

## The State-owned Maritime Concessions in Italy: the Cross-border Interest Issue and the Ongoing Reform of the Sector

The Italian State-owned maritime concessions regulatory framework testifies the seminal impact of Title IV of the Treaty of the Functioning of the European Union (TFEU) and of the Services Directive (Directive 2006/123/EC) on national administrative procedures. Recently, the Plenary Assembly of the Council of State (following the reasoning of the Court of Justice of the European Union (CJEU) in joined cases C-458/14 and C-67/15 *Promoimpresa* and *Mr. Melis*), has confirmed the illegitimacy of the automatic extension of State-owned maritime concessions provided by the Italian law until 2033, as contrary to both Article 49 TFEU and Article 12 of the Services Directive. It has modulated the effects of the unlawfulness of the ongoing extension calling on the Italian legislator to reform the sector's regulations by the end of 2023. Therefore, both the legislator and the national administrations will have to find a balance between all relevant interests at stake in a transformed service market of bath tourism, since the beginning of the implementation of the Services Directive. Moreover, also in a case-by-case analysis of the 'scarcity of available natural resources', they both will have to consider the cross-border interest of these concessions as necessarily existing in *re ipsa*, whilst balancing this aspect with some peculiar features of the Italian bathing sector. Firstly, it is clear how the national legislator has to implement the EU law taking into account the concrete facts and context at stake. Secondly, the protection of private operators and of recipients is a basic condition not only for a general equitable and solidarity-based reform, but also for each selection procedure.

### 1. Introduction

In Italy, the bathing sector has a considerable economic impact. Firstly, it should be remarked how Italy can claim 7458 km of coastline.<sup>1</sup> For these reasons, seaside tourism is a natural consequence of Italy's geomorphology. Indeed, services and tourist facilities have sprung up around the seaside resorts, even though the coastal territory is very different in terms of morphology and exploitation, both from a purely internal point of view, and when compared with other Member States looking onto the sea and facing a tourist vocation.<sup>2</sup>

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<sup>1</sup>'Strategic Plan on Tourism 2017-2022' (Italian Ministry of Tourism)  
<<https://www.ministeroturismo.gov.it/il-piano-strategico-del-turismo/>> accessed [insert date]; The sector consists of about 30 thousand companies, often family-run.

<sup>2</sup> *Infra* note 79.

**Commentato [A1]:** It might be nice to put the full name of the abbreviation the first time it is mentioned but this is not completely necessary as those who read the article should know what the abbreviations stand for

**Commentato [A2]:** Starting a sentence with 'anyway' might come across quite informal

**Commentato [A3R2]:** Perhaps try "Moreover, in a case-by-case ..."

**Commentato [A4R2]:** ok

In addition, the impact of Directive 123/2006/CE of 12 December 2006 on services in the internal market (hereinafter the ‘Services Directive’) has been quite intrusive on some services in Italy related with tourism and local peculiarity.<sup>3</sup> Disputes and judgments have been widespread due to the unclarity of the regulatory framework. Hence, some reflection on the so called ‘twin judgments’ of the Plenary Assembly of the Council of State published on the 9<sup>th</sup> of November 2021 are remarkable.<sup>4</sup> They have generated a heated debate in Italy from a legal perspective. At the same time, they also reflect on the Italian political context, as well as on the relations between Italy and the European Union.

This article, starting with a short recap of the history of the legal institution of the State-owned concessions in relation to EU law (section 2), focuses on how the Italian administrative judges define the cross-border interest (section 3). Highlighting this point also allows for some reflections concerning the future reform of the bath sector as to comply with Article 49 TFEU and Article 12 of the Services Directive affecting the implementation of the EU law (section 4). Against this backdrop, the Italian public administration called upon to establish the procedures for awarding expiring concessions, will have to balance different interests at stake, in order to assure the effectiveness of the EU law. Namely, the Plenary Assembly of the Council of State has exercised its decision-making power modulating the temporal effects of its interpretative judgments by the end of 2023. It will be highlighted how the law is in action and affected by the context, as well how it is difficult to ‘align’ national law with the provisions of the EU law and the EU Court (CJEU) ruling. In line with the reform of the sector being debated in the Italian Parliament, particular attention is paid to the protection of freedom of movement in the service market, as well as to the equal treatment of operators. Not least, the updated legal framework would benefit from the inclusion of the requests of recipients and consumers (section 5).

## **2. Directive 2006/123/EC and State-owned Maritime Concession: a Troubled Relationship.**

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<sup>3</sup> Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market [2006] OJ L 376.

<sup>4</sup> Council of State – Plenary Assembly, judgment n. 17 e n. 18 [2021]. In Italy, judicial review of administrative action is performed by specific courts: a court of first instance, called ‘Tribunale Amministrativo Regionale’ (TAR), which is established in every Region and the ‘Consiglio di Stato’ (Council of State) which acts as an appeal court. See., DU Galetta, P Provenzano, ‘Administrative Procedure and Judicial Review in Italy’ in G della Cananea, M Bussani, *Judicial Review of Administration in Europe* (Oxford 2021), 64.

Before going to the heart of the reasoning of the Council of State, it is useful to look back at a few milestones of a story which began more than 15 years ago. The Services Directive which is embedded in the wider *Internal Market Strategy for Services*,<sup>5</sup> has sought – and still seeks – to dictate common rules on economic services, with the attempt to complete the internal market.<sup>6</sup> To do so, it provides the removal of legal and administrative barriers to trade, thereby increasing benefits for providers and consumers. The preference for a Directive, instead of a Regulation, was prompted by the awareness of common types of barriers, not only among Member States but also among different sectors. Consequently, recognizing the horizontal nature of the obstacles, it would have been pointless to multiply solutions by means of regulations that were too detailed and limited within a sector.<sup>7</sup> This Directive, in turn, has also codified the case-law of the EU Court (CJEU) regarding freedom of establishment and of service providing.<sup>8</sup> It specifies how the concept of ‘overriding reasons relating to the public interest’ in relation to Articles 49 to 56 of TFEU may continue to evolve according to the state of the service market.

