12 of the Services Directive and with Article 49 TFEU regarding freedom of establishment.

Following the letter of 2010, the infringement procedure no. 2008/4908 was closed by the European Commission on 27 February 2012 following Italy's enactment of Article 11 of Law no. 217 of 15 December 2011[112], which repealed the legislative provision that allowed automatic renewal of six years every six years[113]. Moreover, Law no. 217 of 15 December 2011 has conferred on the Italian Government the power to adopt – "within fifteen months of the date of entry into force" of the same Law 15/2011 – "a legislative decree concerning

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[107] *Ibid.*, p. 3.

[108] *Ibid.*, p. 4.

[109] *Ibid.*, p. 4, where the Commission quotes the CJEU judgment of 18 November 2008, *Förster*, C-158/07, EU:C:2008:630, paragraph 67.

[110] Article 1(18) of Law no. 25 of 26 February 2010, and Article 1(2) of Legislative Decree no. 400 of 5 October 1993.

[111] To this effect, see European Commission letter of 5 May 2010 C(2010) 2734, p. 4.

[112] Community law 2011.

[113] Article 1(2) of Legislative Decree no. 400 of 5 October 1993, converted, after amendment, by Law no. 494 of 4 December 1993.

the review and reorganisation of legal framework on State-owned maritime property concessions". Among the principles dictated to the Government for the exercise of the delegation, Article 11 of Law 15/2011 establishes that the legislative decree should "provide criteria and award procedures in compliance with the principles of competition, freedom of establishment, guarantee of the exercise, development and promotion of entrepreneurial activities, and protection of investments"[114].

3.3. Article 12 of Directive 2006/123/EC

As mentioned in the preceding paragraph, 28 December 2009 was the deadline by which the Member States should have adopted the legislative, regulatory and administrative provisions to comply with Directive 2006/123/EC (Services Directive), which entered into force on 28 December 2006.

The objective of the Services Directive is to "build on, and thus complement, the Community acquis"[115], in order to "remove barriers to the freedom of establishment for service providers in Member States and to guarantee providers and recipients the legal certainty necessary for the exercise in practice of those fundamental freedoms of the Treaty"[116]. For the aforesaid purposes, the Services Directive "establishes a general legal framework which benefits a wide variety of services while taking into account the distinctive features of each type of activity or profession and its system of regulation"[117].

To safeguard and properly assess the aforementioned objective specialities, the Directive aims to provide its legal effects (removal of barriers) according to a "dynamic and selective approach consisting in the removal, as a matter of priority, of barriers which may be dismantled quickly and, for the others, the launching of a process of assessment, consultation and complementary harmonisation of specific issues […]".

According to the wording of Article 1(2 and 3), the Services Directive is not a "directive on liberalisation" of economic activities. Establishing which economic activities must be carried out "under free market conditions" and which must be carried out "under monopoly" remains within the competence of each Member State. In this regard, clarification is provided in recital no. 8 of the Services Directive, which states that "it is appropriate that the provisions of this Directive concerning the freedom of establishment and the free movement of services should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States either to liberalise services of general economic interest or to privatise public entities which provide such services or to abolish existing monopolies for other activities or certain distribution services."[118].

The Services Directive draws on the *acquis communautaire* also with regard to the notion of "overriding reasons relating to the public interest", to which some provisions of the Directive refer. According to recital no. 40, this notion, developed by the Court of Justice of the European Union in its case-law in relation to Articles 43 and 49 of the TFEU, "may

[114] To this effect, see Article 11(1)(b) of Law no. 217 of 15 December 2011.

[115] To this effect, see Services Directive, recital no. 30.

[116] To this effect, see Services Directive, recital no. 5. The "general" scope of the Services Directive is also indicated in Article 1(1).

[117] To this effect, see Services Directive, recital no. 7.

[118] To this effect, see Services Directive, recital no. 8.

continue to evolve" and "covers at least" a wide range of reasons including public policy, public security, public health, social policy objectives, the protection of recipients of services and workers, and the protection of the environment[119]. These reasons, if applied by way of derogation (of strict interpretation) in accordance with the principles of necessity and proportionality, may justify restrictions on the performance of economic activities[120], which must not result in indirect discrimination of service providers on the basis of their nationality[121].

In the case of economic activities carried out on a national level on the basis of "authorisation schemes" (inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions)[122], the Services Directive dictates a specific guideline where the number of authorisations available for an activity is limited due to scarcity of natural resources. On this point, Article 12 of the Services Directive states that:

"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 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

[119] Recital no. 40 textually establishes that the notion of "overriding reasons relating to the public interest" "covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historic and artistic heritage; and veterinary policy". See also the definition of "overriding reasons relating to the public interest" in Article 4, no. 8 of the Services Directive.

[120] CJEU, judgment of 26 September 2013, *Ottica New Line*, C-539/11, EU:C:2013:591, paragraph 33: "Restrictions on the freedom of establishment which are applicable without discrimination on grounds of nationality may be justified by overriding reasons relating to the general interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective". CJEU, judgment of 24 March 2011, *European Commission v Kingdom of Spain*, C-400/08, EU:C:2011:172, paragraph 74: "Such overriding reasons recognised by the Court include: environmental protection; town and country planning; and consumer protection. On the other hand, purely economic objectives cannot constitute an overriding reason in the public interest".

[121] On this point, see Services Directive, recital 56.

[122] See Services Directive, recital 39. Within the meaning of Article 4(6) of the Services Directive "authorisation scheme" means "any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof".

protection of the environment, the preservation of cultural heritage and other overriding reasons relating to the public interest, in conformity with Community law".

Article 14 of the Services Directive contains the "prohibited requirements" (that cannot be provided by Member States in order to limit access to a certain activity), which include "the discriminatory requirements based directly or indirectly on nationality or […] on the location of the registered office" and "the case-by-case application of an economic test"[123].

Notwithstanding the contents of these generally applicable provisions, it should be noted that the Services Directive does not contain any specific reference to the inclusion of State-owned maritime property concessions for leisure and tourism purposes in its scope. Recital no. 33 specifies that "the services covered by this Directive concern a wide variety of ever-changing activities", listing among the services included in its scope "the services to consumers, such as those in the field of tourism, including tour guides, leisure services, sports centres and amusement parks […]".

In addition to the above remark, there is no particular recognition in the Services Directive of the specific value of the tourism activities which, in other areas, are explicitly promoted and supported by the European Union in terms of the "strategic and vital contribution to employment in the various Member States", thanks in particular to the widespread role played by micro-, small- and medium-sized enterprises (SMEs) "which both contribute to innovation from below and stability in the sector and guarantee the quality, diversity and authenticity of the regions where they are rooted"[124].

3.4. Judgment of the Court of Justice of the European Union of 14 July 2016

Italy has implemented Article 12 of the Services Directive through Article 16 of Legislative Decree 59/2010[125], in force since 8 May 2010, and which is an almost literal transposition of Article 12 of the Directive[126].

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[123] With regard to Article 14 of the Services Directive, the Court of Justice has clarified that: "an interpretation of Article 3(3) of Directive 2006/123 to the effect that Member States may justify, on the basis of primary law, a requirement prohibited by Article 14 of that directive would deprive that provision of any practical effect by ultimately undermining the ad hoc harmonisation intended by that directive. That interpretation would be contrary to the conclusion drawn by the EU legislature in recital 6 in the preamble to Directive 2006/123, to the effect that barriers to freedom of establishment may not be removed solely by relying on direct application of Article TFEU, owing, inter alia, to the extreme complexity of addressing barriers to that freedom on a case-by-case basis. To concede that the 'prohibited' requirements under Article 14 of that directive may nevertheless be justified on the basis of primary law would in fact be tantamount to reintroducing such case-by-case examination, under the FEU Treaty, for all restrictions on freedom of establishment" (see CJEU judgment of 16 June 2015, *Rina Services*, C-593/13, EU:C:2015:399, paragraphs 37-38).

[124] See *Turismo in Europa. Risoluzione del Parlamento europeo del 27 settembre 2011 sull'Europa, prima destinazione turistica mondiale – un nuovo quadro politico per il turismo europeo* (2010/2206(INI)), in OJEU C 56E of 26.2.2013, pp. 41–54.

[125] Legislative Decree no. 59 of 26 March 2010, *Attuazione della direttiva 2006/123/CE relativa ai servizi nel mercato interno*, published in GURI no. 94 of 23 April 2010, Ordinary Supplement no. 75.

[126] Article 16 of Legislative Decree no. 59/2010, headed "Selection from among several candidates", provides as follows: "1. Where the number of authorisations available for a given service activity is limited due to the scarcity of available natural resources or technical capacity, the competent authorities shall apply a selection procedure to potential candidates and ensure the predetermination and publication, in accordance with their national legal system, of the criteria and modalities to guarantee impartiality, which the authorities themselves must adhere to.
2. The competent authorities may take into account, in establishing rules for the selection procedure, considerations of public health, social policy objectives, the health and safety of employees or self-employed

In the fulfilment of the national rules of transposition of the Services Directive, the Italian system of State-owned maritime property concessions has become the subject of proceedings before the administrative courts. The referrals for a preliminary ruling formulated by two Italian Regional Administrative Courts pursuant to Article 267 TFEU led to the judgement given by the Court of Justice of the European Union on 14 July 2016 in joined Cases C-458/14 and C-67/15.

3.4.1 Main proceedings and question for preliminary ruling in case C-458/14

The first case C-458/14 arose from the referral for a preliminary ruling of the Regional Administrative Court of Lombardy, to which the company Promoimpresa s.r.l. had requested annulment of the decision of the Consorzio dei Comuni della Sponda Bresciana del Lago di Garda ("the Consortium") to refuse to renew the lake concession expiring on 31 December 2010. Promoimpresa appealed against the decision of the Consortium before the Regional Administrative Court of Lombardy, basing its plea on a violation of Article 1(18) of Legislative Decree no. 194/2009, as converted by Law no. 25/2010, as such provision allowed an extension of the termination date of concessions.

During the proceedings for annulment of the Consortium's decision, the Regional Administrative Court of Lombardy formulated a question for preliminary ruling as follows:

"Do the principles of freedom of establishment, non-discrimination and safeguarding competition, as laid down in Articles 49, 56 and 106 TFEU, and the 'rule of reason' principle implicit therein, preclude national legislation under which the validity of concessions of economically significant publicly-owned maritime, lakeside and waterway assets is to be repeatedly extended through a succession of legislative acts, the duration of that validity being statutorily increased for at least eleven years, with the effect that the same concessionaire retains the exclusive right to exploit the asset economically, even through the period of validity under the concession awarded to that concessionaire has meanwhile expired, whereby interested economic operators are deprived of any opportunity of obtaining a concession for the asset on the basis of a public tendering procedure?"[127].

3.4.2. Main proceedings and question for preliminary ruling in case C-67/15

Case C-67/15 arose from the appeal lodged by several concessionaires (Mr Melis and others) of State-owned maritime property on the coastlines of the Sardinia Region.

The concessions in question, granted in 2004 for a period of six years, were subsequently extended for a period of one year. In 2012, the concessionaires submitted a request to the competent local authorities for an extension, to which the Municipality did not respond, leading the applicants to believe that they could legally continue their activities from May 2012, in accordance with Article 1(18) of Legislative Decree no. 194/2009 that provides for the automatic extension of State-owned maritime property concessions for leisure and

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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.
3. Effective enforcement of the criteria and modalities in paragraph 1 shall result from the individual measures relating to the granting of the authorisation.
4. 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".

[127] See judgment on Joined Cases C-458/14 and C-67/15, paragraph 18.

tourism activities[128]. However, on 11 May 2012 the Municipality, following approval of the plan for use of coastal zones, published a notice for the award of seven new State-owned maritime property concessions, some of which were for locations in areas in which Mr Melis and the other concessionaires already held concessions. They therefore resorted to the Regional Administrative Court of Sardinia requesting annulment of the Municipality's decisions.

In the referral order, the Tar (Regional Administrative Court of Sardinia) raised the following interpretative questions to the Court of Justice to determine whether the national legislation at stake would conflict with the application of European Union law, in particular, Article 12 of the Directive 2006/123, as well as the provisions of the TFEU relating to the freedom to provide services and freedom of establishment:

"1) Do the principles of freedom of establishment, non-discrimination and safeguarding competition, as laid down in Articles 49, 56 and 106 TFEU, preclude national legislation under which the period of validity of concessions of economically significant State-owned maritime property is repeatedly extended through a succession of legislative acts?

