

MARITIME CONCESSIONS IN ITALY: THE NEW PERSPECTIVE AFTER THE TWIN RULINGS OF THE COUNCIL OF STATE / Raffaele Caroccia

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Abstract: *The paper deals with the treatment – both legislative and judicial – of maritime concessions in Italy. It first analyses legal provisions regarding the term of duration of such concessions and then focuses on some recent sentences. The first of them could have made stronger the conflict between the Italian legal environment and the EU one, as the legislative automatic prorogation of concessions was deemed to be legitimate. Luckily, further rulings stated that this legislative statute is not in line with the EU law and so has to be non-applied. The Council of State solved the question very recently: not only Italian legal discipline was sentenced not to be in line with the EU law, but also some guidelines were given to step out the impasse. Judicial review so proved out to be once again the key element to grant rule of law, even when relationships between different legal environments are concerned.*

Key words: *Maritime concessions; non-application; freedom of establishment; judicial review; Italian law.*

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1. INTRODUCTION

The brief contribution hereafter presented will concern a topic that has been occupying both the legislator and the Italian administrative judge for about a decade. It concerns maritime public concessions for tourism purposes and constitutes a point of potential conflict with European law.

In particular, the Italian legislator has taken care to grant extensions to beneficiaries from time to time. This favourable choice was prompted by the importance of the balneator's lobby, by the importance of the tourism sector in the Italian economy and by the fact that the original long duration of the concessions had led to the construction of irremovable structures with major investments.

The topic has taken on particular importance in the last year: the crisis linked to COVID has in fact particularly affected the tourism sector and the legislator has, as a consequence, introduced protection measures for the latter. However, the emergency provisions were immediately questioned as deemed not to be in line with the provisions of EU law.

The topic of compatibility of current legislation with EU law had already been addressed by national jurisprudence not in a unique way, until in November, a twin pronouncement of the Council of State intervened.

These rulings have clarified the picture and given both to the legislator and to single Administrations important guidelines on how to apply freedom of establishment principle.

2. LEGISLATIVE ORIGINAL PICTURE AND ITS EVOLUTION TILL BEFORE COVID CRISIS

But let's try to go in order.

The discipline of the matter is found in the so-called Navigation Code, which dates back to 1942.¹

It provides that the Administration can attribute to an operator the exclusive use of public property maritime areas for a set period of time. The discipline provides that, at least in the case of several requests relating to the same portion of the territory, a competitive comparison must be carried out. The provisions on the subject are rather sparse and very old fashioned.

Scholars have, for this reason, never particularly deepened them (for example, Agosto, 2020; Armenante, 2020; Benetazzo, 2016; Giannelli, 2017; Magri, 2016).

In the 90s, a right of insistence was introduced in favour of the concessionaire: in the event of renewal of the concession even by tender, the outgoing concessionaire would have been preferred. An automatic mechanism for the renewal of concessions for 6 years was then introduced in 2001. As a result, the European Commission launched an infringement procedure against Italy.

The right of insistence was therefore abolished.

A new infringement procedure also led to the abrogation of the "theoretical" automatic renewal criterion, which took place in 2011. At the same time, a commitment was agreed with the EU institutions to bring the Italian legislation into line with the European one.

However, a temporary dual regime was already in place since 2009. For the new concessions, the obligation to tender was introduced. Instead, for the existing concessions, the following provisions were envisaged:

- a) a renewal of the overall discipline (never occurred), which should have taken into account both the principle of free competition and the legitimate expectations of the concessionaires also in relation to the investments made;
- b) an extension until 31.12.2012.

This date was then extended to 31.12.2015 and then to 31.12.2020.

The Court of Justice ruled on this dual regime introduced in 2009 with the *Promimpresa* and *Melis* rulings of 2016.² With them, the intervention of the Italian legislator was not deemed legitimate because it violated the freedom of establishment principle.