## 2.1 *Services Directive* and the ‘Selection from Among Several Candidates’

Referring to [my reasoning](#), there are two relevant aspects of the Directive directly affecting the state property concession as framed in Italy. First of all, ‘Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme’ unless some clear-cut conditions make it necessary (Article 9). In any case, Member States do not exercise their power of assessment in an arbitrary manner, meanwhile they also

**Commentato [A5]:** This is a bit ambiguous - who is being referred to as 'our'?

**Commentato [A6R5]:** my

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<sup>5</sup> Communication from the Commission to the Council and the European Parliament (An Internal Market Strategy for Services), COM [2000] 888 final.

<sup>6</sup> On Directive 2006/123/CE, *inter alia*, U Stelkens, W Weiss, M Mirschberger (eds), *The Implementation of the EU Services Directive: Transposition, Problems and Strategies* (Springer 2012); M Wiberg, *The EU Services Directive: Law or Simply Policy?* (Springer 2014); M. Klamert, *Services Liberalization in the EU and the WTO: Concepts, Standards and Regulatory Approaches* (Cambridge 2014). On the impact of the Services Directive and other issues affecting its transposition, see A Monica, ‘I regimi di autorizzazione e la libertà di circolazione dei servizi nel mercato unico dell’Unione europea’ in DU Galetta (ed), *Diritto amministrativo nell’Unione europea*, (Giappichelli II ed. 2020).

<sup>7</sup> To be precise, not all economic activities related with ‘services’ have been liberalized according with the Services Directive. Article 2, c.2, on the scope of the Directive, punctually lists the activities where the Directive is not applied as non-economic services of general interest or healthcare facilities, financial services, such as banking, credit, insurance and re-insurance, occupational or personal pensions, securities, investment funds, payment and investment advice; electronic communications services and networks, services in the field of transport, including port services, falling within the scope of Title V of the Treaty; social services; services provided by notaries and bailiffs, who are appointed by an official act of government (...).

<sup>8</sup> Recital 40.

have to respect all the criteria as to assure freedom to provide services. Secondly, in Article 12, the Directive clarifies how ‘in cases where the number of authorisations is limited because of scarcity of available natural resources and technological capacity’ a selection procedure from among several candidates can be compatible with the EU law. This provision should be read in conjunction with Articles 14 and 15 of the Directive itself, defining the requirements prohibited or subject to evaluation. The goal of eliminating restrictions on freedom of establishment of service providers in Member States, as well as on the free movement of services between the Member States, aims to contribute to the achievement of a genuine internal market of services. Therefore, the requirements, which cannot be regarded as constituting such restrictions, do not fall under the scope of the Services Directive, ‘since those requirements do not regulate or do not specifically affect the taking up or the pursuit of a service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity’.<sup>9</sup> In other words, it applies only to ‘requirements which affect the access to, or the exercise of, a service activity’.<sup>10</sup> Also, due to the fact that the law of the internal market constitutes a moving target, provisions of Chapter III (e.g. Articles 12, 14 and 15) apply regardless of any cross-border activity. Not least, according to the existing provisions of the TFEU, concerning freedom of movement and freedom to provide services, the activity carried out by operators on the State-property maritime concession is of an economic nature since it is carried out for remuneration (*ex* Article 57 TFEU).<sup>11</sup>

## 2.2. State-owned Maritime Concession as ‘Authorization’ of Service Activity

To put it plainly, the focus of the Services Directive is on the actual activity of establishment rather than the ultimate finality of such establishment;<sup>12</sup> it is self-evident the absolute coincidence of what is understood as ‘service’ under the Treaty and under the

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<sup>9</sup> Joined cases C-360/15 and C-31/16 *X and Visser* [2018], ECLI:EU:C:2018:44, para 123. For an extensive commentary on this case law, J Snell, ‘Independence Day for the Services Directive’ [2019] 56 CMLR, 1119.

<sup>10</sup> Recital 9.

<sup>11</sup> M Wiberg, *The EU Services Directive: Law or Simply Policy?*, cit., 187.

<sup>12</sup> AG Spuznar, Opinion joined cases C-360/15 and C-31/16 *X and Visser* [2018] ECLI:EU:C:2017:397, para 85.

Directive, despite the limited scope of the latter.<sup>13</sup> For this reason, it is of little relevance whether there is a well-established difference in Italian law between the *nomen iuris* of ‘authorisation’ (that is the ‘*noun*’ used in the Services Directive also referring to the Italian linguistic version) and ‘concession’; nor is it substantial if the activity is exercised on a ‘public good’ (as it is the beach). Therefore, according to EU law, these ‘authorizations’ are not relevant for ‘public goods’ entrusted to the private operator, but for the economic activity exercised by the latter thanks to the exploitation of a public good in the framework of the contract which has been concluded with public administration. Against this backdrop, private operators keep a certain economic freedom to determine the conditions under which that right is exercised. In addition, they are to a large extent exposed to the risks of operating the service.<sup>14</sup>