2) Does Article 12 of Directive 2006/123/EC preclude a national provision, such as Article 1(18) of Decree Law no. 194 of 30 December 2009, converted into Law no. 25 on 26 February 2010, as amended and supplemented, which permits the automatic extension of existing concessions of State-owned maritime property for leisure and tourism activities to 31 December 2015, or to 31 December 2020, pursuant to Article 34k of Decree Law no. 179 of 18 October 2012, inserted by Article 1(1) of Law no. 221 of 17 December, converting the aforesaid Decree Law into law[129]?

3.4.3. Clarifications given by the Court of Justice

It is well known that in a preliminary judgment, the Court of Justice does not rule on national law and its compatibility with European Union law. Preliminary rulings given by the Court of Justice focused on the provisions of European Union law that are the subject of the referral, aiming to ensure correct and uniform interpretation of EU law in all Member States. Conversely, it is solely the national court that can rule on the interpretation of national law when deciding on a case[130].

It may also be recalled that, pursuant to the established case-law of the Court of Justice, a judgment issued by the latter on a preliminary ruling binds the national court in terms of interpretation of the acts of the institutions of the European Union in question, for the solution of the dispute in the main proceedings[131]. Preliminary rulings also produce an "external effect" towards the other courts of the Member States of the EU, which are

[128] *Ibid.*, paragraph 20.

[129] *Ibid.*, paragraph 25.

[130] See CJEU judgment of 18 April 2013, *L v. M*, case C-463/11, EU:C:2013:247, paragraph 29. See also CJEU judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales SAL*, case C-118/08, EU:C:2010:39, paragraph 23, where the Court clarified that "although it is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of provisions of national law with the legal rules of the European Union, it has repeatedly held that it has jurisdiction to give the national court full guidance on the interpretation of European Union law in order to enable it to determine the issue of compatibility for the purposes of the case before it".

[131] CJEU judgment of 16 June 2015, *Peter Gauweiler and Others v Deutscher Bundestag*, C-62/14, EU:C:2015:400, paragraph 16.

exempt from the obligation to refer questions that are "substantially identical" to those already answered by the Court of Justice by way of preliminary ruling[132].

In the light of this, it is therefore possible to examine the clarifications given by the Court of Justice in the judgment of 14 July 2016 in response to the questions for preliminary rulings formulated by the Italian courts.

Firstly, the Court of Justice states that "State-owned property concessions" that are the subject of questions for preliminary rulings may fall within the notion of "authorisations" pursuant to Article 12 of the Services Directive as they "constitute formal decisions, irrespective of their characterisation in national law, which must be obtained by the service providers from the competent national authorities in order to be able to exercise their economic activities." To determine whether the case actually falls within the scope of Article 12, it is up to the national court to decide if the concessions cover "scarce natural resources"[133].

This said, the Court excludes that "State property concessions" fall within the scope of "service concessions" under Directive 2014/23/EU[134], noting that the concessions subject to dispute "do not concern the provision of a particular service by the contracting entity, but an authorisation to exercise an economic activity on State-owned land". From this it follows, according to the Court, that "the concessions at issue in the main proceedings do not fall within the category of service concessions [subject to Directive 2014/23/UE]"[135].

Regarding the scope of Article 12(1 and 2) of the Services Directive, the Court, in consideration of the wording of the rule – precludes national legislation that provides for an extension of the date of termination by law, equivalent to an automatic renewal, "in the absence of any selection procedure between the potential candidates"[136].

The Court adds that, under Article 12(3) of the Services Directive, Member States can take account of considerations linked to imperative reasons of public interest "in establishing the rules of the selection procedure"[137].

Furthermore, the Court admits that national authorities may adopt solutions based on the protection of "legitimate expectations" of concessionaires. Such solutions require "assessment on a case-by-case basis to show that the holder of the authorisation could reasonably expect its authorisation to be renewed and has made the corresponding investments"[138].

Notwithstanding the clarifications provided with regard to Article 12 of the Services Directive, the Court goes on to consider the alternative interpretative hypothesis, in which State-owned maritime property concessions subject to dispute do not fall within the scope of any directive (neither the Services Directive nor other directives on public contracts). In

[132] CJEU judgment of 6 October 1982, *Cilfit*, 283/81, EU:C:1982:335, paragraphs 15 and 21.

[133] See judgment on Joined Cases C-458/14 and C-67/15, paragraphs 41 and 43.

[134] Directive 2014/23/EU of the European Parliament and the Council of 26 February 2014 on the award of concession contracts, in OJEU L 94 of 28.3.2014, pp. 1–64.

[135] See judgment on Joined Cases C-458/14 and C-67/15, paragraph 47. See also Chapter 1, § 1.2.

[136] *Ibid*., paragraphs 50 and 57.

[137] *Ibid*., paragraph 43.

[138] *Ibid*., paragraph 56.

this regard, the Court reminds that – also in this second hypothesis – national authorities are still required "to comply with the fundamental rules of the TFEU, in general, and the principle of non-discrimination, in particular" for the granting of concessions with a "certain cross-border interest", in particular in terms of geographical location and value, given that the award of such a concession "without any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings located in another Member State […] in principle, prohibited by Article 49 TFEU"[139].

Concerning the application of Article 49 TFEU, the Court admits that national legislation may provide for extensions that are necessary and proportionate to protect overriding public interests regarding legal certainty, allowing concessionaires to recoup the cost of their investments[140].

In order to decline case by case available protection for reasons of legal certainty, the Court gives importance to the date of award of each concession. For concessions awarded in 1984 "when it had not been established at that time that contracts with certain cross-border interest might be subject to a duty of transparency, [the principle of legal certainty] requires that the termination of such a concession be coupled with a transitional period enabling the contracting parties to untie their contractual relations on acceptable terms, inter alia, from an economic point of view"[141].

Conversely, for concessions – such as those in dispute – awarded in the 2000s "when it had already been established that contracts with certain cross-border interest were subject to a duty of transparency, […] the principle of legal certainty cannot be relied on in order to justify a difference in treatment prohibited on the basis of Article TFEU"[142].

3.5. Petitions pending before the European Parliament

Several Italian citizens holding State-owned maritime property concessions have addressed petitions to the European Parliament under Articles 20 and 227 TFEU[143].

[139] *Ibid*., paragraphs 64-65.

[140] *Ibid*., paragraph 71 where the Court states that: "[…] in so far as […] the renewals resulting from the operation of the national legislation aim to allow concessionaires to recoup the cost of their investments, […] such a difference in treatment may be justified by overriding reasons in the public interest, inter alia, by the need to comply with the principle of legal certainty".

[141] *Ibid*., paragraph 72.

[142] *Ibid*., paragraph 73.

[143] For example, see the following petitions: 0365/2014; 0044/2015; 0632/2015; 1043/2015; 1077/2015; 1144/2015; 1150/2015; 1160/2015; 1174/2015; 1175/2015; 1179/2015; 1180/2015; 1181/2015; 1187/2015; 1188/2015; 1201/2015; 1206/2015; 1210/2015; 1211/2015; 1229/2015; 1231/2015; 1238/2015; 1239/2015; 1245/2015; 1246/2015; 1247/2015; 1248/2015; 1249/2015; 1251/2015; 1259/2015; 1274/2015; 1279/2015; 1355/2015; 1356/2015; 1386/2015; 0007/2016; 0058/2016; 0084/2016; 0085/2016; 0086/2016; 0087/2016; 0088/2016; 0089/2016; 0090/2016; 0091/2016; 0099/2016; 0100/2016; 0101/2016; 0102/2016; 0107/2016; 0108/2016; 0116/2016; 0121/2016; 0147/2016; 0148/2016; 0149/2016; 0150/2016; 0151/2016; 0152/2016; 0153/2016; 0154/2016; 0155/2016; 0156/2016; 0157/2016; 0158/2016; 0159/2016; 0160/2016; 0161/2016; 0162/2016; 0163/2016; 0164/2016; 0175/2016; 0228/2016; 0229/2016; 0230/2016; 0231/2016; 0234/2016; 0256/2016; 0264/2016; 0269/2016; 0271/2016; 0272/2016; 0275/2016; 0279/2016; 0280/2016; 0281/2016; 0282/2016; 0295/2016; 0305/2016; 0306/2016; 0311/2016; 0312/2016; 0313/2016; 0314/2016; 0315/2016; 0318/2016; 0334/2016; 0366/2016; 0396/2016; 0428/2016; 0433/2016; 0449/2016; 0451/2016; 0452/2016; 0456/2016; 0460/2016; 0462/2016; 0463/2016; 0521/2016; 0568/2016; 0610/2016. The complete list of petitions submitted by Italian citizens on the application of Directive 2006/123/EC can be found at https://petiport.secure.europarl.europa.eu/petitions/it/show-petitions by searching "2006/123/EC".

In connection with pending proceedings, following publication of the Court of Justice's judgment of 14 July 2016, some representatives of the above-mentioned concessionaires were heard by the European Parliament Committee on Petitions, together with representatives of the European Commission and the Italian Government[144].

During the hearing of 11 October 2016, the representatives of the Italian concessionaires pointed out that the Italian Government's implementation of the Services Directive on beach concessions would result in an infringement of the rights enshrined under Articles 7, 16 and 17 of the Charter of Fundamental Rights of the European Union, posing a serious threat to the survival of a large number of enterprises active in the sector (mostly family-run micro-businesses), that undertake activities in the public interest ensuring safety, hygiene, environmental protection and touristic promotion. In addition to undermining the continuity of existing businesses, the launch of competitive procedures for the award of concessions would entail the risk of infiltration of organised crime in the public tendering procedures, for money laundering purposes. According to the petitioners, for the Services Directive to achieve its "useful effect" by promoting the economic development of backward areas, the Italian Government should award new State-owned maritime property concessions for the approximately 4,000 km of coastline in southern Italy that currently lack leisure and tourism establishments, rather than affect the continuity of existing companies in the country's more developed tourism areas.

Speaking at the hearing on 11 October 2016, the European Commission was able to briefly explain its position on the judgment of 14 July 2016. In particular, the Commission expressed its willingness to comply with the statements of the Court of Justice, clarifying that Article 12 of the Services Directive is applicable to State-owned maritime property concessions where resources are scarce; on this point, the Commission acknowledged that according to the Court's explanations, it is up to the national authorities to check when the condition of scarcity of resources is satisfied, in which case Article 12 of the Services Directive is applicable. Where the condition of "scarce resources" is not satisfied, the fundamental principles as enshrined in the Treaty must be applied, through the competitive award of concessions with a "certain cross-border interest", as further clarified by the Court of Justice. At the end of its hearing, the Commission also stated that Italian legislation on State-owned maritime property concessions was the subject of infringement procedure no. 2008/4908 concluded in 2012, insofar as it entailed "horizontal legislation" applicable to all cases. In this regard, the Commission agreed with the approach indicated by the Court of Justice, according to which the national authorities can assess on a case-by-case basis each existing concession. According to the Commission, however, this examination cannot be carried out on the basis of a "horizontal rule" indistinctly applicable to all cases; it should instead be limited to the cases that satisfy the conditions in which – according to the explanations provided by the Court of Justice – there is no obligation to carry out the competitive procedure for the award of concessions.

As for the position taken by Italy at the hearing of 11 October 2016, the representative of the Government noted that, following the ruling of the Court of Justice, dialogue had resumed with the European Commission to identify ways to implement the judgment of 14

[144] The audio/video recording of the hearing of 11 October 2016 at the European Parliament's Committee on Petitions is available at the following link: http://www.europarl.europa.eu/ep-live/it/committees/video?event=20161011-1500-COMMITTEE-PETI.

July 2016 that are balanced for all EU countries, where contested European provisions must be uniformly applied.

4. THE OTHER EUROPEAN SYSTEMS

4.1. Subject, method and purpose of comparative study

To assess the possible implications of the judgment of the EU Court of Justice of 14 July 2016, with particular reference to the application of the Bolkestein Directive on beach concessions, an analysis of management models adopted by other Member States of the EU is essential. By comparing the experiences of other countries, this contribution will be able to offer valid insight into the degree of alignment of each administrative system with the principles imposed by EU law, particularly with regard to the protection of competition and equal treatment among operators, as well as their concrete articulation, consistent with the objective of integrated management of European coastal zones. On the basis of this approach, the study will be limited to France, Spain, Portugal, Croatia and Greece.

The criterion for identifying the systems analysed is that these can be considered competitors of Italy in relation to the object of the study. From a geomorphological point of view, the countries chosen have large coastlines and average seasonal temperatures similar to Italy, resulting in a considerable range of tourism services in the beach establishment industry. Furthermore, the exercise of legislative functions referable to State-owned maritime property in the countries in question is divided between the state and regions based on articulated mechanisms of distribution of planning and management competencies in the same sector, in which multiple "levels" of government operate[145].