In particular, the automatic extension was considered equivalent to renewal without a tender. Particular importance in the two decisions was given to the freedom of establishment principle and the *Bolkestein* Directive. The object of the ruling was the part of the Directive (art. 12), which requires the start of competitive procedures in the event

¹ Royal Decree n. 327/1942, in particular articles 36 and 37.

² All rulings of the ECJ can be found on the following site: www.curia.europa.eu.

that the scarcity of natural resources allows a maximum number of authorizations available for a certain activity. This element should have been assessed at the national level, but (not surprisingly) no reflections have been made on this point.

It should be noted that, if it is true that the Navigation Code does not provide for anything in relation to competition, but this is not surprising given the political context in which it was promulgated, unfortunately the Republic legislator was even more deaf to the principles of European law.

The two ECJ decisions considered that an automatic renewal was possible only if the concessionaire could legitimately have expected the renewal itself and, for this reason, had made new investments that were not amortized. However, this expectation can only be protected if it arose at a time when the principle that public concessions should have been arranged only by tender was not affirmed.

The Italian Parliament completely ignored the two sentences and in 2016 extended the duration of the concessions to 31.12.2020 and then from 2018 to 2033. So the legislative discipline is completely detached from the principle of competition.

3. JURISDICTIONAL STATE OF ART TILL BEFORE COVID CRISIS

The Council of State also acknowledged this in 2019 with sent. n. 7874/19,³ in which the extension regime was disregarded. This is because it was considered that the various extensions were all vitiated in a derivative way because of contrast with European law since they all contain an automatic extension regime. The reason is that it has already been declared contrary to European law by the Court of Justice.

In particular, it was then considered that a tender would still be necessary also because the portion of the maritime public property subject to concession gives its owner an important (it should be noted) opportunity of economic advantage. Precisely for this reason and without necessary reference to supranational law it would still be necessary – in the application of national law alone, which provides for the principles of transparency and non-discrimination – the experiment of a competitive confrontation.

Consequently, the outgoing holder of the concession does not have any legally relevant interest in the renewal of it, but has a mere factual interest not protected by the legal system. This is also because the prevalence of the rotation principle over the preference of the outgoing beneficiary has been affirmed and in order to avoid position rents.

The Council of State has decided that the act contrary to the European law is not void, but can be voidable. Whoever intends to contest it must act within 60 days from its knowledge.

In an *obiter dictum*, the administrative judge also recalled that the obligation of disregard should lie not only with national judges, but also with all state bodies. So much in application of another principle constantly expressed by the Court of Justice (C-103/88 Fratelli di Costanzo). In this case, therefore, each individual civil servant should disregard national law. Unfortunately, this statement has remained mostly on a theoretical level.

Finally, the Council of State held that the deadline within which a legitimate expectation could mature was that of transposition of the Bolkestein Directive (December 2009). After that date, it is not possible to have legitimate expectations, given that the aforementioned directive has as its focal point the promotion of the freedom of establishment through tender procedures.

³ All rulings of administrative judges can be found at the following site: www.giustizia-amministrativa.it.

4. LEGISLATIVE INTERVENTION AFTER THE COVID CRISIS AND ITS APPLICATION BY LOCAL ADMINISTRATIVE BODIES

The Italian legislator, however, has continued in its intent to favour concessionaires. In fact, the temporariness of this exceptional regime has even become permanent or - better said - without an end, as a result of the pandemic emergency.

In fact, in May 2020 a further forecast was introduced by law decree n. 34/2020. It confirmed the extension of the concessions until 2033 and prohibited the initiation of new competitive assignment procedures. The provision does not have an express term, a profile that certainly violates the Bolkestein Directive and its transposition in Italy (Legislative Decree 59/10). However, it is thought that it must be linked to the conclusion of the health emergency. Unfortunately, the legislator's decision was in fact another opportunity to block the start of competition in the sector.

The individual Italian administrations are moving in no particular order, despite the alarms and initiatives of the Competition Authority.