Again, upon closer examination, the ‘right of insistence’ provided in Article 37, c. 2 of the *Italian Navigation Code* of 1942, was already contrary to Article 49 TFEU because it granted a system of preference in favour of the outgoing operator in case of a new allocation of the concession.<sup>15</sup> Clearly, this practice is also contrary with the Article 12 of the Services Directive and the provision of a guarantee for the aspiring operators that their application will be dealt with objectively and impartially, as to enable the services market to be opened to competition.<sup>16</sup> Because of this, the provisions laid down in the Directive have faced a disruptive impact on the Italian administrative law: they have helped to modify the application of typical Italian institutions such as ‘the concession of goods’ in the bath-sector. According to Recital 62, authorisations can be granted but they should not have an excessive duration, be subject to automatic renewal or confer any advantage on the provider whose authorisation has just expired. Indeed, the duration of the authorisation in Italy is generally a minimum of 6 years; normally, the first authorisation is renewed to the original operator unless he has lost the initial requirements (for other reasons).<sup>17</sup> Due to the legislative framework at stake, in 2008 the EU Commission had opened an infringement

**Commentato [A7]:** This part of the sentence can be confusing - maybe you can try to reword it

**Commentato [A8R7]:** explained

**Commentato [A9]:** This may appear informal; perhaps replace it with “Therefore”

**Commentato [A10R9]:** ok

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<sup>13</sup> S O’Leary, S Iglesias Sánchez, ‘Free Movement of Persons and Services’ in P Craig, G De Búrca (eds), *The Evolution of the EU Law* (Oxford 2021) 523, 524.

<sup>14</sup> C-300/07, *Hans & Christophorus Oymanns* [2009], para 71. See infra note 37.

<sup>15</sup> A Monica, ‘Le concessioni demaniali marittime in fuga dalla concorrenza’ (2013) 2 *Rivista Italiana di diritto pubblico comunitario* 444.

<sup>16</sup> Case C- 324/98, *Teleaustria* [2000], ECLI:EU:C:2000:669, para 62.

<sup>17</sup> Decree Law n. 194 [2009] converted with amendments by Law n. 25 [2010].

procedure,<sup>18</sup> which was closed after the Italian government agreed to abolish the domestic provisions in conflict with EU law.<sup>19</sup> Even though Article 16 of legislative Decree n. 59/2010 has also transposed the requirements of Article 12 of the Services Directive without providing (nor attempting to) for special derogations for this peculiar sector,<sup>20</sup> no procedures have been identified as to open the concession award procedures, for maritime concession coming to an end, to EU principles. Rather, the legislator has continued to resort to extensions, with the attempt to postpone the difficult task of a regulatory reform of the sector.<sup>21</sup> Therefore, Article 12 is, in fact, not be applied with regard to concessions of State-owned property<sup>22</sup>. In the midst of these regulatory interventions which had only maintained the *status quo*, the CJEU were referred to by two national administrative courts (TAR) regarding the extension's regime and its compatibility with the EU law.<sup>23</sup> The Court's preliminary ruling C-458/14 and C-67/15 *Promoimpresa* and *Mr. Melis* (thereinafter *Promoimpresa*) has declared the unlawfulness of the automatic extension of (existing) authorisations for State-owned maritime concessions for tourism and recreational purposes, in the absence of any transparent selection procedure among potential applicants, and if they present a clear cross-border interest to be determined by the judges *a quo*. The judgment recalls that authorizations schemes embed the 'concession' according to Recital 39 of the Services Directive; if these concessions allow the provider to exercise their economic activity they also should be of limited duration, albeit fixed by each Member State. Hence, the CJEU called upon by the referring Italian court – which had stated that the legal relationship between *Promoimpresa* and the public administration is in the nature of a 'concession'<sup>24</sup> – also recalls how 'the concessions do not concern the provision of a particular service by the contracting entity, but an authorisation to exercise an economic

**Commentato [A11]:** Should this perhaps say 'which was closed...?'

**Commentato [A12R11]:** yes

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<sup>18</sup> EU Commission Infringement procedure 4908 [2008].

<sup>19</sup> Law n. 217 [2011] so called 'Community Law 2010', article 11.

<sup>20</sup> The overmentioned art. 16 mirrors the literal transcription of art. 12 of the Services Directive without specifying any exceptions. See, E Zampetti, 'La proroga delle concessioni demaniali con finalità turistico-ricreativa tra libertà d'iniziativa economica e concorrenza. Osservazioni a margine delle recenti decisioni dell'Adunanza Plenaria' (2021) 3 Diritto e società 513.

<sup>21</sup> Decree Law n. 179 [2012] has been converted with amendments by Law n. 221 [2012]. It extended the existing concessions until 31 December 2020.

<sup>22</sup> Conclusion C-458/14 and C-67/15 *Promoimpresa* and *Mr. Melis* [2016] ECLI:EU:C:2016:122, para 107.

<sup>23</sup> TAR Lombardia order n. 2401 [2014] and TAR Sardegna order n. 224 [2015].

<sup>24</sup> *Ivi*, para 16

activity on State-owned land'.<sup>25</sup> Despite the fact that State beach/land object of the authorization is considered as a 'good',<sup>26</sup> the State-owned maritime concessions fall into the scope of the Services Directive in so far as the provider has a right of use over State-owned property, meanwhile the provider keeps the commercial risks of operating that property.<sup>27</sup> In return, the Member State receives the payment of a fee for the exploitation of the concession.

### 2.3 Services Directive, Economic Activity and Freedom of Establishment.

Not only has the nature of the concession and its regulation been a topic frequently discussed by the Italian administrative law doctrine,<sup>28</sup> but the Italian debate has also tried to question the legal basis of the Services Directive, being Article 53, c.1<sup>29</sup> and Article 62 TFEU.<sup>30</sup> For this purpose, a short clarification on the legal basis of the Services Directive has to be made, as to better understand the link between 'concessions' and 'freedom of establishment'. This kind of concession concerns an authorisation to exercise an economic activity on State-owned land and, on this path, it is strictly related to the open competition in the internal market (of services).<sup>31</sup> Referring back to the general objectives of the internal market in Article 26 TFEU, a more precise legal basis for an act achieving liberalisation objectives (as the Services Directive) is that provided for by Article 114 TFEU.<sup>32</sup> The latter allows for the addressing of disparities between the laws of the Member States in areas where

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<sup>25</sup> *Ivi*, para 47.