Attention has been paid to several principle aspects: identification of the institutional body holding the State-owned maritime property; distribution of administrative powers for the management of assets (in particular, with reference to the powers for issuing concessions); the procedure for choosing the contractor (with particular attention to the presence of competitive mechanisms); and the duration of concessions. For each of these aspects, the main references to constitution, legislation and regulations in force in the analysed countries were traced.

As will be seen, the reference sources are not homogeneous in the various countries, but are distinguished by degree, since there are some systems where State-owned maritime property is subject to constitutional provisions as specified by state laws and regulations, and others where discipline is inserted into primary laws. They are also distinguished by form, as they are organic in nature when contained in single texts or codes, and are fragmented and of more complex reconstruction when inserted into multiple measures to be interpreted together.

Furthermore, it should be noted that the complexity of the reference legal framework is also linked to the period of introduction by the single countries of laws to regulate the use

[145] Due to their different characteristics and tourism offering, the countries of northern Europe and the United Kingdom were not considered, despite public policies in this field offering advanced solutions regarding the environmental protection of State-owned maritime property compared with the systems analysed. In this context, it is worth mentioning the *Marine and Coastal Access Bill 2009*, adopted on 12 November 2009, through which community directives on the protection of coastlines have been incorporated into the British system (available at http://www.opsi.gov.uk/acts/acts2009/pdf/ukpga_20090023_en.pdf), or the *Swedish Environmental Code*, adopted in 1988 and amended in 1999, which conducts an intensive beach protection policy throughout the country, with provisions also for the safeguarding of public waters (the *Code* is available at http://www.regeringen.se/content/1/c6/02/28/47/385ef12a.pdf).

of State-owned maritime property within their legal systems. For example, the legislation in force in France and Spain is the result of the revision or reorganisation of previous legislation, with reforms coming even after very long periods of application. On the other hand, the use of State-owned maritime property in Croatia was only regulated in 2002 on the basis of several principles in the Constitutional Charter adopted in 1990. Nevertheless, the adoption of legislative and administrative provisions in more recent times does not necessarily seem to affect the quality of case-law adopted: in many respects, the Croatian *Maritime Domain and Seaports Act* no. 11/2002 appears to be more compliant with Community principles than the Spanish *Ley de Costas*, reformed in 2013.

Common to the countries analysed is the express indication of ownership, proprietorship or pertinence of State-owned maritime property, a category in which beaches and other natural elements making up a coastal zone (dunes, cliffs, salt lakes, etc.) is included.

As already mentioned, the sources by which recognition is made are different.

4.2. France

In the French system, State-owned maritime property is regulated, as amended most recently, by the *Code général de la propriété des personnes publiques* (CGPPP), issued with *Ordonnance* 2006 - 460 of 21 April 2006[146]. This provision came into force on 1 July 2006 after a long and complex gestation, and almost entirely repealed the earlier *Code du domaine de l'Etat*, rewriting the legislation applicable to public assets and heritage[147].

In the CGPPP there are several articles dedicated to State-owned maritime property, including Article L2111-4. Like the Italian system (Articles 822 and following of the Italian Civil Code), natural State-owned maritime property is defined according to a factual finding based on the result of the action of natural agents in relation to the marine environment. Also, several characteristics common to all state assets are defined: Article L3111-2 establishes that these are inalienable and imprescriptible and affirms that State-owned maritime property, like fluvial state property, can be reserved under law or granted to third parties in the manner prescribed by the law.

Article L2124-4 reiterates in the French system a general principle in the other countries analysed: access to beaches must be free and without charge[148]. This provision stipulates, in particular, that access is free unless there are justified reasons of public safety, national defence or environmental protection that justify specific limitations: the free use without charge by the community constitutes the fundamental purpose of beaches, as well their use for fishing and mariculture. Such criterion, under paragraph II of Article L2124-4, is also applicable to beach concessions, which in any case must preserve the freedom of movement and use of the coastline by the public in a significantly broad area along the

[146] OG 158/03, amended and supplemented with OG 141/06. Published in *National Gazette No*. 158/2003.

[147] For a comment, see Vv.Aa., *La codification du droit des propriétés des personnes publiques*, in *Act. jur. droit adm.*, 2006, 20, 1073 et seq.

[148] The legislative part of the *Code* was enacted with *ordonnance* no. 2000-914 of 18 September 2000, while *livres* I, III, IV and V of the regulatory part were issued by *décret no. 2005-935* of 2 August 2005, and *livres* II and VI by *décret no. 2007-397* of 22 March 2007. The provisions discussed are included in *Titre* II, dedicated to the coastline and the related functions of protection and development. The order is available at www.legifrance.gouv.fr.

whole shoreline[149]. The principles described are the subject of *décret no. 2006-608*[150], which introduced new regulations on beach concessions in the French system. The successive Article 2 places further limits on the beach concessions compared with those set out in Article L321-9 of the *Code de l'environnement* (including the provision that, with respect to the surface area of the state property area, a minimum of 80% of the length of the coastline and beach must remain free of any structure, equipment or installation). It should be added that, with the exception of sanitary and safety facilities, only removable or transportable equipment and structures are allowed on the beaches, with no element that can be anchored permanently to the ground and the value of which is compatible with the purpose accorded to the state property asset with respect to the duration of its occupation. This rule is linked to another key principle of the decree, according to which any installation on a beach must be conceived in such a way that the area must return to its original state at the end of the period of validity.

The French system therefore seems to be strongly oriented towards the environmental protection of State-owned maritime property and, at the same time, tends to favour the general use of its assets over other uses. This interpretation is reinforced by the reading of two principles. The first is that the surface area of the beach must be free from any movable structure for a period not exceeding six months, as defined in the concession[151]. The second refers to the possibility that the granting authority has the faculty to decide which facilities are authorised on beaches according to layout and attendance, as well as the level of services offered in the areas around the concession.

Regarding the granting of concessions, Article 1(1) of the above-mentioned *décret* gives the state, through the Prefect, the power to grant concessions which have as their object the development, exploitation and conservation of specific stretches of coastline[152]. In all cases, the concessionaire is authorised to occupy part of the allocated space for the installation of facilities and the exploitation of seaside activities for the public. The decree in question also acknowledges that the concessionaire empowers one or more subconcessionaires, through a specific exploitation agreement, to carry out all or part of the activities covered by its licence, including the receipt of earnings. In this case, the duration of the concession may not exceed that of the principal concession.

In this regard, Article L2124-4 contains further indications. The first concerns the award and renewal of concessions, which are subject to an *enquête publique* (public enquiry)[153]

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[149] This aspect must be mentioned in concession contracts and adapted according to the characteristics of the relevant locations. There are further provisions on access to the seashore in Articles L. 160-6, L. 160-6-1, L. 160-7 and L. 160-8 of the *Code de l'urbanisme*, available at www.legifrance.gouv.fr.

[150] Available at www.legifrance.gouv.fr. For a comment on the decree, see C. MAUGUÉ, *La réaffirmation du caractère exceptionnel de l'occupation privative des plages*, in *Act. jur. droit adm.*, 2006, 27, p. 1496 et seq.

[151] This measure has been widely debated in legal literature and at the same time challenged by operators, as noted, for example, by C. MAUGUÉ in *La réaffirmation du caractère exceptionnel de l'occupation privative des plages*, cit., p. 1496 et seq.

[152] See, on this point, Articles 5 et seq. Port concessions are classed as exceptions, as these must be granted by the director of the competent port authority (Article 12).

[153] This is an participation procedure typical of the French system, counted among the instruments of the so-called *démocratie de proximité* of *Loi no. 2002-276* of 27 February 2002 (available at www.legifrance.gouv.fr) and used when the execution of a project or the construction or localisation of an infrastructure poses potential risks for the environment or community health, or is liable to setting several types of opposing interests into competition with each other. On this subject, see the *Commission nationale du débat public* website bibliography (http://www.debatpublic.fr). For the Italian legal theory, see L. CASINI, *L'inchiesta pubblica. Analisi comparata*, in

conducted by the competent Prefect, who is required to inform the community or association of interested Municipalities of the intention to award or renew a concession, or to have received an application from a non-beneficiary of the pre-emption right of local authorities and their groupings[154]. Interested parties have two months from the date of the notification to assert their right, and in such cases, within six months must present to the Prefect a file containing the documents referred to in Article 5(2), which will be the subject of a specific administrative procedure and a public enquiry. The second concerns the subjects to whom the concession is assigned, which must be granted, as a priority, to communes or associations of multiple communes and, where such subjects renounce their pre-emption right, to public or private legal persons following publicity of the competitive procedure.

If preferential rights are not asserted, the granting of the concession is subject to a comparative assessment procedure pursuant to Article 38 of Law no. 93 - 122 of 29 January 1993 (so-called *Loi Sapin*)[155], relating to the prevention of corruption and the transparency of economic life and public procurement. In both cases, at the end of the public enquiry, the Prefect reaches a decision on the concession applications submitted and can decide to grant a licence despite a contrary opinion being expressed during the debate, as long as the decision is adequately justified[156].

Where the concessionaire is a local authority which decides to adopt an exploitation agreement, the reference framework is that of the *délégations de service public* referred to in Articles L. 1411-1 et seq. of the *Code général des collectivités territoriales*[157]. This is a competitive procedure of the type of restricted procedures under EU law[158]. If, on the other hand, the concessionaire is not a local authority, an open tender procedure is applied with the submission of multiple competing bids, from which the one deemed best for subconcession activities will be chosen. Also in this case, draft conventions are submitted to the Prefect for opinion[159]. Article 1(1) of *décret no. 2006-608* stipulates that the duration of beach concessions for the exploitation, development and maintenance of specific stretches of coastline cannot exceed twelve years. Conversely, nothing is said about the period of duration in cases of subconcessions, but it has already been said that, pursuant to Article 1(1) of the *décret*, their expiration cannot exceed that of the main provision.

In the French system, the brief duration of beach concessions and the predominantly public management are, as we will see, an exception compared to other European contexts. These differences are justified in the already mentioned reasons of environmental protection and due attention to the conservation of State-owned maritime property assets, according to

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Riv. trim. dir. pubbl., 2007, p. 176 et seq. In general, on the participation implementation tools of the participatory democracy of the French system, see Vv.Aa., *Information et participation du public*, in *Act. jur. droit franç.*, 2006, p. 2314 et seq.

[154] Article 5 of *décret no. 2006-608.*

[155] Available at www.legifrancegouv.fr.

[156] Article 10 of *décret no. 2006-608.*

[157] Also available at www.legifrancegouv.fr.

[158] The administration invites certain candidates to present an offer on the basis of a draft convention, on which the Prefect's opinion is required before the final award (Article 13 of *décret no. 2006-608*).

[159] Article 14 of *décret* no. 2006-608.

principles that in recent years have been strongly re-evaluated and reinforced by EU law through rules relating to integrated coastal zone management.

4.3. Portugal

With a view to greater "openness" to national autonomy, it is on the concessionaire's choice of specific regulatory procedures that the Spanish and Portuguese models are based, the essential features of which will be examined below[160].

In Portugal, the assignment of licences for State-owned maritime property is regulated, in general, by Article 10 of *decreto – lei* no. 226-A of 31 May 2007[161], which lays down some binding criteria for the competent administrative authorities[162] and clarifies that initiation of the procedure happens at the request of one of the parties[163].

Regarding the concessionaire selection procedure, in the Portuguese system, invitation to tender is obligatory for some types of licence and for all concessions[164]. In the first case, it is established that licences for the installation of facilities for the provision of assistance services in beaches of State-owned maritime property must be granted on the basis of competitive procedures[165]. Moreover, in cases of occupation where allocation is subject to tender, if the competitive procedure concerns a number of uses on the same asset, the comparison must take place in relation to each licence for which issue is requested[166]. In the second case, Article 24 establishes that concessions are granted following a competitive procedure but it also stipulates that they may be assigned directly to "*entidades públicas*

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[160] See F. DI LASCIO, *La concessione di spiaggia in altri ordinamenti*, cit., spec. §§ 2.1 – 2.2; 3.1 – 3.2; 4.1 – 4.2; 5.1 – 5.2; 6.1 – 6.2.

[161] Available at http://www.dre.pt/util/getdiplomas.asp?s=sug&iddip=20072012.

[162] Referred to, inter alia: *a) Da inexistência de outros usos efectivos ou potenciais dos recursos hídricos, reconhecidos como prioritários e não compatíveis com o pedido;b) Da possibilidade de compatibilizar a utilização com direitos preexistentes*.