In Italy, the competence over public property maritime areas is identified in relation to the ownership of the area itself, which can be municipal, provincial or national. This increases the confusion.

There are only a few fixed points.

The extension should be the result of an express administrative provision and is not tacit or automatic. The measure, however, would not have constitutive effects, but only recognize an effect deriving from the law according to what was established by the Council of State with the sentence already mentioned. It is obvious, however, that public officials do everything to avoid adopting an illegitimate act in contrast with the European legal system. Consequently, in most cases, the adoption of an act is avoided.

This circumstance led to the initiation of some criminal proceedings against both employees and entrepreneurs, which also resulted in seizures of the areas. The trials are still under investigation, so no decisions on the merits have yet been recorded. Instead, the Supreme Court has already confirmed the legitimacy of the seizures.

In the event that an act is adopted, this almost inevitably involves the initiation of a legal administrative dispute. In fact, a new season of trials on the subject began in October 2020.

Another certain element is that the procedures are not subject to the European regulation envisaged for public contracts; consequently, the few selective procedures have a much leaner and non-overlapping discipline. Lastly, this circumstance was underlined by sentence no. 7837/20 of December 2020 of the Council of State.

The last clear aspect is that Administration bodies retain control powers over the use of the property.

5. JURISDICTIONAL PICTURE AFTER COVID CRISIS

It is now appropriate to face the most significant decisions, the framework of which is at least varied.

We will focus on both first- and second-degree judgments of the administrative judge and on a decision of the Constitutional Court. The exam will be carried out in a diachronic way.

The first sentence to be examined is n. 1322/20 of TAR (Regional Administrative Tribunal) Lecce of November 2020. This is an important decision for two reasons.

It is completely distant from the prevailing jurisprudence and comes from a "sensitive" judge, whose territorial context of competence is characterized by the

presence of numerous operators in the tourism sector. It states that the denial on an extension to 2033, opposed by a municipality to a concessionaire, is illegitimate.

This is on the assumption that in the context of the sources of law:

- a. Bolkestein Directive is not self-executing;
- b. the rulings of the European Court could not ascertain the repeal of national laws in contrast with EU law, but only the non-application;
- c. ECJ decisions would not always be sources of law, but only integrative criteria of interpretation. On this assumption, it is believed that the 2016 decisions would be sources of law, but not other (surprisingly not cited) decisions, that would require all branches of a Member State not to act in contrast with EU law.

Consequently, the P.A. should legally apply the state law about term extension, even if in conflict with the European one.

The decision aroused alarm among scholars and criticism from the general public because it could indicate a favour with respect to concessionaires no longer only in the legislative but also in the judiciary sector.

There was a fairly strong reaction, which led the subsequent jurisprudence to an immediate withdrawal.

The first expression of this new orientation is a sentence no. 10/21 of January 2021 of the Constitutional Court⁴. The decision concerns a regional law (Calabria), which provided for a general extension of public concessions without a final term.

The Court brings the question back - to avoid triggering a too sharp a contrast - to the different legislative powers recognized to the State and Regions.

The discipline of concessions is brought back to the competence of the State and it is also stressed the necessary respect of the European competition principles, from which Regions cannot depart.

The Calabria provision is therefore declared illegitimate because it constitutes an attempt to award concessions without respecting these criteria. The highest Italian judge held that - in application of the principles deriving from the Treaties and expressed by the European Court - an extension of the concession is not possible and that the same must be assigned after a competitive comparison.

The authoritative voice of the Constitutional Court has extinguished in the cradle the subversive attempts of other judges. In fact, subsequent decisions disavowed the reasoning presented by Lecce TAR.

The first judgment to be aligned with the principle expressed by the Constitutional Court is judgment n. 616/21 of Rome TAR of January 2021. This time, the direct applicability in the Italian legal system of all the decisions of the European Court was expressly established. Consequently, the Italian State must comply with the provisions of the Bolkestein Directive in the allocation of public areas - scarce assets for which a title is required - and, therefore, carry out a tender.