<sup>26</sup> Among others, G Di Plinio, 'Il Mostro di Bolkestein in spiaggia. La "terribile" Direttiva e le concessioni balneari, tra gli eccessi del Judicial Italian Style e la crisi del federalizing process' (2020) 4 marzo, *Federalismi.it*, 16.

<sup>27</sup> 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: article 4 of Directive 2006/123/EC and joined cases C-458/14 e C-67/15, *Promoimpresa* and *Mr. Melis* para 41.

<sup>28</sup> Recently, A Giannelli, *Concessioni di beni e concorrenza* (Editoriale scientifica 2018); M Timo, *Le concessioni balneari alla ricerca di una disciplina fra normativa e giurisprudenza* (Giappichelli 2020).

<sup>29</sup> F Pocar, M Baruffi, *Commentario breve ai Trattati dell'Unione europea* (Cedam II ed. 2014), 378.

<sup>30</sup> Art. 62 TFEU can be considered a referral rule to specific provision on freedom of establishment and on services. S Serrano, 'Article 62', in HJ Blanke, S Mangiameli (eds), *Treaty on the Functioning of the European Union - a Commentary. Volume I, Preamble, Articles 1-89* (Springer 2021) 1214.

<sup>31</sup> Directive 2006/123/EC, Recital 9

<sup>32</sup> 'The legal basis of Article 114 c. 1 TFEU can be made use of '[s]ave where otherwise provided in the Treaties'. Thus, other *leges speciales* legal basis in the Treaty take precedence over Article 114 c.1 TFEU.' M Kellerbauer, M Klamert, J Tomkin, *The EU Treaties and the Charter of Fundamental Rights: a Commentary* (Oxford 2019) 1241.

such disparities are liable to create or maintain appreciable distortions of competition. Specifically, the word ‘approximation’ is used in Article 114 TFEU with the goal of ‘creating something entirely new at EU level’;<sup>33</sup> it is a clear consequence that leaving intact existing disparities among national regulation has become inconceivable. This reading has triggered a dispute among legal practitioners – some have referred to the legal basis provided by Article 115 TFEU as more appropriate<sup>34</sup>. This consideration cannot be shared, since Article 115 TFEU refers to provisions ‘directly affecting the establishment or functioning of the internal market’. Of course, this is not one of the objectives of the Directive, given the wording of Recital 7.<sup>35</sup> Additionally, Article 115 TFEU requires unanimity in the Council for acts whose purpose is the harmonisation of national laws. *A fortiori*, the reasoning set out for Article 115 TFEU also applies to Article 195 TFEU.<sup>36</sup> The possibility of referring to the latter legal basis, which provides for the Union’s supplementary powers, in relation to the action of the Member States in the field of tourism, cannot take precedence over Article 114 TFEU. On the one hand, in the case of concessions on State-owned maritime property we are not dealing only with ‘tourism’, but also competition in the market is of seminal relevance. On the other hand, even though Article 114 TFEU shall not apply ‘to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons’, these fields of intervention are surely distant from the specific case of State-owned maritime concessions. In addition, in *Promoimpresa*,<sup>37</sup> the CJEU clearly reiterates how, according to Recital 15 of Directive 2014/23/UE, State-owned

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<sup>33</sup> S Weatherill, *The Internal Market as a Legal Concept* (Oxford 2017) 154.

<sup>34</sup> Plenary Assembly of Council of State, n. 17 and n. 18 [2021], para 21. See also, F Capelli, *Evoluzione, splendori e decadenza delle direttive comunitarie. Impatto della direttiva CE n. 2006/123 in materia di servizi: il caso delle concessioni balneari* (Editoriale Scientifica 2021) 111, 115. Recently, this argument has taken up also by TAR Lecce order n.743 [2022] and it is object of the first question of a preliminary ruling regarding the nature of Services Directive: see infra note 89.

<sup>35</sup> ‘This 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. [...] Provision should be made for a balanced mix of measures involving targeted harmonisation, administrative cooperation, the provision on the freedom to provide services and encouragement of the development of codes of conduct on certain issues. [...] This Directive also takes into account other general interest objectives, including the protection of the environment, public security and public health as well as the need to comply with labour law.’ On the seminal liberalisation purpose of the Directive see, F. Ferraro, ‘Diritto dell’Unione europea e concessioni demaniali: più luci o più ombre nelle sentenze gemelle dell’Adunanza Plenaria?’ (2021) 3 Diritto e società 365.

<sup>36</sup> This legal basis is suggested as appropriate in F Capelli, *Evoluzione, splendori e decadenza delle direttive comunitarie. Impatto della direttiva CE n. 2006/123 in materia di servizi*, cit.,122.

<sup>37</sup> Case C-458/14 *Promoimpresa*, paras 44 and 48.



maritime concessions do not fall within the category of 'services concessions' punctually regulated (more recently) by rules on public procurement.<sup>38</sup>

Notwithstanding the CJEU ruling in 2016, the lack of a legislative review of the sector, due to the conscious inertia of the legislative power, has produced many disputes between operators and administrations, as well new conflicts of law between different levels of government. Lastly, Article 1 of the Italian Law 145/2018 has provided for the extension, of maritime concessions obtained before 2010, until 31 December 2033.<sup>39</sup> This fact has triggered a new infringement procedure by the EU Commission which has sent a letter of formal notice on 3 December 2020, nudging the Italian legislator to finally overcome the incompatibility of the national law with the EU law. The Commission considers that the Italian legislation is contrary to the substance of the CJEU ruling in case *Promoimpresa* and creates legal uncertainty for seaside tourist services. Indeed, it discourages investment in a sector that is crucial for the Italian economy that has already been hit hard by the Covid crisis.