[163] See also the subsequent Article 11, according to which those interested in the operation of assets can present to the competent authorities a preliminary information request (*Pedido de informação prévia*) in which there must be an absolutely clear indication of the type of intended use (*A identificação rigorosa da utilização pretendida*) and indication of the geographical area of interest (*A indicação exacta do local pretendido, nomeadamente com recurso às coordenadas geográficas*). The request can then be formalised and it shall become binding for the competent authority if, within a period of one year, the same subject that presented the preliminary information request also presents the preliminary updates required for the issue of the licence (see, in this sense, paragraph 4 of Article 11, according to which "*A informação prévia vincula a entidade competente desde que o pedido de emissão do título seja apresentado no prazo de um ano a contar da data da sua notificação, excepcionalmente prorrogável por decisão fundamentada, sem prejuízo dos condicionalismos resultantes quer do respeito pelas regras do concurso quer das decisões ou pareceres, dotados de carácter vinculativo, emitidos posteriormente no âmbito do licenciamento*").

[164] This is one of the implementing decrees of the provisions governing the functions of management of State-owned maritime property, contained, in terms of primary sources, in *Lei* no. 54 of 15 November 2005 on the ownership of water resources and in *Lei* no. 58 of 29 December 2005 (so-called *Lei da Água*). Specifically, *Lei* no. 54/2005 clarifies that the *domínio público hídrico* includes State-owned maritime property, state lake and river property and State-owned property relating to all other waters such as, for example, groundwater [Article 2(1)] and that ownership of the first group of assets belongs to the State (Article 4). Therefore, in the Portuguese system, legislation regulates the wider category of public waters, which includes the various types of public waters, as opposed to what happens in Italy, where State-owned maritime property is distinct from public water property (see Article 822 of the Italian Civil Code).

[165] See Article 21(1)(c) of *decreto – lei* no. 226-A/2007, which provides for competitive procedures for the "*Instalação de apoios de praia nos terrenos do domínio público*".

[166] See paragraph 3 of Article 21, cit.

empresariais e às demais empresas públicas" by means of a specific decree law[167]. Lastly, the tender must be carried out according to the regulations relating to competitive tendering for public contracts[168].

Nonetheless, the binding nature of the principle of tenders is significantly reduced on account of provisions on the duration and extension of concessions. Indeed, Article 25 of *decreto – lei* no. 266-A/2007 stipulates that the maximum duration of concessions is seventy-five years and that within this limit, duration is set on a case-by-case basis in relation to the size of investments associated with the use of the asset and their economic and environmental importance[169]. In this country, therefore, it is at the discretion of the competent administrative authority to decide on the duration of concessions, but (as has been said) with reference to a very long time frame and with the effects that this might have, also in consideration of the varying arrangements from one region to another.

Furthermore, as happened in the Italian system with the so-called preferential right[170], Portuguese legislation admits that the previous concessionaire can exercise a pre-emptive right when the licence is to be re-assigned. Specifically, Article 21(8) of the above-mentioned decree provides that the outgoing concessionaire can, no later than one year before expiry of the licence, inform the competent administrative authority of its interest in continuing to use the asset, with the right to be preferred over other candidates, on the condition that, within ten days of the award of the tender, it accepts the terms of the selected tender as winner, as set out by the administrative authority[171]. This is, however, a provision that raises doubts about compatibility with Community principles of competition protection[172]. The pre-emption right reserved to previous concessionaires puts participants in the competitive procedure at a clear disadvantage, particularly towards awarding bodies. Moreover, in the provisions in question there are no other obvious reasons for such preference other than being a past recipient of an award[173].

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[167] Article 24(1) of *decreto – lei* no. 226-A/2007.

[168] See Article 24(3) of *decreto – lei* no. 226-A/2007.

[169] See, in particular, paragraph 2, which states: "*O prazo da concessão, que não pode exceder 75 anos, é fixado atendendo à natureza e à dimensão dos investimentos associados, bem como à sua relevância económica e ambiental*".

[170] As already mentioned, the arrangement was provided for by Article 37(2) of the Codice della navigazione, according to which "upon renewal, preference is given to previously granted concessions over new requests". To comply with the requests of the European Commission in the infringement procedure no. 2008/4908 which raised issues of compatibility with community law of Italian legislation governing State-owned maritime property concessions as well as the consequent regional legislative initiatives, this provision was repealed, during conversion, by Article 1(18) of Legislative Decree no. 194/2009. As we have seen, the Constitutional Court also moved in the same direction (see Chapter 2, § 2.2). For a more in-depth analysis of regional legislation on State-owned maritime property, refer to F. GUALTIERI, *La regolamentazione regionale e locale, tra pianificazione e gestione*, in M. DE BENEDETTO (edited by), *op. cit.*, p. 71 et seq.

[171] Article 21, paragraph 8, cit., textually states that "*Sem prejuízo do disposto no n.º 4 do artigo 34º, o anterior titular pode manifestar à autoridade competente o interesse na continuação da utilização, no prazo de um ano antes do termo do respectivo título, gozando de direito de preferência, desde que, no prazo de 10 dias após a adjudicação do procedimento concursal previsto no n.º 3 ou no n.º 4 comunique sujeitar-se às condições da proposta seleccionada*".

[172] On these aspects, see N. RANGONE, *Uso imprenditoriale del demanio marittimo e tutela della concorrenza*, in M. DE BENEDETTO (edited by), *op. cit.*, 199-204.

[173] The situation is different where the holder of the concession to be awarded expresses to the competent authority an interest to continue the original use of the asset on a temporary basis during the tender process. In this case, the duration of the licence may exceptionally be extended until the end of the competitive procedure, but in no case can any extension be for a period longer than five years: see Article 24(8) of the quoted decree,

4.4. Spain

There are doubts about compatibility with the EU system also in relation to the Spanish system.

To provide a historical and systematical framework of the legislation governing the sector, it should be remembered that in Spain, a careless policy of urbanisation of the coastline caused ill-considered construction in the most outstanding coastal zones of the country. The failed management of areas along the Spanish Mediterranean coastline, which is so blatant that it has become a prime example of "the 'cementification' of the Spanish coast"[174]. What has been lacking most of all is a comprehensive project in Spain, with a management integrating development and work requests whilst maintaining the natural characteristic of the coastline and its ecosystems. A few geographical figures are enough to give an idea of what has been happening since the mid-1980s: 7 million people live on a strip of land just 4.5 kilometres wide that runs along the Spanish Mediterranean coastline. Added to this is seasonal tourism which brings to Spain a total of 40 million people, most of whom visit the coastal zones[175].

In an attempt to remedy this situation, in 1988 the Government enacted the *Ley de Costas* [176], which regulates and protects the Iberian coastal environment[177]. Specifically, this law[178] provides for two acts in the use of State-owned seafront property: authorisations and concessions. As to the first, authorisation requests must refer to facilities and activities regulated by general laws and can be subject to public disclosure if provided for by specific regulatory provisions[179].

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according to which "*Se o antigo titular manifestar à autoridade competente o interesse na continuação da utilização, o prazo do título de utilização pode ser excepcionalmente prorrogado até à decisão final do procedimento concursal, não podendo, em qualquer caso, a referida prorrogação exceder o prazo máximo de cinco anos*".

[174] The phenomenon in Spain has been studied by J.L. SUÁREZ DE VIVERO and J.C. RODRÍGUEZ MATEOS, Department of Human Geography of the University of Seville: see the WWF dossier entitled "*Spiagge italiane: bene comune, affare privato*", cit., p. 39.

[175] In Andalusia, approximately 10% of regional GDP depended on coastal construction. The construction sector in Andalusia grew by 45.4% percent between 1995 and 2002.

[176] The legislative text is available at http://noticias.juridicas.com. Several petitions were proposed also against the *Ley de Costas*: for example, see petition no. 174/2008 (Jose Ortega), no. 103/2009 (Margarita García Jaime), no. 274/2009 (Tomás González Díaz), no. 278/2009 (Gregorio Amo López), no. 666/2009 (Carmen Ramos Badia), no. 676/2009 (Jorge Comin Giner). All the aforementioned petitions can be found at https://petiport.secure.europarl.europa.eu/petitions/it/show-petitions).

[177] This is a particularly important law since it directly implements Article 132(1 and 3) of the Spanish Constitution (published in BOE no. 311 of 29 December 1978 and available at www.boe.es), which asserts that the State's Domain and National Heritage, as well as their administration, protection and preservation, shall be regulated by law (paragraph 3), and that the legal regime governing public and communal property shall be based on the constitutional principles of inalienability, imprescriptibility and exemption from distraint (paragraph 1).

[178] See M. JESÙS MONTORO CHINER, *La Ley de Costas. Un proyecto viable?*, in *Civitas*, 1988, 58, 181 et seq.; A. MORENO CÁNOVES, *Régimen jurídico del litoral*, Madrid, 1990; J.R. CALERO RODRÍGUEZ, *Régimen jurídico de las costas españolas*, Pamplona, 1995; VV.AA., *La Ley de Costas y su reglamento*, Ministerio de Medio Ambiente, Madrid, 2000; J. GONZÁLEZ SALINAS, *Régimen jurídico actual de la propiedad en las costas*, Madrid, 2000; P. RODRÍGUEZ LÓPEZ, *Playas y costas en el derecho español. A Propósito de la Ley de Costas de 1988*, Barcelona, 2010; Id., *Comentarios a la Ley de Costas: doctrina y jurisprudencia*, Madrid, 2003. With reference to the concept of State-owned maritime property approved by the *Ley de Costas*, see J.L. MEILÀN GIL, *El concepto de dominio pùblico marìtimo – terrestre en el Proyecto de Lei de Costas*, in *Rev. esp. Der. Adm.*, 1989, 361 et seq.

[179] On this point, see Article 52(1 and 2). The provision previously referred to the provisions of Article 34(1), which identified several subjects where the State had competence for determining, in accordance with the functions

With regard to the choice of contractor, in the Spanish system there are generally competitive procedures for the awarding of concessions. Nevertheless, Article 75(1) of the *Ley de Costas*[180] leaves to the discretion of the granting authority[181] the decision regarding the invitation to tender and establishes that during the selection procedure, the principles of openness, objectivity, impartiality, transparency and competition must be respected.

Therefore, also in the case of the Spanish system the award of concessions does not necessarily take place on the basis of a tendering procedure. However, if the authority does so and if the selection procedure is started after an interested party has already expressed an intention to obtain the management of a certain asset, they will be recognised the right, if the tender is not awarded, to have costs covered for projects already presented, in a form determined by regulation[182]. Furthermore, if none of the offers submitted during the competitive procedure satisfy all the conditions deemed necessary by the authority for the granting of the licence, the tender procedure may be cancelled, as is the case if no offer is received[183].

Concessions are transferable by means of acts between *inter vivos* and *mortis* causa[184] and, in case of death of a concessionaire, the successors may take over rights and obligations provided that they inform the authority of the death and their intention to take over the concession licence within four years, after which, in the absence of an express manifestation to the granting authority, the concession is terminated[185].

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assigned to the *comunidades autónomas*, the general principles in some areas relating to coastal management (such as, for example, temporary beach services or procedures for use of shorelines in relation to the safety of bathers). This, provision, however, has been declared unconstitutional by judgment of the Tribunal Constitucional 149/1991, 4 julio ("BOE" 29 July 1991).

[180] As amended by Article 30(3) of *Ley* no. 25 of 22 December 2009, available at http://noticias.juridicas.com.

[181] In general, on the division of administrative functions as regards coasts and their exercise, see L. PÉREZ CONEJO, *Las costas marítimas: régimen jurídico y competencias administrativas*, Comares, Granada, 1999 and J. JUSTE – RUIZ – V. BOU, *Towards integrated management of the coasts and the costal waters in Spain*, in N. GRECO (edited by), *Le risorse del mare e delle coste. Ordinamento, amministrazione e gestione integrata*, cit., especially pp. 143 – 144. With particular reference to the impact of the fragmentation of legislative and administrative competencies on the management of coasts and shorelines, see E. GARCÍA - TREVIJANO GARNICA, *El régimen jurídico de las costas españolas: la concurrencia de competencias sobre el litoral. Especial referencia al informe preceptivo y vinculante de la Administración del Estado*, in *Rev. adm. púb.*, 1997, p. 97 et seq. On the relationship between the regulation of State-owned property in the *Ley de Costas* and the functions of urban planning law, see I. BORRAJO INIESTA, *La incidencia de la Ley de Costas en el Derecho urbanístico*, in *Rev. Adm. Públ.*, 1993, p. 130 et seq., and J. AGUDO GONZÁLEZ, *Terrenos colindantes con el dominio público marítimo-terrestre: transcendencia urbanística del régimen transitorio de la Ley de Costas, a los 20 años de su entrada en vigor*, in *Práct. urb.*, 2008, p. 23 et seq.