The automatic renewal mechanism was not found to be legitimate.

Even Salerno TAR has aligned itself with sentence no. 221/21 of February. It is of particular interest that the decision indicated that the extension to 2033 is also subject to an obligation of non-application. Obviously, the legislator did not take any inspiration from this ruling.

The Council of State with the decision no. 1416/21 of February reaffirmed the need for a tender, which must be based on the criteria of publicity and transparency in order to avoid the creation of position rents in favour of some operators. In this case, it

⁴ It can be read at the following site: www.cortecostituzionale.it. Constitutional judges have confirmed their view in decision no. 139/21.

has been highlighted that European law has a primary rank, has direct effect and is directly applicable in particular reference with the Bolkenstein directive.

The last decision that deserves to be mentioned is the 363/21 of Florence Regional Administrative Court of last March. The sentence was pronounced on the initiative of the Competition Authority, an administrative Authority that has also the power to initiate judgments against administrative acts damaging to competition. The judgment concerns a general extension of the duration of the concessions in the Municipality of Piombino. The ruling affirms the need to disregard all Italian rules on the extension of concessions. It then goes on to affirm the nature of scarce assets of state-owned areas and the need therefore to start competitive procedures for their assignment, which can only take place with an administrative act due to the characteristic of the property. It points out that the Bolkestein Directive brings about exhaustive harmonization and that the dispute would still be subject to the principle of free movement of services deriving directly from the Treaty due to the certain cross-border interest given the notoriety of the areas.

6. THE TWIN RULINGS BY THE COUNCIL OF STATE

The question concerning the legitimacy of a legislative extension of the duration of public maritime concessions until 2033 and the substantial prolongation of the existing assignments without competition found a definitive solution with two articulated decisions of the Council of State in Plenary composition (see Bello, 2021).

These are the twin judgments no. 17 and 18 of 9 November 2021; they were pronounced after the President of the Administrative Appeal Judge himself had raised the problem *ex officio* and requested the maximum composition of the Council of State to intervene on the issue, deemed to be of particular social and economic importance and in order to guarantee a uniformity of discipline on the national territory, after the "escapes" from competition perpetrated by the TAR of Lecce (see Dipace, 2021 for further analysis of the act).

The Italian Administrative judge therefore assumed the role of being responsible for the correct implementation of the EU law and of making up for the absences of the legislator, who proved to be sensitive more than to the reasons of right to the influence of the balneators lobby.

As a result, the Council of State has given guidelines not only to the legislator, but also to individual administrations on how to overcome the *impasse* in which the Italian legal system languishes.

In particular, on this point, it was specified that:

- a) the existing concessions will cease to be effective from January 2023;
- b) the legislator will no longer be able to extend their duration, and any act of such kind must be disregarded as in contrast with the EU law;
- c) the individual administrations will have to carry out selective calls for new assignments, with respect to which the Plenary Assembly has indicated possible *criteria* related to environmental protection, the maintenance of existing employment levels and the enhancement of experience in the sector.

This result was reached through a very articulated argumentative path.

In the first instance, the effectiveness of what was decided by the ECJ in the Promoimpresa ruling was stressed.

This decision is considered to be a clear source of law, so much so that in order to resolve the questions, it is not considered necessary to make a preliminary reference to the Luxembourg Court in the application of the CILFIT doctrine.

It follows from this that the principles of the Bolkestein Directive apply to the concessions in question.

They are interpreted as a title to exercise an entrepreneurial activity and not as a tool to ensure public interest.

The aim of concessions' new legal status is to liberalize and open the tourist services market, also in favour of non-national subjects according to the EU principles.

It was also stressed that the Directive was not adopted to harmonize national legislation in the tourism sector, but to guarantee the freedom to provide services.