**Commentato [A13]:** this might seem a bit informal

### 3. The Plenary Assembly of the Council of State: Cross-border Interest and Legitimate Expectation.

As to settle contrasts between the various Administrative Italian courts, due to the fact that many disputes flourished despite the self-evident provisions of the CJEU in the *Promoimpresa* case, the Plenary Assembly of the Council of State made some clarification remarks in exercising its function of nomofilachy<sup>40</sup>, that is the uniform interpretation of national legislation provided for by Article 99 of the Code of Administrative Procedure. In doing so, the judge must deal with 'non-national' sources, conventional law or European Union case law. The judges of the Council of State also reiterated how it was not necessary to make a new preliminary reference to the CJEU (pursuant to Article 267 TFEU) following the 'so-called *Cilfit* case law'<sup>41</sup> (also recently reaffirmed in the *Consorzio Italian Management case*<sup>42</sup>) because of the clarity of what was already affirmed in *Promoimpresa*

**Commentato [A14]:** this is a bit confusing – what flourished?

**Commentato [A15R14]:** Many disputes

<sup>38</sup> Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts [2014] OJ L 94.

<sup>39</sup> Law 145 on State budget for the 2019 financial year and multiannual budget for 2019-2021 [2018].

<sup>40</sup> A Monica, 'Il futuro prossimo delle concessioni balneari dopo il Consiglio di Stato: *nihil medium est?*', (2022) 1 CERIDAP 81.

<sup>41</sup> Case 283/81, *Cilfit* [1982] ECLI:EU:C:1982:335.

<sup>42</sup> Case C- 561/19, *Consorzio Italian Management* [2021] ECLI:EU:C:2021:799.

in 2016. Furthermore, it should be remarked how *Promoimpresa's* statement was fully confirmed in subsequent domestic case law.<sup>43</sup>

It must be noted that the aforementioned – not only a formal reading of the EU law (but also a substantial one) in relation to national law or *vice versa* – shows how the Italian procedure for allocating State-owned maritime concessions is mainly violating Article 49 TFEU. As far as Article 12 TFEU is concerned, it presents a detailed nature, hence an analysis of the context must be carried out to assess whether it falls within its scope. Thus, a systemic reading of the national rules, correctly implementing the EU law (aimed at giving the fullest possible effect to the law itself), may be sufficient to overcome any doubts as to the interpretation in relation to the direct applicability of Article 12 of the Services Directive, ‘leaving to the national court only the task of ascertaining the requirement of scarcity of the natural resource’.<sup>44</sup> Consequently, if Article 12 is not applicable, the concessions at issue fall, by their very nature, within the scope of Article 49 TFEU. That is clearly linked with the assessment of the existence of a cross-border interest to be protected and not restricted (according to the EU legal framework).

It follows that the evaluation of the cross-border interest issue is considerable and – according to the author – regarding the determination of the cross-border interest, the Plenary Assembly of the Council of State even went beyond what the CJEU has specified in case *Promoimpresa*.<sup>45</sup> Here, recalling the *Belgacom* case law on procurement, the Court had remarked that the cross-border interest was to be determined case-by-case, ‘taking into account in particular the geographical situation of the property and the economic value of that concession’.<sup>46</sup> This evaluation has a direct connection with the protection of the legitimate expectations of service provider whose concession is expiring. In fact, the protection of legitimate expectation is based on the subjective good faith of the subject invoking the expectation; its protectability varies according to the weight of the public

**Commentato [A16]:** If you use the plural ‘service providers’, then then sentence should continue ‘concessions **are** expiring’. Alternatively, you can say ‘concession is expiring’, but you should then rather use the singular ‘service provider’

**Commentato [A17R16]:** ok

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<sup>43</sup> R Mastroianni, ‘L’Adunanza Plenaria del Consiglio di stato e le concessioni balneari: due passi avanti e uno indietro?’ (2022) 1 Eurojus.it 108.

<sup>44</sup> Plenary Assembly n. 17 and n. 18 [2021] para. 18.

<sup>45</sup> A Monica, ‘Il futuro prossimo delle concessioni balneari dopo il Consiglio di Stato: *nihil medium est?*’ cit. Here the cross-border issue is investigated in relation to the Italian administrative case law.

<sup>46</sup> Case C-221/12 *Belgacom* [2013] ECLI:EU:C:2013:736, para 28.

interests at stake.<sup>47</sup> For this purpose, the Plenary Assembly makes quite a *revirement* and it affirms:

*‘Nor can the importance and economic potential of the national coastal heritage be undermined by artificially splitting it up in an attempt to assess the cross-border interest of the individual areas of land under concession. Such a fragmentation would not only distort the undisputable unity of the sector, but would also conflict with national legislation itself (which, when it has provided for extensions, has always done so indiscriminately and for all, and not with reference to individual concessions at the end of a case-by-case assessment) and, above all, would give rise to unjustifiable and unreasonable differences in treatment, allowing only some (and not others) to continue to benefit from the system of extensions ex lege. There is no doubt, on the contrary, that Italian beaches (as well as lake and river areas), due to their conformation, geographical location and tourist attraction, are all of certain cross-border interest, which implies that the national rules providing for an automatic and generalised extension are contrary to Articles 49 and 56 TFEU, inasmuch as it is likely to unjustifiably restrict the freedom of establishment and the free movement of services in the internal market, moreover so in a market context in which the dynamics of competition are already particularly blurred due to the long duration of the concessions currently in force’.*<sup>48</sup>

Due to this interpretation, it becomes necessary to understand what scope there really is for the legitimate expectations of the provider in the tourist market. The latter is highly vulnerable to all socio-economic pressures. Consequently, a proportional balancing of the various interests and rights at stake is necessary.<sup>49</sup> Therein, it is also difficult to protect the legitimate interest which, in turn, is a general principle of law.<sup>50</sup>

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<sup>47</sup> DU Galetta, ‘Le fonti del diritto amministrativo’, in S Battini, E Chiti, DU Galetta, BG Mattarella, M Macchia, C Francini, G della Cananea, MP Chiti (eds) *Diritto amministrativo europeo* (Giappichelli 2019) 112.