[182] See, in this respect, Article 75(2), which provides that "*Si la convocatoria del concurso se produjese durante la tramitación de una solicitud de concesión o autorización, el interesado tendrá derecho, en caso de no resultar adjudicatario del título, al cobro de los gastos del proyecto, en la forma que se determine reglamentariamente*".

[183] As provided by Article 75(3) of the *Ley de Costas*. It should be added that, in accordance with the provisions of Article 67 of the quoted law, before accepting an application for a concession, the State must clarify via public notice the conditions requested to the concessionaire. The licence cannot be granted without express acceptance of these conditions. At the end of the procedure, the related documentation can be sent to the competent *Departamento ministerial* and must in any case be made public. The provision concludes stating that "*Si el concesionario impugna las cláusulas que fueron aceptadas por él, la Administración estará facultada para declarar extinguido el título, salvo cuando aquéllas fueren ilegales*".

[184] Similar to what happens in the Italian system, where, the concessionaire can substitute others in terms of entitlement of the concession by requesting authorisation from the granting authority: see Article 46(1), Codice della navigazione.

[185] In this sense, see Article 70(2) of the *Ley de Costas*, as amended by *Ley* 2/2013, *de 29 de mayo,* "*de protección y uso sostenible del litoral y de modificación de la Ley 22/1988, de 28 de julio, de Costas*", at

As regards the duration of grantor relationships, the *Ley de Costas* sets the basis for their differentiation, acknowledging that their duration is set in a regulatory manner according to the uses of assets. Specifically, the maximum period – already set at thirty years in the previous text of the *Ley de Costas* – was recently raised to seventy-five years with the reform introduced in 2013[186], and could be extended for another seventy-five years, in accordance with Article 2(3) (*apartado tercero del artículo 2*), of the *Ley* 2/2013*,* which modified the *Ley de Costas*[187]on the subject.

An exception to this mechanism is the specific case of a concession involving an activity related to another concession for the exploitation of mineral or energy resources and granted by the state for a longer period than the above-mentioned one. In such a case, the concessionaire has the right to obtain a new State-owned property concession for a period equal to the remaining validity of the exploitation concession, but in no case can this be longer than seventy-five years[188].

4.5. Croatia

The coastal management model in Croatia is very different from the Spanish one as the Croatian coasts, for evident historical, political and morphological reasons[189], are characterised by lower economic development of a speculative nature and by a greater attention to the conservation of natural resources[190], quality of life and sustainable development.

In Croatia, State-owned maritime property is mentioned in the Constitution. Article 52 of the Constitutional Charter adopted in 1990 stipulates that the sea, beaches and islands (in addition to other natural assets listed) are of primary interest for the Republic and must benefit from special protection. It is then for the law to regulate the use and exploitation by the body owning the property or subjects who can boast rights of another nature (such as concessionaires, for example), and to state with the same source the limitations and restrictions on the aforementioned use. In particular, the conditions and modes of use of State-owned maritime property are regulated by the *Maritime Domain and Seaports Act* no.

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http://www.ccelpa.org. In Italy the term for confirmation of the concession to heirs is much shorter: just six months.

[186] Article 66, as amended by Article 1(21) of *Ley* 2/2013 states that the maximum duration of concessions is established according to their intended purposes and that in no case can it exceed seventy-five years.

[187] The rule referred to provides that "*La duración de esta prórroga en ningún caso excederá de setenta y cinco años*", adding that it is also possible to set a shorter renewal duration or provide for successive renewals within this time limit. On this new regulation see E. DESDENTADO DAROCA, *La reforma de la Ley de Costas por la Ley 2/2013: Una solución adecuada al problema de los enclaves privados?*, in *Rev. Adm. Públ.*, 2014, especially p. 72 et seq.

[188] See Article 66(3) of the *Ley de Costas*.

[189] The regions of Croatia differ very much from each other, with diverse flora and fauna, making it one of the richest in Europe in terms of biodiversity. There are four types of biogeographical regions in Croatia: Mediterranean along the coast and in its immediate hinterland; Alpine in Lika and Gorski Kotar, Pannonian along the Drava and Danube; and Continental in the remaining areas. Among the most significant are the habitats which include the submerged karst areas, such as those along the Zrmanja river and the Krka canyons.

[190] The total surface area of the country's protected areas is 532,063.35 hectares, equivalent to 6.07% of the entire surface area and 9.40% of the mainland surface area. There are eight national parks, and ten natural parks in which over 380 species of protected animals live. It should also be noted that 44% of the Croatian national territory (2,490,000 hectares) is covered by forests, mainly broadleaf (oaks), evergreen (Aleppo pines, holm oaks) or Mediterranean scrub, while there are 523 endemic plant species (approximately 6% of known flora) in Croatia.

11/2002[191], where the constitutional provision of special protection granted by the Republic to State-owned maritime property assets is reaffirmed[192] by analytically identifying the natural elements that fall within that concept.

As for the allocation of administrative functions, it is up to the state to manage and protect State-owned maritime property by operating directly or through regional or local self-governing authorities. The latter, however, are tasked with the care and protection of state property areas of general use[193]. Competencies for the granting of concessions are divided between regional and state authorities, in some cases subject to the consent of Parliament[194].

Particularly analytical is the legislation relating to the procedure for granting concessions, to which the *Maritime Domain and Seaports Act* dedicates an entire title, in which Articles 16, 17 and 18 are particularly relevant. The first clarifies that the rights and duties deriving from the concession relationship arise from the conclusion of a contract between the competent authority and the concessionaire, and that such act is regulated by the *Maritime Act*, the *Concession-granting Decision and Concession Contract*[195] and any other acts adopted for implementing the general principles contained in such provisions[196]. The following Article 17 establishes a general principle that is not expressly found in any of the countries analysed: concessions for the economic exploitation of State-owned maritime property must be granted by a tendering procedure, while concessions for special use are granted on the request of interested parties. In the latter case, if a competitive procedure is held, the licence must be granted based on the opinion of a panel of experts nominated by the relevant county or central government according to respective competencies. The group of experts assesses the tenders submitted on the basis of the criteria set out in Article 23[197].

The different framework envisaged for the two models probably derives from the different types of underlying relationship. While exploitation concessions in the Croatian system are conceived as means through which competent authorities allow the concessionaire to potentially benefit from the use of a certain public asset[198]; on the other hand, the

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[191] Published in the *National Gazette No*. 158/2003 and available in English at http://lnweb90.worldbank.org/ECA/Transport.nsf/ECADocByUnid/0D04671881753FB485256DFF0055F85D?Opendocument.

[192] Article 2.

[193] Article 10 of the *Maritime Domain and Seaports Act.*

[194] More specifically, given the division of management functions of State-owned maritime property into regular, extraordinary and emergency, the first and second are the competence of local authorities (*towns* e *municipalities*), while competence for the third lies with regional authorities (*counties*) (Article 11).

[195] This is a general law on concessions which was enacted in October 2008 and entered into force on 1 January 2009.

[196] See, on this point, Article 37 of the *Maritime Act* which states that the procedure for granting of concessions and the criteria for fixing the concession fee requested from the concessionaire shall be regulated by the government.

[197] The reference is to compliance with special regulations and economic importance of the public asset, alignment with economic, economic development and environmental protection policies adopted by the government and the planned activity that should not impose restrictions on the use or exploitation of State-owned property areas adjacent to those that are object of the tender.

[198] This is, therefore, a restriction of the use of the same asset (compared with its general use), which is linked to the presence of a market, and as such is likely to affect several applicants, who must be free to compete under

awarding of concessions of special use is not subject to a tendering procedure because through this, activities of a social, cultural or sporting nature are carried out and put in place by private concerns in favour of the community. In this case, therefore, the concession does not take on an economic importance such as to impose a competitive procedure under EU law. Competencies for the awarding of the latter type of concessions are subdivided between institutional subjects due to the importance of installations intended to be carried out: if of national importance, it is the Government's decision; if of regional importance, the county decides; if of local importance, the municipality or town decides[199].

A fundamental principle, applicable to all types of concessions, is that any constructions carried out by the concessionaire on the basis of the concession relationship and during the same, can, on termination of the licence, be removed if not permanent, and if is reasonably possible, proceed without inflicting substantial damage to the State-owned maritime property[200]; if such conditions do not exist, the facilities become part of the state area where they are located.

Lastly, as far as duration is concerned, the *Maritime Domain and Seaports Act* states that concessions can have a variable duration between five and ninety-nine years[201] but, at the same time, specifies in detail the criteria defining duration within this broad time frame. Specifically, concessions for the economic exploitation of State-owned maritime property and the use or construction of buildings of regional importance must be granted by the governing body of the competent county authorities for a period not exceeding twenty years. By way of exception, the county can extend the duration of this type of concession up to a total of thirty years, at the request of the concessionaire and subject to approval by the national government, provided that this is justified by new investments or on grounds of force majeure[202]. Concessions of the same type that include the construction of structures of national importance must be granted by the Government with a maximum duration of fifty years.

There is a different regulatory framework for constructions of buildings of national importance. In these cases the government has greater discretion and can, at the request of the concessionaire, extend the duration of concessions up to sixty years.

4.6. Greece

As far as the situation in Greece is concerned, it appears to differ greatly from the systems thus far analysed.

Specifically, the matter is governed by the law of 19 December 2001, no. 2971 (Articles 13 to 15). This law generally involves transparent and unbiased selection procedures for

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the Community principle of equality: in this sense, see F. DI LASCIO, *La concessione di spiaggia in altri ordinamenti*, cit., 114.

[199] In this regard, Article 21 of the Act provides in general that, at the proposal of regional government bodies and at the request of local authorities, the counties can delegate concession-granting authority for local public property in the area of town/municipality to such town/municipality.

[200] See Article 33 of the *Maritime Act.*

[201] Article 20 of the *Maritime Domain and Seaports Act.*

[202] Article 22.

authorization to conduct beach tourism activities, with the exception of hotels facing the beach, for which this particular location justifies a derogation to the application of the selective procedure. These hotels, in fact, pursuant to Article 13, paragraph 4 of Law no. 2971/2001, may obtain, under certain conditions laid down by that law, an annual authorization for the exercise of their business.[203] Articles 14 and 15 of the law in question also provide for the possibility of leasing the exploitation of coasts and beaches for purposes relating to trade and industry or for other purposes of public utility.

In accordance with the above-mentioned legislation, the Ministry of Finance issued a decree in 2014 providing for the direct award (i.e. without a tendering procedure) of beach concessions, giving local authorities the responsibility for granting concessions[204]. On the basis of this decree, MRPEE has approved more than 80 projects for the creation of concessions for leisure and tourism use on parts of shores and beaches considered particularly sensitive in environmental terms (located within NATURA 2000 sites)[205], neglecting EU legislation in this area. It has also been established that the construction of platforms and islands in special wood, floating docks, canopies, pergolas and other "rest and service facilities" for the customers of large hotels and resorts can only take place after special licences have been issued by the decentralised state authority. Additionally, the "extension" of operating licences for tourist ports has been established[206], as well as the postponement of administrative fines for illegal construction on the Koumoundourou beach[207]. Paradoxically, law-making is harsher on "free campers" whom the state considers a greater problem than illegal marinas, with offenders facing severe criminal sanctions ranging from arrest and imprisonment to "violent expulsion"[208].

As is evident by the developments regarding the exploitation of public assets in Greece, the public nature of beaches and shores is sometimes under threat. Nevertheless, as already mentioned, greater attention has been paid to the protection of coastal shorelines in recent years. A positive aspect is the recent approval of the new Strategic Plan for Athens (SPA 2014) for the "*coherent planning and management of coastal zones"*, which envisages the subsequent adoption of a "*Plan – Framework for the Coherent Management of Attica Coasts (PCMAC)*" for each geographical area. The SPA 2014 also suggests the extension of the

[203] In this context there is also the "unusual" provision, applied until 31.12.2014 (provided that there had already been a request submitted – within a certain deadline – for the rental of the intermediate public property), according to which hotel businesses are considered adjacent to beaches or shores even when "public property lies between the perpendiculars drawn from the sides of the business and the shore": Article 172 l. 4261/2014 (A' 107).

