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European and comparative administrative law



Background (and future) of the case law on Italian state-owned maritime concessions and the preliminary ruling C-348/22 *Comune di Ginosa*, by Alessia Monica

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The CJEU case C-348/22 *Comune di Ginosa*, which focuses on the compatibility of the Italian regime for

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Services Directive (2006/123/CE). According to Recital 39 of the *Services Directive*, “[the] concept of ‘authorisation scheme’ should cover, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions” and they should not be qualified as “concessions” within the meaning the *Directive on the award of concession contracts* (Recital 15, 2014/23/EU). Effectively, the EU law is not concerned with the regime of ownership of public goods in Member States (art. 345 TFUE), but with the regulation of services, or rather the “service activity” carried out on the public good. This issue is a crucial point of conflict between the Italian law and the EU law.

Tracing the milestones of the state-owned maritime concessions' issues, we must go back to January 2009 when the EU Commission opened an infringement proceeding against Italy for failure to implement the provisions of Directive 2006/123 on authorisation schemes (Chapter III of Directive 2006/123/CE). Actually, the Italian national legislation then in force, favoured the assignment of maritime concessions to the current provider (the so-called *right of insistence* ex. art. 37 of the Navigation Code) and, therefore, an entity already established in Italy. Briefly, the outgoing provider often obtained the automatic renewal of the concession, without a new award procedure being organised which provides full guarantees of impartiality and transparency for a potential operator aspiring to replace the incumbent. Although on the one side this unlawful article was repealed, on the other side the Italian legislator adopted several acts which moved the extension deadline of ongoing concessions forward: to 2015 (Decree-Law 194/2009), then to 2020 (Decree-Law 179/2012) and finally to 2033 (Law 145/2018). This conduct had already been addressed in 2016 in the *Promoimpresa* ruling (Joined Cases 458/14 and C-67/16). What was already fully recognised in this case is the illegality behaviour of the Italian legislator and its recurrent use of automatic extensions, as a trick to avoid public competitive procedures to award concessions. Or better, the CJEU confirmed the unlawfulness of the automatic extension of (existing) authorisations in the absence of any transparent selection procedure among potential candidates where the concessions present a clear cross-border interest that is largely in the hands of the Member State and its authorities to determine. In addition, the last *prorogatio* of the extension of the duration of concessions (from which also follows a new infringement procedure n. 2020/4118), was also the subject of the referral to the Plenary Assembly of the Italian Council of State (nn.17 and 18/2021), which confirmed the illegality of the automatic extension, as contrary to both Article 49 TFEU and Article 12 of the *Services Directive*. The Council of State explicitly stated that the economic potential and attractiveness of maritime concessions, as well as the existence of a cross-border interest of "indistinct character" at national level, are self-evident. Therefore, the Italian judges pointed out the economical relevance of the administrative procedure embedded in a maritime concession, and the (economic) effects resulting from it.

Even though some points had already been clarified in the *Promoimpresa* case, other points remained open to discussions: for instance, nothing was expressly said about the self-executing nature of the *Services Directive*; the CJEU did not characterise Article 12 of *Services Directive* as a provision producing a direct effect (although it can reasonably be interpreted in this sense according to point 50 of *Promoimpresa* C-458/14). This means that a potential new private operator is entitled under EU law to rely on the *Services Directive* against the public authorities in order to require that a transparent and impartial selection procedure is organised when a concession expires, and a new concession needs to be

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owned maritime concessions, the subsequent issue for national law concerns the unlawfulness of

administrative acts and the applicability of existing administrative acts which comply with Italian law, but which are in clear contradiction with EU law (in case the municipal authority does not refrain from applying provisions of national law which are inconsistent with them, see *Costanzo*, 103/88). So, according with Italian administrative procedure, a national administrative act contrary to EU law has to be withdrawn (unless the internal rule, to which it is applied, is held not to exist).

Against this backdrop, the preliminary ruling C-348/22 made by the *Lecce Regional Administrative Court* (TAR Lecce Order No. 743/2022) drew its origin from the appeal brought by the Antitrust Authority (AGCM) for the withdrawal of several acts of extension of state-owned maritime concessions issued by the *Comune of Ginosa* (pursuant to Article 1, paragraphs 682 and 683, Law No. 145/2018). It should be recalled that the AGCM, by virtue of the powers conferred on it by Article 21-bis of Italian Law 287/90, is empowered to challenge acts of the public administration that may distort competition and create barriers to entry into the market. Therefore, for the Authority, an act extending the State-owned concessions in question is deemed to be of such detrimental nature. Moreover, by providing for an automatic renewal of the concessions themselves, *Comune of Ginosa* did not take into account a previous Opinion of the Authority where it reminded the local administration about its obligation to carry out a public competitive procedure, fully in compliance with the principles of EU law.

The seven blog pieces published in this series will analyse the various legal issues arising from this CJEU case (automatic renewal, Service Directive implementation, scarcity of resources and their allocation, right protection), comparing the Italian situation with other Member States where similar legal problems occur, like France, Greece, Spain and Portugal (in these two last Member States infringement procedures have been opened by the EU Commission). Moreover the EU Commission delivered to Italy a reasoned opinion under article 258 TFUE to Italy on 16th November 2023.

Reflecting on the implications of the CJEU' judgment, including in comparative terms, is an opportunity not only to discuss the implications of the ruling in the various legal systems, but also to launch a broader reflection on a model of governance for beaches and coasts that is genuinely based on loyal cooperation.

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Posted by Alessia Monica, Researcher of Administrative Law, University of Milan

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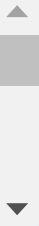
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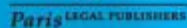
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