<sup>48</sup> Plenary Assembly n. 17 and n. 18 [2021] para 16 (Author’s translation).

<sup>49</sup> See A Cossiri (ed), *Coste e diritti* (EUM 2022). This volume seeks to bring together in a structured dialogue the multiple perspectives involved in the reform of the maritime-concessions.

<sup>50</sup> The principle of legitimate expectations was established as a general principle of law since case 112/77 *Töpfer* [1978] ECLI:EU:C:1978:94, para 20. However, a ‘full definition as general principle of law’ can be found in the joined cases C-37/02 and C-38/02 *Di Lenardo and Dilexport Srl* [2004] ECLI:EU:C:2004:443, para 70.

It is quite evident that the ongoing services market is structurally different from the service market portrayed during the approval of the Directive in 2006. In any case, the principle embedded in the freedom of movement needs to be implemented, as far as possible, among Member States.<sup>51</sup> This seems to be the EU Commission's main concern: rather than the extension, it is the automatic renewal embedded in the Italian law (which in practice gives more chances to the ongoing provider) that is contrary to obligations arising from membership of the European Union. It follows that national administrations, called upon to implement EU law, have to refrain from applying different rules depending on whether they are implementing EU or national legislation.<sup>52</sup> The lack of uniformity and certainty in the management of the 'EU services policy' directly affects the correct functioning of the market. In other words, procedural autonomy of each Member State, that allows it to put in place national strategies for the transposition of EU directives, is not considered, as a principle subject, to be arbitrary.<sup>53</sup> It follows that national law must not affect the scope and effectiveness of the Services Directive. This would be the case if the application of national law made it practically impossible to achieve what is envisaged for an impartial and transparent selection among several candidates.<sup>54</sup> Obviously, national procedural rules are always subject to a judgment of adequacy with respect to the principles and rules laid down by EU law. In all cases in which national administrations did not disapply national provisions in conflict with EU, they disregarded what has been established since the *F.lli Costanzo* case in 1989 (according to the duty of disapplication of the conflicting national law).<sup>55</sup> Again, this also means not recognising the 'primacy of EU' law at the basis of the Union system. Consequently, it stems that the cross-border interest is strictly intertwined with the direct

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<sup>51</sup> This is the opinion expressed by G Di Plinio, 'Il Mostro di Bolkestein in spiaggia. La "terribile" Direttiva e le concessioni balneari, tra gli eccessi del Judicial Italian Style e la crisi del federalizing' cit., 18.

<sup>52</sup> Plenary Assembly n. 17 and n. 18 [2021] para 38. Here, the Italian Council of State, affirms that the legitimate expectation of the operator should be protected setting the rules for the tender procedure. On this point, see also, case C-458/14 *Promoimpresa* cit., paras from 52 to 56.

<sup>53</sup> The problem of what procedural autonomy is, and the limits of the so-called 'procedural autonomy of the Member States', is a matter that the doctrine has examined, at least, since the judgement of the CJEU in the case 33 *Rewe* [1976] ECLI:EU:C:1976:188. For a in depth analysis HCH Hofmann, 'Seven challenges for EU administrative law' (2009) 2 REALaw 40; DU Galetta, *The Procedural Autonomy of the Member States from the Viewpoint of the Principles and Criteria Regulating the Relations Between National Law and EU Law* (Springer 2010).

<sup>54</sup> M Lottini, *Principio di autonomia istituzionale e pubbliche amministrazioni nel diritto dell'Unione europea* (Giappichelli 2017) 82.

<sup>55</sup> Case 103/88 *F.lli Costanzo* [1989] ECLI:EU:C:1989:256.

effect of Article 49 TFEU. Additionally, regarding the design of authorization schemes, the issue of the self-executing character of Article 12 of the Services Directive cannot be overpassed, even if it is to be determined case by case. Again, the quoted passage of the sentence is noteworthy because it sums up all the issues examined so far, and it sets out the differences of approach followed by some Italian TAR. As an example, the TAR Lecce,<sup>56</sup> adopting the interpretation of the lack of self-executing nature of Article 12 of the Directive, has repeatedly claimed that the qualification of the cross-border interest, as well the evaluation of the current scarcity of natural resources, should be reserved for ‘active administrative bodies’. This means that national administration would call to evaluate, case-by-case, the real existence of a cross-border interest ensuring that cultural and local identity (which, in turn, distinguishes the different geographical areas within Italian territory from others in the Union), will be preserved. In other words, national administrations are called upon to avoid competition leading to the depletion of the tourist offer, in terms of cultural and local traditions.<sup>57</sup> My view is that, aside from what is stated by the Plenary Assembly in this regard, the analysis of TAR Lecce is not so unacceptable if referring to some maritime concessions located in coastal areas characterised by low profitability, concerning family-run bathing establishments, where a self-standing evaluation could be justified.<sup>58</sup> The *ratio* of this specific attention is to protect the work of small businesses and the social reasons for it. As well, it cannot be ignored how these small enterprises, since the last two years of the pandemic, have certainly suffered the greatest effects of the economic crisis.<sup>59</sup> Surely, it cannot be shared that the idea of a case-by-case evaluation is the direct consequence of the lack of clarity of Article 12 of the Services Directive, which the Plenary Assembly recognises as a self-executing provision,<sup>60</sup> according to a functional-oriented reading of the

**Commentato [A18]:** This sentence is very long and a bit difficult to read – perhaps you can split it into two sentences

**Commentato [A19R18]:** Ok. Consequently.... Additionally

**Commentato [A20]:** do you perhaps mean ‘during’?

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<sup>56</sup> On this opinion, TAR Lecce n. 981 [2021].