[204] Joint Ministerial Decree ΔΔΠ0005159/586Β΄ΕΞ2015/2015 «Direct concession, with compensation, of the rights to the simple use of shores, beaches, coasts and coastside zones of big lakes and navigable rivers to first degree municipality authorities» (Β΄ 578), as was complemented by JMD ΔΔΠ0006856/728ΒΕΞ2015/2015 (Β΄ 848). See also Joint Ministerial Decision ΔΔΠ0005159/586Β΄ΕΞ2015/2015 "Direct concession, at a price, of the rights to the simple use of shores, beaches, coasts and coastal zones of big lakes and navigable rivers to first degree municipality authorities" (Β΄ 578).

[205] See MEECC Priority Action Plan for Natura 2000 sites for the 2014-2020 programming period. Retrieved on 19.06.2014 from https://greeknationalpafs.wordpress.com/. The document, which is a requirement of article 8 of the Habitats Directive, aims at recording and prioritizing the conservation and management needs of Natura 2000 sites in EU countries, and to lead to more effective use of available funding, particularly European funds during the 2014-2020 programming period.

[206] Article 166, par. 7 r. a l., 4070/2012, as was replaced by article 13 l. 4276/2014 (A' 155).

[207] Article 89 l. 4310/2014 (A' 258).

[208] Article 7, par. 18, l. 4276/2014 (A' 155).

PCMAC beyond the "critical zone" (i.e. the shoreline), to the "dynamic zone" (i.e. the sands), detailing its content[209].

The legal status of coastal areas was reinforced by two important rulings of the Greek Council of State[210]. With significant delay, the supreme court ruled that the application of urban planning regulations in port zones based on decisions of the Port Planning and Development Committee is unconstitutional[211]. In particular, the Council of State pointed out that the legislative approval of such decisions can only apply to future cases and not retrospectively (with regards to the retrospective upgrade of regulations that violate the Constitution)[212].
Finally, further steps have been taken regarding the delimitation of concession areas, to avoid "overcrowding" at seaside resorts.

According to law no. 2971/2001, all permanent buildings, relative purchase transactions and any other alteration of urban territory are prohibited within 100 meters of the coast, unless the administrative boundary delimitation measure has been adopted or if the beach has not been completed or the delimitation of the existing shore. At the end of 2014, a new two-step procedure was introduced. In the first phase, after the preliminary line[213] is delineated, the Regional Public Asset Directorates delete the parts of the line that overlap with already approved lines, and review them in cases where they don't. In the next phase, the competent General Secretariats validate the final line, and the Ministry of Finance publishes it on its website, alongside the associated technical details and background "for the benefit of the public". The procedure does not include public consultations (which are

[209] Article 16 and Annex VI l. 4277/2014 (A' 156).

[210] We refer, in particular, to the decision of Greece's Council of State (CoS 646-8/2015), which censured the existing framework that attributes exclusive jurisdiction for seashore and beach concessions to the municipal authorities. Specifically, in the quoted decision, Greece's Council of State noted that "the concession to local government authorities of simple-use rights on shores and beaches for activities that are, first of all, mild and compatible with the purpose of these elements of our natural environment as public space, should be examined individually and case-by-case, following an individualised judgement […] which will also set out the terms and limitations as required, taking into account the particular characteristics of the specific part of the shore, in order to ensure its intended use as public good […]". In this context, "approval for future interventions ... without prior examination is not acceptable", because in this way the "jurisdiction of supervision on acts of the local authorities" is lost, which "endangers coastal ecosystems". The decisions refer to the "*Protocol for the Integrated Coastal Zone Management*", as part of EU law. See also Council Decision 2009/89/EC, of 4 December 2008 on the signing, on behalf of the European Community, of the Protocol on Integrated Coastal Zone Management in the Mediterranean to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (EE L 34 of 4.2.2009, p. 17 to 28).

[211] The associated responsibility is dictated by article 19 Law 2932/2001 (A' 145), as is currently in force [following its amendment by article 40 par. 1D l.4256/2014 (A' 92)]. According to the article, the Plan and Development Committee for Ports is responsible for «approving, revising and updating the development plans and master plans of ports, which set out the extent of allowable Port Zone boundaries, the permissible sediments, land uses, building construction terms and limitations» and for «the definition of land uses and construction terms, following a proposal made by the port management and exploitation body, concerning the total area of the port's terrestrial zone, for all ports, if development plans and master plans have not been developed».

[212] CoS (E', 7m.) 716-7/2015.

[213] Article 4 of Law 2971/2001, as was replace as a whole by article 11 par. 1.a) Law 4821/2014 (A' 160). The deadlines were subsequently amended by article 27 Law 4321/2015 (A' 32).

considered fundamental parts of coherent management)[214], but there are in any case forms of publicity that do not affect the validity of the procedure[215].

[214] Article 14 of the Protocol for the coherent management of Mediterranean coastal zones (EE L 34 of 4.2.2009, p. 17 ἑως 28).

[215] Article 11 par. 5 l. 4281/2014 (A' 160) on the legal importance of publicity.

5. CONCLUSIONS

5.1. Critical issues facing the seaside resort sector in Italy and Europe, and the essential rules for comprehensive reform: the principle of competition and a ban on automatic renewal

The rules governing State-owned maritime property concessions and the application of the Services Directive concern all Member States of the EU, not just Italy. As we have seen in the previous chapter, national experiences today offer various solutions to the problem. In particular, the study carried out highlights several tendencies that are common to the European systems analysed, demonstrating how there can be significant convergences among them.

Firstly, there is increasing attention to integrated coastal zone management, though which the environmental protection of State-owned maritime property and its elements are being pursued[216]. In addition, with some significant exceptions (Greece), measures have been taken to transpose into domestic law the *acquis communautaire*[217], in order to adapt it and make it operational in the single national contexts[218]. Attention to the environmental protection of coasts is particularly evident in France where, through immediately operational provisions, it has been established that at the end of the bathing season all removable equipment must be dismantled to restore the integrity of beaches during the winter[219].

Another common objective of national legislatures is the overall improvement of the management of public assets, mainly through the introduction of competitive mechanisms – whilst not uniform – in the award of new concessions as well as the reallocation of those due to expire. In this regard, it is EU law that imposes through the principles of free exchange and movement of capital an efficient use of owned resources in Member States, who are called upon to contribute to the economic development of the European Union. EU law is also responsible for the gradual evolution of state law towards regulatory models that take account of the necessity of promoting competition among operators as a key criterion in the definition and allocation of uses of State-owned maritime property.

On the other hand, the efficient use of concessions and the widespread introduction of competitive mechanisms in the awarding of State-owned maritime property has effects on the guarantee of public protection. Indeed, the public choice to allocate a given asset to a specific use through concession rather than general use entails a possible disadvantage due to the potential reduction of available options (for example, costs) for the uses of assets.

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[216] See, for example, the rules and documentation at www.observatoriodellitoral.es.

[217] In this respect, see the two communications from the Commission to the Council and the European Parliament COM(1997)744 e COM(2000)547 and also the European Parliament and Council recommendation of 30 May 2002 concerning the implementation of Integrated Coastal Zone Management in Europe (2002/413/EC).
For a more in-depth analysis of this topic, refer to P. BIONDINI and M. D'AURIA, *La concessione di spiaggia nel quadro della gestione integrata delle coste*, in M. DI BENEDETTO, *Spiagge in cerca di regole*, cit., 57 et seq.

[218] See the Spanish Coastal Law of 1988, the French Coastal Act of 1986 and the Portuguese Water Framework Law of 2005.

[219] In Italy, there is a similar rule in Article 37(2), Codice della navigazione which gives preference to applications that include non-fixed and completely removable equipment, with the aim of protecting the coastal environment.

To counter this tendency, in all the systems analysed there is at the basis of the management of State-owned maritime property for leisure and tourism purposes a general principle of protection of assets entrusted to private bodies, from which there are specific conservation objectives of the initial state of the asset and its restoration at the end of the period of entrepreneurial exploitation, as well as important obligations to safeguard citizens' enjoyment of assets. In this sense, the provision of the Spanish *Ley de Costas* is significant, as installations made on beach concessions for private use must guarantee free access to the public unless, for duly justified reasons of public interest, concessionaires are not authorised by the competent administrative authority to proceed differently[220].

To this we should add the criterion, which is also widespread in the countries analysed, for which the granting of licences for the use of state property assets must in any case be preceded by a clear identification of their intended use: a decision that implies widespread discretionary powers on the part of competent authorities, who, before assessing the possible ways of selecting concessionaires, must identify the intended use that can guarantee, as far as possible, the right of citizens to use the asset free and without charge. Moreover, when this decision has been made and award procedures are set out, many states have envisaged that when making comparative assessments, the preferred projects are those that focus attention on the installation at beach resorts of public service facilities or those that take measures to facilitate the use of assets by disadvantaged persons.

It is in this perspective that the importance given to the administrative functions of programming and planning of State-owned maritime property for leisure and tourism purposes can be assessed. In all the systems analysed, the division of the above allocations is influenced by administrative decentralisation processes or legislative "federalism" that, albeit with different sizes and directions, affect the division of "government" functions of beaches, especially where these result in the division between the ownership/proprietorship of State-owned maritime property assets and their management. Indeed, in the countries analysed it is the state that holds general dominical power on State-owned maritime property, while its administrative management is usually attributed to territorial institutions[221].

The subject of division of competencies among the various territorial levels of government is directly related to the relationship between administrations and operators.

As for Italy, the value of the principles of competition, transparency and non-discrimination deriving from EU law is now an accepted fact in domestic law (constitutional and administrative) and enshrined in legislation. The recent reform on "federalismo demaniale"

[220] See, in particular, articles 23 et seq. of the aforementioned law, which provide that a protective easement is created in a strip of one hundred metres back from the public maritime border, resulting in the prohibition of various activities, including private construction. Property owners are subject to two further easements: the so-called "safety" easement, where there must be right of way on public property for an area of six metres, and the so-called sea access easement, where public access to the sea must be guaranteed. The planning rules adopted by the *Comunidades Autónomas* can also impose other restrictions on the so-called zones "of influence", i.e. the terrestrial area five hundred metres back from the public maritime border. On these aspects, see F. DI LASCIO, *La concessione di spiaggia in altri ordinamenti*, cit., 123 et seq.

[221] The receipts of fees and charges from the economic exploitation of assets varies, however, from cases where this fully remains in the hands of state administration (as has happened in Italy), to others where it is the State that periodically determines the distribution of revenues among the institutional subjects involved (this is the case in Portugal), and where primary laws indicate a percentage share between central and regional authorities (this happens, for example, in Croatia), or where distribution is through regulatory or administrative means (as in the French case): on these aspects, see F. DI LASCIO, *La concessione di spiaggia in altri ordinamenti*, cit., 126-127.

moves in this direction, and by regulating the status of assets subject to transfer to local and regional authorities, explicitly states the importance of respect of the principle of competition protection for State-owned maritime property assets[222]. Consequently, the adoption of public tendering procedures for the selection of concessionaires is envisaged also on a regional level and with increasing frequency.

The main problem, which requires an answer, therefore regards a specific procedure to be adopted for the award of beach concessions. None of the Member States seem to have offered fully satisfactory solutions, except for the "French" system of management, often quoted as a model of careful state protection of these delicate natural environments[223].

The principle of invitations to tender in Spain and Portugal, in actual fact, amounts to an abstract affirmation which is not supported by homogeneous and uniform application, while in Croatia the system of award through open tender is linked to the special geomorphological situation of the coastal zones, with their well-kept beaches, numerous natural reserves and lower exploitation for leisure and tourism purposes, even though the seaside resort sector has experienced strong growth[224] in recent years. In Greece, meanwhile, as already noted above[225], there is still no comprehensive set of rules for the sector.

This aspect is linked to the maximum duration of concessions granted, which, in order for the pro-competitive development of the systems analysed, is projected to be reduced compared with current time ranges[226].

In the countries analysed, though, there are still cases in which a long duration of licences is envisaged. While it is true that a maximum period of 12 years has been introduced in France, there is still the possibility to reach up to 75 years in Spain and Portugal, and in Croatia, where tendering procedures are the main general licence award principle, there are many hypotheses allowing for a long duration, especially when coastal restructuring interventions are associated with the concession of state property assets. Moreover, the reference framework often favours the allocation of assets to certain categories of operators, public entities and/or non-profit associations[227].

The way out of the impasse?

5.1.1. The need for general and coordinated planning of the use of coastal zones

The way out of the impasse must be identified on the basis of indications from the Court of Justice case-law regarding close cooperation and dialogue between EU institutions and national authorities: for the Services Directive and the Treaty rules to carry out their "useful effect", it is necessary to identify uniform solutions in Europe, while avoiding excessive limitation of the property ownership systems in EU Member States.

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[222] Article 4(1) of Legislative Decree no. 85/2010.