The point is specified to stem possible arguments aimed at the non-applicability of the Bolkestein Directive to public property maritime matters.

It was then underlined that maritime concessions must be considered as a whole, have as their object one of the most important naturalistic heritages in the world, play a central role in the Italian economy and consequently constitute a matter of certain cross-border interest and, therefore, subject to competition discipline.

The use of selective calls is also considered an instrument of protection of transparency of administrative choices and a guarantee instrument of better tourist services for citizens.

The judgments address then the issue, thanks to which the TAR Lecce had supported the legitimacy of automatic legal prolongation: the non-self-executing nature of the Bolkestein Directive.

This point is denied: the Directive is immediately enforceable and both the Judge and the Administration must disregard the national rule in contrast with the European source.

Therefore, the Directive is indicated as a direct source of rights.

Above all, Administrations cannot be forced by national law to issue illegitimate acts because they are in contrast with EU rules.

This responds to the first of the needs that had prompted the President of the Council of State to invest the Plenary in the problem and can be summarized in the duty to ensure compliance with European standards not only by the judges, but by all Administrations.

However, the non-application of the national law cannot have criminal consequences for the concessionaires and the fact that legal prolongation was in known conflict with the content of EU law prevents operators from having a legitimate trust in the stability of the title.

Instead, it is not excluded that in future tenders, clauses may be inserted that reward investments made by current concessionaires.

The Plenary then takes care to specify the nature of the legal acts according to which the concessions are extended.

They do not have an innovative force, but they consist in a mere recognition of an effect deriving directly from the law, which is not applicable because it is in contrast with EU law: therefore, the extensions issued should not be cancelled as they constitute simple certifications and not provisions.

The individual Administrations (in Italy concessions are mostly issued by the Municipalities) will have to limit themselves to informing the concessionaires that the provisions issued in their favour will expire on 31 December 2022.

The prevalence of EU law means that even concessions, on which a *res judicata* has been formed in the abstract favourable to the concessionaire, have this very same fate.

This is in order to guarantee legal certainty and regardless of the moment in which the judgment is concluded.

To give time to the Administrations and to the legislator, whose intervention is in any case hoped for to regulate the topic in an overall way,⁵ to adapt to the EU law and to start the procedures, the effects of the Plenary rulings will take effect only from January 2023.

The tenders will have to provide for an increase in the concession fees, which must be determined to be consistent with market values.

The judgments received a good and warm reception, above all because they indicated with certainty the deadline within which the existing concessions will have to expire and provided Public Administration officials with a precise address regarding tenders to come.

However, there was some influential critic remark about judicial activism, which created a general rule in the trial without a democratic legitimacy (see Sandulli, 2021).

7. CONCLUSIONS

To sum up, it can be said that in the Italian legal system, in relation to public maritime concessions, there is a strong resistance to the full application of European principles. The subject that is operating the greatest brake is precisely the legislator, who – taking advantage of the pandemic crisis and in an attitude of constant favour for concessionaires – has introduced provisions that are completely not in line with a now established framework.

Not only during the COVID emergency, the Italian legislator acted in violation of an express position by the ECJ. The judiciary power has also suffered a similar temptation. COVID emergence has been improperly used to undermine the correct way of interpreting the relationship between the Italian and European systems. Fortunately, however, sufficient antibodies have been found at the top level of the jurisdictions to stop immediately such attempts. The initiative of the Competition Authority also helped in this.

Therefore, we can conclude that there are adequate safeguards in the Italian legal system capable of guaranteeing the supremacy of European law, despite the fact that this character has not yet been fully metabolized by both the legislator and some sectors of the economic world. The respect of rule of law, even in the relationship between two different legal environments, was once again found through judicial review, which can be defined as the very heart of rule of law.

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⁵ The legislator timidly addressed the problem - before the rulings of the Plenary - in art. 2 of the annual competition law for the year 2021, where it was decided to start a survey on existing concessions.

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