<sup>57</sup> This thesis is fully developed in G Carullo, A Monica, ‘Le concessioni demaniali marittime nel mercato europeo dei servizi: la rilevanza del contesto locale e le procedure di aggiudicazione’ (2020) 26 *Federalismi.it*, 43; MC Girardi, ‘Concessioni demaniali marittime e principio di concorrenza costituzionalmente orientato’, in A Cossiri (ed), *Coste e Diritti* cit., 175.

<sup>58</sup> This TAR, since some years, has embraced a ‘minority thesis’ with regard to the direct applicability of Article 12 of the Services Directive, seeking to offer a reading of the EU and national rules aimed at favouring beach operators.

<sup>59</sup> A Monica, ‘Il futuro prossimo delle concessioni balneari dopo il Consiglio di Stato: *nihil medium est?*’ cit., 78.

<sup>60</sup> ‘Secondly, the proposed distinction, in the context of directly applicable EU rules, between regulations, on the one hand, and self-executing directives, on the other - for the purpose of considering only the former and not the latter to be capable of producing the obligation of non-application on the part of the P. A. - would result

*Promoimpresa* case.<sup>61</sup> Since this judgment did not explicitly affirm the self-executing nature of Article 12, it left it to the referring Court to verify some peculiar aspects. In any case, if it is true that a directive binds the Member State as to the result to be achieved, the obligations to arrange an open selection procedure cannot be bypassed. Even more, if the disposition is so clear.

**Commentato [A21]:** This sentence appears incomplete – what is the result if the disposition is so clear?

**Commentato [A22R21]:** Even more

### 3.1 The Perspective Overruling of the Judgments and the Administrative Activity.

Following this path, the *prospective overruling*<sup>62</sup> of the effects of the twin judgments of the Plenary Assembly of the Council of State represents further evidence that the challenges risen by the Directive for national law are to be faced, rather than dodged.<sup>63</sup> By applying this technique, the Council of State also suggests, to the national legislator, some criteria as to regulate the State-owned maritime concessions in compliance with the EU law, whilst not disregarding the interest of providers and consumers. Beginning with the characterisation of the potential candidate to obtain the concession, the Italian judges invite the legislator to not forget to include provisions aimed at enhancing the ‘professional experience’ and the ‘know-how’ acquired by those who have already operated in a similar asset.<sup>64</sup> This would be possible ‘taking into account the project’s ability to interact with the

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in the partial disavowal of the so-called useful effect of the self-executing directives themselves and in the artificial creation of a new category of directly applicable EU rules (in the case of the directives themselves). This would result in the partial disavowal of the so-called useful effect of the self-executing directives themselves, and in the artificial creation of a new category of EU rules that are directly applicable (in vertical relationships) only by the court and not by the P.A. There is no trace of such a limitation in Community case-law, which, on the contrary, has for some time been oriented towards a progressive enhancement of the direct effect of the self-executing directive (which is also recognised as having an increasing impact on the regulation of horizontal relations).’; Plenary Assembly, n. 17 and n. 18 [2021] para 34.3 (Author’s translation).

<sup>61</sup> Plenary Assembly n. 17 and n. 18 [2021] para 34.1. On this point, G Greco, ‘Nuove regole di applicazione del diritto UE in sede nazionale?’ (2022) 1 Eurojus.it 176.

<sup>62</sup> This term refers to any technique by which a court places an explicit limit on the retrospective effect of its decision. See, R Caponi, ‘Prospective overruling: bilancio di una vicenda’ (2019) 2 *Revista Eletrônica de Direito Processual* 173; M Harden, ‘Prospective overruling’, in *Human Rights and European Law* (Oxford 2015), 267; A Jakab, ‘Judicial Reasoning in Constitutional Courts: A European Perspective’ (2013) 8 *German Law Journal* 1236.

<sup>63</sup> H de Waele, ‘The Transposition and Enforcement of the Services Directive: A Challenge for the European and the National Legal Orders’ (2009) 15 *European Public Law* 523, 531.

<sup>64</sup> Plenary Assembly n. 17 and n. 18 [2021] para 49. Already TAR Lecce n. 981 [2021] had attempted to indicate precisely some criteria aimed at defining how tenders *should* be. Clearly also in this case the judge attempts to become a substitute of the Parliament as legislator. Moreover, it had listed as ‘necessary’ to be define by the law reform (1) the duration of the concessions; (2) the composition of the tender commissions; (3) the subjective and objective requirements for participation; (4) the forms of publicity (also to protect cross-border interests); (5) the selection criteria; (6) the amendment of the rules of the Navigation Code on the subject of compensation; 7) the provision of an administrative procedure enabling the amount for each concession to

overall tourism and hospitality system of the local area'. However, drawing up the call for tenders and choosing the specific selection procedure, national administration will have to consider all the specific and local circumscribed problems of the sector, including the 'subjective requirements for participation'. Therefore, it seems possible to take into account the particular context; some social and labour policy and environmental protection profiles can also be assessed and enhanced in the tender process. On this regard, the Plenary Assembly seems to be quite aware of all social and economic changes that have occurred all-around the EU in the Service market since 2006. For two years, the tourist service market has been dealing with many difficulties because of the movement of people (and consequently of providers and consumers) which has often been restricted. On this purpose, Article 12 c.3 of the Directive already aims for Member States to take into account some 'relevant interest' such as 'considerations of public health, social policy objectives, the health and safety of employees or self-employed persons, the protection of the environment, the preservation of cultural heritage and other overriding reasons relating to the public interest, in conformity with Community law' in establishing the rules for the selection procedure. It follows that the authorization schemes and the conditions for the granting of authorizations may change over time if the overriding public interest also changes.