[223] See the WWF dossier entitled "*Spiagge italiane: bene comune, affare privato*", cit., p. 40, where it is noted that the success of the French model is largely due to the activity of the *Conservatoire du littoral*, a public body created in 1975 and part of IUCN, and which specifically protects French coasts, including those overseas.

[224] See Chapter 4, § 4.5.

[225] See Chapter 4, § 4.6.

[226] See, in this sense, F. DI LASCIO, *La concessione di spiaggia in altri ordinamenti*, cit., p. 127.

[227] See the in-house management model, Chapter 2, § 2.1.

In this regard, there is the need, first and foremost, for a general coordination of the various regulations concerning marine and coastal zones. On the one hand, the use of these assets must be regulated with the aim of avoiding their destruction and allowing their conservation and development; on the other hand, such assets are necessary for the exercise of numerous economic activities (tourism, transport, trade, energy, agriculture). In this context, general programming could balance the various objectives of conservation, protection and development of coastal zones through the forward-looking and careful planning of environmental and economic aspects[228].

Furthermore, EU law has requested, for quite some time and vigorously, general programming or, at the very least, the coordination of programming, in view of the failure of existing policy instruments[229]. At the same time, the uncertain situation of the seaside resort sector should be considered, especially following the CJEU judgment in cases C-458/14 and C-67/15[230], which appears to "oscillate" between an "unconditional" application of the principles of competition and autonomous assessment, referred to Member States, regarding the concrete applicability of the Bolkestein Directive to the beach concessions sector. This assessment requires a specific on-site verification of the "level" of availability of areas impacted by these activities[231].

Such a delicate aspect of land management requires, first and foremost, clearer and more transparent information that can be rapidly acquired, systematised and made accessible, also through the information system of State-owned maritime property (Sid)[232]. An intervention of this kind is entirely appropriate, not only in Italy, where the surface area of seaside establishments is roughly 18,000,000 square metres[233], but also in other Member States (Spain, Portugal, Greece), where the "exploitation" of coastal zones for leisure and tourism purposes is very intense[234].

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[228] In this direction, the d.d.l. January 27, 2017, (Act No. 4302) places among the principles and guiding principles the «integrated management of business assets and activities» [art. 1, paragraph 1, lett. a)] by introducing also provisions for strengthening the maritime information system (as will be better described in this section). In the same sense, see N. RANGONE, *op. cit*., 207-208.

[229] See paragraph 2.1, *Relazione al Parlamento europeo e al Consiglio : Valutazione della gestione integrata delle zone costiere (Gizc) in Europa*, COM (2007) 308 final, where it is emphasised that "coastal resources are depleted beyond their carrying capacity, scarcity of space leads to conflicts between uses, there are large seasonal variations in population and employment, and the natural ecosystems that support the coastal zones suffer degradation. The coastal zones are particularly exposed to risks, aggravated by the possible impacts of climate change". Nor should we ignore the (negative) impact on the economies of many tourist areas of the "massive" waves of migration from the coasts of North Africa, which Italy above all is called upon to tackle as an emergency but also because of the absence of shared solutions and coordination at European level.

[230] See Chapter 3, §§ 3.4.

[231] See CJEU judgment C-458/14 and C-67/15, paragraph 43.

[232] In the prospect of a "strengthening" of Sid, the recent d.d.l. January 27, 2017, provides for «the transmission to the Marine Information System of any useful information on the number of concessions and their consistency: Article. 1, paragraph 1, lett. g)».

[233] This is an extremely credible, but probably underestimated statistic, and this is demonstrated by the Apulia region, which has provided its data with transparency and clarity: Apulia alone has 1,081 concessions for a total surface area of 3,442,040 square metres.

[234] See the WWF dossier entitled "*Spiagge italiane: bene comune, affare privato*", cit., 39 et seq., which reflects concern at the risk of new concessions being awarded in the most delicate zones, both from an environmental and aesthetic point of view: "There are not many free beaches remaining and these must be protected, no matter what their natural or scenic characteristics. They must be protected as the "empty" that balances the "too full" that has been created elsewhere".

The identification of alternative frameworks to the existing one must therefore take account of an insurmountable constraint linked to the "scarcity" of resources needed to operate in services (the coastline); a condition that in the Italian legal system has led to the allocation of public assets property to the State and other territorial authorities, followed by possible operation by third parties through administrative concession[235].

It therefore seems possible to imagine a comprehensive reform of the sector also in Italy that – as recommended by the EU Commission[236] – envisages differentiated solutions according to whether the nature of state property resources is "scarce" or not, and which also takes account of the date of award of concessions as well as the needs of public interest during tendering procedures.

The provision of regulations that correctly distinguish various cases is in line with the objectives of Directive 2006/123/EC, since this is not properly a liberalisation directive, nor does it intend to "ignore/deny" the specificities that distinguish the various economic activities, preventing them from being developed in the interest of promoting tourism and the well-being of local communities in the various Member States, as already noted elsewhere in this paper[237].

5.2. Operational proposals: a) the general rule of public tendering procedures for new concessions. Some positive regional experiences

In the light of the above considerations, it therefore seems possible to outline the following operational proposals, in accordance with the criteria set out above.

To set up new entrepreneurial initiatives in available areas, the only regulation "option" coherent with the principle of competition would therefore seem to be attributable to the general provision of a tender procedure, designed to provide incentives for the correct use of areas. Among the selection criteria, projects to develop and protect the areas used should be encouraged (subject to subsequent verification and the application of penalties in the event of non-compliance). As suggested by the AGCM, "the granting authority could also give indications in tendering procedures regarding the type and entity of investments that new concessionaires will be required to make"[238].

In this sense, the most innovative and extensive provisions are found in the regional regulations introduced by the Friuli-Venezia Giulia, Emilia-Romagna, Campania and Veneto regions.

The legislation of Friuli-Venezia Giulia is characterised by the complexity of documentation required from aspiring concessionaires in the tender procedure, giving particular importance to all economic and financial aspects[239]. Friulian legislation is also particularly

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[235] N. RANGONE, *op. cit.*, pp. 207-208.

[236] See, in this sense, what is referred to in Chapter 3, § 3.5.

[237] See, in this regard, the observations in Chapter 3, § 3.3.

[238] See report AS481 of 20 October 2008, cit., available at www.agcm.it, which led to the infringement procedure (see Chapter 3, §§ 3.1 and 3.2.).

[239] In this sense, Article 8(1) of Regional Law no. 22/2006, cit., establishes that in the assessment of cases for concessions over six years for State-owned maritime property assets for leisure and tourism purposes, investigations are carried out on the basis of: "a) a technical report of interventions to be carried out, to include an analysis and/or cost calculations; b) a time schedule indicating the anticipated starting and completion dates of all planned interventions and works, broken down into operational phases; c) an economic and financial plan

advanced with regard to the complex topic of environmental protection, especially where it states that administrative functions must be exercised "in compliance with the principle of environmental sustainability, in the context of support, social and economic development and planning and programming"[240]. There are also some interesting ideas from Emilian legislation, which besides dictating principles of environmental protection[241], also outlines criteria for the selection of concessionaires who give priority to eco-friendly projects[242]. Similarly, legislation in Veneto[243] and Campania articulate an ad hoc procedure for concessions of special importance due to entity, duration and purpose[244]. Moreover, legislation in Campania[245] is particularly innovative due to its selection criteria, and original

drawn up and certified by an authorised professional showing implementation costs, operating and financial costs, amortisation, and expected returns, taking into account estimated use and pricing for the provision of the service and that this justifies the duration of the concession; d) any further points considered useful for assessment purposes by the grantor". The same attention for project and financial aspects is shown in the subsequent paragraph 3, where it is established, in order to stimulate efficiency of management, that "If the concessionaire, at expiry of the concession, has not fully recovered investments made through their total amortisation, the incoming concessionaire is liable for the remaining part of amortisations according to the principles and terms of an estimate drawn up and certified by a qualified professional, and determined by a special regulation to be issued within one hundred and eighty days of the entry into force of this law. This estimation shall take into account amortisations corresponding to a theoretical maximum duration of a further five years".

[240] See Article 1(2) of Regional Law no. 22/2006.

[241] In particular, Article 1(4) of Regional Law no. 9/2002 stipulates that "the use of State-owned maritime property areas shall guarantee the conservation and enhancement of the physical and cultural heritage of the public asset being used and shall therefore be exercised in accordance with criteria and interventions aimed at the restoration of the single physiographic units of coastal zones".

[242] In this context, resolution no. 226 of 17 February 2003 of the Giunta regionale (laying down "Provisions concerning concessions related to State-owned maritime property areas for leisure and tourism purposes") establishes in point b) no. 2 that "the granting authority may take into consideration the following project factors when assessing the fruitful use of the concession area and the overriding public interest: I) realisation of structures that use eco-compatible materials, i.e. the development of services that are beneficial for the environment (for example, separate waste collection system); II) realisation of structures that allow energy saving and that use clean energy (for example, solar panels and photovoltaic installations); III) realization of structures with quality certification under European regulations; IV) exercise of the activity for the entire calendar year; V) greater development of the tourism offering compared with existing structures in the municipal and/or regional territory (lacking or insufficient opportunities); VI) realisation of services that can be used by the weakest or most disadvantaged (for example, the disabled, pregnant women, infants, etc.), further to those required by Law 494/93".

[243] Article 5(2) of Regional Law no. 9 of 6 April 2001. The same law provides for a generalised procedure for the publication of all cases, regardless of their relevance (Annex C, point 1b).

[244] Article 9(3) of resolution no. 2189 of 17 December 2007 of the Giunta regionale.

[245] In Article 13 of resolution no. 2189 of 17 December 2007 of the Giunta regionale (concerning the Plan for use of State-owned maritime property areas), it is stipulated that: "1. In examining cases to assess the appropriateness of granting a new concession or altered concessions under Article 11, the Municipality will evaluate the following elements, with reference to the type of establishment and classification of the standards on services as defined in the PAD[State-owned property management plan]: a) general compatibility with territorial, urban development and environmental constraints; b) detailed compatibility with regard to: 1) structural elements, with reference to the precariousness, or not, of installations and product quality; 2) health and hygiene aspects, including the connection to technological networks and drainage systems; 3) accessibility of car parks; 4) compliance with regulations on the removal of architectural barriers and improvement of usability and accessibility, especially for the disabled; 5) landscape evolutionary dynamics; c) indicators of proposed services, such as density of beach umbrellas; hygiene, safety and emergency services; health services; reception services and facilities; games and sports; d) guarantee of development of the local economy, preferably through the use of local manpower in the operation of assigned areas, with reference to the number of employees and functions; e) technical and economic suitability of the applicant, as well as recognition as an active entrepreneur in the tourism sector, as recognised by current national or regional legislation, except in the case of first entrepreneurial activity".

where ample space is dedicated to "materials" and eco-friendly "technologies" to be used as a priority in products for seaside establishments[246].

5.3. b) Protection of current concessionaires and "modification" of the rule on public tenders for the areas already subject to concession

The selection procedure should instead be structured differently when it comes to reassigning stretches of coastline that are already subject to previous concessions: this situation occurs more often along the coastlines of Italy, Spain, Portugal and Greece, due to their higher density of seaside establishments and tourist facilities compared with France and Croatia.

In this case, without prejudice to the application of appropriate forms of disclosure (already present within the different systems) aimed at encouraging competition in the phase following the concession deadline (in order to stimulate the development of competing projects), a protection "net" should be taken into consideration for existing entrepreneurs through two types of intervention: a) first of all, through the precise regulation of the transitional phase, in compliance with art.12 of Directive 2006/123/EC and of the necessary time to implement municipal plans for the use and enhancement of State-owned property; b) second of all, by introducing forecasts (both general and related to individual tenders) in order to take into account not only the legitimate awarding of concessions for those who have invested based on the previous contract by confiding in the possibility for renewal, but also the «fundamental reasons of general interest» provided for by the Bolkestein Directive for each individual state. After all, said Directive does not leave margin to exclude that, in principle, upon expiry of the concession, it is possible to protect, within certain limits, the investments made by the concessionaire, especially if made in a period when they could rely on their preferential right or the extensions set *ope legis*[247].

Moreover, case-law had already highlighted the need to give a "value" to the legitimate concession of the "outgoing" concessionaire, at the same time as comparing different offers[248]. However, the recent bill of law dated 27 January 2017 lays out clear provisions,

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[246] In particular, Article 7(1) of resolution no. 2189/2007 of the Giunta regionale, cit., states that: "In compliance with current urban planning, building, landscape and environmental legislation, architectural structures, with dimensions established on the basis of criteria formulated according to the different requirements of municipal authorities, are realised with construction types, materials and architectural features that take account of the morphology of the area and the construction traditions of seaside establishments along the Tyrrhenian coastline, by using, as a priority: a) soil bioengineering and bio-architecture works; b) non-invasive technological solutions based on energy saving through the use of alternative energy, such as solar panels; c) phytodepuration systems in place of traditional plants where it is impossible to connect to the existing sewer system; d) eco-compatible materials such as stone, clay, wood and cork". In addition, in paragraph 3 it is stated that: "In zones that still preserve natural features of value, plant elements can be used to maintain environmental balance, as well as planting methods that reproduce the natural layout as far as possible. In particular, with respect for ecological balance, indigenous and rustic plant species with low water and maintenance needs should be chosen, and *xerogiardineria* techniques should be preferred, namely the identification and preferential use of "xerofite", plants that can tolerate difficult climatic conditions, and the very wide choice of which is able to satisfy even ornamental criteria".

[247] See Constitutional court no. 157 of 7 July 2017 (especially point 4), available at www.giurcost.org.

[248] Precisely in these terms, Council of State, section VI, 24 December 2009, no. 8716, in *Foro amm.-CDS*, 2010, p. 676, where it is stated that "application of the principle sanctioned by Article 37(2), Codice della navigazione, where preference is given to the previous concessionaire for the renewal of a concession in an area belonging to State-owned maritime property (so-called preferential right), is subject to appropriate publication of the renewal procedure and the actual equivalence of conditions offered by the previous concessionaire compared with the other aspirants".

expressly envisaging that the new regulation shall establish specific concession criteria and procedures while respecting the "performance, development, enhancement of business activities and acknowledgement and protection of investments, corporate assets and commercial value" through transparent and impartial selection procedures, "which take into account the professionalism acquired in the concession of State-owned maritime, lakeside and waterway property for touristic and recreational purposes"[249].

In this regard, the case of Bibione - San Michele al Tagliamento is particularly innovative: the municipality is one of the first in Italy to apply the public tender procedure for the concession of beach property. The public tender procedure that has led to the 20-year concession being awarded to the previous operator, Bibione Spiaggia S.r.l.[250], has in fact greatly enhanced the investments made and the works developed by the outgoing concessionaire.

Moreover, in a similar way to the provisions of Community regulation on public tenders (which expressly envisage the "negotiation procedure")[251], the possibility to apply procedures other than public tenders, or at least simplified ones (such as negotiated procedures), should not be ruled out; in fact, according to the cases identified by the sector regulation, it is clear that the contract can only be awarded to the outgoing concessionaire[252].

From this point of view, an appropriate benchmark is represented by the Spanish[253] and Portuguese models, which so far have not been subject to infringement procedures[254].

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[249] See Article 1(1)(a).

[250] The company, which comprises a wide range of shareholders including the Municipality, business associations and private tourism operators, obtained the highest score among participants in the tender, securing the twenty-year concession on what had already been managed since 1994: five of the eight kilometres of the Bibione beach on which there are 25 thousand beach umbrellas, 50 thousand sunbeds and deckchairs, 8 service points with sick-bays, nurseries, toilet facilities, and activities which provide jobs for approximately 200 mostly local people. Furthermore, as it is a company partly owned by the Municipality, the company statute ensures the absolute independence of regulating functions for access to use of the coastline with respect to subjects operating on behalf of the company.

[251] The negotiated procedure, which is based in Italy, is now governed by art. 124 and 125 of Legislative Decree no. 50/2016 ("Public Contracts Code").

[252] In this sense, there are useful reference parameters that are analytically identified by Article 1(1)(a) of the draft law in the process of approval, including: “landscape quality, environmental sustainability, enhancement of the various territorial characteristics […]”, but also “commercial value” and “professionalism acquired”.

[253] It is recalled in this regard that the judgment of the Tribunal Constitucional (Constitutional Court of Spain) of 13 November 2015, at www.tribunalconstitucional.es, in relation to the Services Directive (2006/123/EC), deemed unfounded the issues of constitutionality raised against the Ley de Costas, regarding the part in which an extraordinary extension is granted to concessionaires of State-owned maritime property assets. Although the judgment has limited effects under Spanish law, it nevertheless contains legal principles that are susceptible of general application at European level. Indeed, the arguments of the Tribunal Costitucional partly overlap with those of the CJEU judgment, C 458/14 and C 67/15 cit. The Tribunal Constitucional noted in particular that in the case of assignment of public assets (state-owned or patrimonial), this is not a concession, but award, of a productive asset, comparable to a lease under ordinary law, of a public asset, which falls within the spatial domain of the activity of the concessionaire (“un título de ocupación del dominio público, no como medida de intervención en garantía de leyes sectoriales que recaigan sobre la actividad”). Similarly, in the above-mentioned judgment of the Court of Justice it is noted that: “Those concessions may therefore be characterised as ‘authorisations’ within the meaning of the provisions of Directive 2006/123, in so far as they constitute formal decisions, irrespective of their characterisation in national law, which must be obtained by the service providers from the competent national authorities in order to be able to exercise their economic activities” (see paragraph 41).

[254] Even though, and rightly so, unequal treatment has been highlighted compared with the Italian system which has been scrutinized far too many times, first by the EU Commission and then by the Court of Justice. G. PIPERATA

In this context, the same reform *in itinere* has tabled the idea of a "double track" system that may envisage, in the transitional period, an extension (to be defined) to current State-owned property being on the date 31 december 2009, «without prejudice to the forecasts of ongoing contractual relations between dealers and operators» [255], followed by an auction of the beach property that has not yet been assigned. At the same time, a differentiated regulation may be introduced for concessions that have already been awarded and are about to expire: said regulation should modify the principle of public tender through instructions that enhance the legitimate concession of existing beach establishments, according to the principles laid out by the EU Court of Justice (also through points systems expressly provided by d.d.l. «for low environmental impact structures and facilities that offer infrastructure and beach accessibility services more than those already provided for by law for people with disabilities»)[256].

Then, both general and individual procedures should be structured in order to determine the duration of the concession, by taking into account the need to allow the concessionaire to get a return on their investment, avoiding automatic or non-automatic renewals. An alternative solution could be not to determine the duration of the concession based on the time needed to get a return on the investments made (even if precisely this criterion is referred to by the new code on contracts for the concession of services based on Directive 2014/23/EU)[257], but rather to "auction" these values upon public tendering: this may represent a solution to the excessive duration of concessions which, as previously mentioned, tends to create restrictions and constraints on accessing the market.

Finally, more attention should be paid to the relationship between authorities and sector operators. The results of the EU ICZM demonstration programme confirm the assumption of the Communication on the integrated structure of coastal zones[258], according to which the

touched on these aspects with wide-ranging arguments in his speech as a discussant at the Study Conference “Affidamento e certezza del diritto: dialoghi tra dottrine e giurisprudenze”, cit., which took place at the Law School of the University of Padua on 23-24 June 2016, the proceedings of which will shortly be published. On the other hand, it is not possible to exclude with certainty any future infringement procedure against Spain or Portugal: in this regard, see the reply of European Commissioner Elżbieta Bieńkowska to the parliamentary question of 22 July 2015, in which she states that “the Commission is closely following the situation in Spain, and is waiting for the outcome of the procedure in front of the Constitutional Court before it takes a final position in this matter” (the question at issue is the constitutionality of the Ley de Costas raised before the Tribunal Constitucional and rejected by the Tribunal with its judgment of 13 November 2015, cit.), adding that “The Commission will ensure that the application of EC law to identical situations on the ground in Italy and Spain is consistent”.

[255] See art. 1, paragraph 1, lett. d) of the aforementioned d.d.l. 27 December 2017.

[256] See art. 1, paragraph 1, lett. a), d.d.l. January 27, 2017, cit . This is a shared hypothesis among the same operators in the sector: see, for example, S. PIERACCINI, Spiagge, si studia il modello Spagna, at www.ilsole24ore.com, 4 March 2016. See also the proposed amendment to the above-mentioned draft law of 27 January 2017, which the Confederazione Nazionale dell’Artigianato e della Piccola e Media Impresa Balneatori presented and explained to the parliamentary committees VI "Finance" and X "Productive activities" of the Chamber of Deputies, in a hearing on 2 May 2017 (available at www.mondobalneare.com), and which requests the introduction of the so-called “double-track” system (tenders only for new concessions and “long-term” extensions for existing State-owned property concessions).

[257] See Article 168 of Legislative Decree no. 50/2016, where it is stated that: “For concessions over five years, the maximum duration of the concession cannot be longer than the period of time necessary for the recovery of investments by the concessionaire, on the basis of criteria of reasonableness, together with a return on the capital investment, taking account of the investments necessary to achieve the specific contractual objectives as per the economic and financial plan. Investments taken into account in the calculation include those actually borne by the concessionaire, both at the start of and during the concession”.

[258] COM (95) 511.

causes of bad management and persistent degradation of several coastal zones in Europe are due to the lack of coordination between the different administration levels and sectors, as well as the lack and inappropriateness of information, and the lack of participation and consultation of interested parties. In order to overcome this situation, an integrated approach to regulating the use of maritime and coastal zones is recommended, based on a strong basis of information and on the comparison and assessment of alternative options, shared by all stakeholders[259], also through the use of tools such as the French enquête publique (public enquiry)[260].

Also for this reason, the path ahead seems hard, requiring interventions in terms of regulations as well as coordination or negotiation between operators and businesses. Moreover, there is also a need to clarify the issue of acknowledging - should a new concessionaire take over pursuant to a public tender - the investments made by the outgoing concessionaire and the goodwill to be monetised, a topic on which the Government, the Regions and Italian beach establishments are lagging behind[261].

In the light of the considerations set out above, it seems necessary to find solutions that respect, first of all, the principles of competition, non discrimination, equality of treatment among operators, as well as the other general interests involved. At the same time, such solutions must avoid an unjustified worsening of the regulatory framework of State-owned property concessions in Italy compared with the legislation applied in other EU member states: such intervention could in fact jeopardize the effectiveness of the Treaties and be in direct conflict with the provisions laid out by the case-law of the Court of Justice and with the objectives pursued by the European institutions in their mission to “harmonise” the bathing resort sector.

[259] See Reccomandation EC 2002 chap. IV.

[260] See Chapter 4, § 4.2 (especially note 153). In the internal context, this aspect seems to be considered by art. 1, paragraph 1, lett. d-bis) of d.d.l. January 27, 2017, according to which it is necessary to "regulate the legal effects during the transitional period of the territorial planning acts and the related negotiated negotiation tools for the improvement of the tourist offer and the reclamation of the state assets, between the competent administrations and the most representative associations on a national basis of the enterprises in the sector ».

[261] See, in this regard, “*L'Ordine del giorno in materia di concessioni demaniali marittime*”, approved by the Conference of Regions and Autonomous Provinces on 20 October 2016 (published at www.regioni.it). The issue of compensation to be paid to the outgoing concessionaire was recently covered by judgment no. 157 of 7 July 2017 of the Constitutional Court, cit., which, while not excluding acknowledgement of the protection of investments made by the “outgoing” concessionaire, considered illegal several provisions of Regional Law of Tuscany no. 31 of 9 May 2016 [Article 2(1)(c and d)], which provided for the right to compensation for the previous concessionaire “amounting to 90 percent of the enterprise value of the company in the area covered by the concession”; this compensation was passed on to the incoming concessionaire, obliged to pay it in full before takeover. According to the Court, compensation of this magnitude is excessive, because “subordinating takeover of the concession to fulfilment of the above obligation affects the possibilities of access to the market concerned and its uniform regulation, as this acts as a disincentive to participation in the tender procedure for companies other than the outgoing concessionaire” (paragraph 6.4.1). The issue, therefore, is not the general intention to protect investments, but the extent of compensation to be paid to the outgoing concessionaire.

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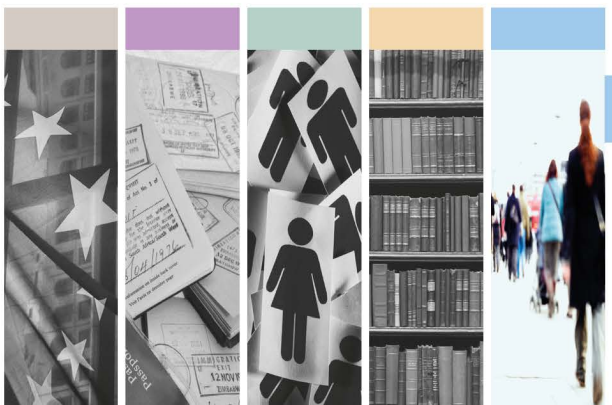
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