Actually, as far as State-owned maritime concessions are concerned, not only do the judges attempt to put the diversity of interpretation among case law in order, according to the 'function of nomofilachy',<sup>65</sup> but they also '*create the law*'.<sup>66</sup> Here, suspending the application of Article 12 of the Directive and postponing the effect of the judgments until the 31<sup>st</sup> of December 2023, they launch into a 'seductive heresy'.<sup>67</sup> Indeed, it is in the CJEU's exclusive jurisdiction to determine if a declared violation of EU law may be tolerated for the

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be identified, on an adversarial basis and in accordance with certain rules; 8) the provision of rules to protect the legitimate expectation of providers in force even before the adoption of the Services Directive. (Author's translation)

<sup>65</sup> *supra* note 40.

<sup>66</sup> A Monica, 'Il futuro prossimo delle concessioni balneari dopo il Consiglio di Stato: *nihil medium est?*', cit, 80.

<sup>67</sup> This 'special expression' is used by M Giavazzi, 'Una seducente eresia: la modulazione temporale degli effetti delle sentenze interpretative del giudice della nomofilachia amministrativa negli ambiti di competenza esclusiva della Corte di giustizia' (2022) 1 CERIDAP 32-62. The article, starting from judgments n. 17 and n.18 of the Plenary Assembly of the Council of State, analyses the recent jurisprudence about prospective overruling on national administrative measures governed by EU law to test its compliance with CJEU's jurisprudence. Again, on the 'perspective overruling', see E. Lamarque, 'Le due sentenze dell'Adunanza plenaria... le gemelle di Shining?' (2022) 1 Diritto e società 483-485.

time necessary to avoid the infringement of a legitimate expectation (as a general principle of law).<sup>68</sup> Leaving aside, in this article, particular issues affecting the national administrative process, it is enough to remember that a provisional suspension of the ousting effect, which is a directly applicable rule of EU law on national law, must be excluded if there is a lack of overriding considerations of legal certainty capable of justifying its suspension.<sup>69</sup> Coming back to what was specified in *Promoimpresa*, it is quite evident that, in 2016, the EU Court had not consciously modulated the temporal effect of its judgment. On the legitimate expectations of the providers, strictly connected with the legal certainty, it had affirmed that, ‘However, the concessions at issue in the main proceedings were awarded when it had already been established that contracts with certain cross-border interest were subject to a duty of transparency, so that the principle of legal certainty cannot be relied on in order to justify a difference in treatment prohibited on the basis of Article 49 TFEU’.<sup>70</sup> So, there was no margin for a time shift.

Concisely, we are faced with the judge who is dealing with a sort of ‘functionalisation of the law’ as he attempts to give a voice to the concerns of the society, avoiding imbalance and inconvenience for citizens. The modulation of the effects made by the Plenary Assembly of the Council of State, *de facto*, establishes a rule that is still not positive. Therefore, a reform, that turns the Italian system of maritime-concessions into one that is fully compliant with the legal certainty, cannot be postponed again.

#### **4. The Challenge of a Compelling Reform**

It is on this backdrop that Italian national administrations will have to patrol all of the concrete critical points of the sector; the ultimate objective is to offer some *form of protection to operators in the sector*, protecting the State-property from the consequences of an unregulated opening that could favour large economic powers, or even worse, subjects related to organised crime. Again, by exercising regulatory power during the preparation of

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<sup>68</sup> *supra* note 50.

<sup>69</sup> Case C-409/06 *Winner Wetten GmbH* [2010], ECLI:EU:C:2010:503, para 67: ‘However, even assuming that considerations similar to those underlying that case-law, developed as regards acts of the Union, were capable of leading, by analogy and by way of exception, to a provisional suspension of the ousting effect which a directly-applicable rule of Union law has on national law that is contrary thereto, such a suspension, the conditions of which could be determined solely by the CJEU, must be excluded from the outset in this case, having regard to the lack of overriding considerations of legal certainty capable of justifying the suspension’.

<sup>70</sup> Case C-458/14 *Promoimpresa*, para 73.



the call for tenders, the use of administrative discretion is set up. In such a case, after looking for elements of similarity between the services already provided by the participant and the activities inherent to the concession, the administration will be called upon to assess the content of the offer by comparing all the proposals. It will also be entitled to award a prize to the candidate that truly enhances the specific nature of the service provided, or better, meets the needs of the recipient identifiable as the ‘average consumer’.<sup>71</sup> According to existing EU case law, the ‘average consumer’ is a person ‘*normally informed and reasonably observant and circumspect*’.<sup>72</sup> As Recital 92 of the Services Directive reminds, ‘*Restrictions on the free movement of services, contrary to this Directive, may arise not only from measures applied to providers, but also from the many barriers to the use of services by recipients, especially consumers*’. Therefore, in compliance with a reasonable balance between all interests at stake, including (not least) the full exploitation of the real value of the State-property covered by the concession, special arrangements for the provision of the service may be envisaged. To this effect, consumer protection may be a possible way to cope with all the interests at stake as well as those in each single award procedure.

As pointed out, the sea-tourist sector implies that one must reflect more adequately on the ‘relationships between law, society and economy’ taking into account the changeset occurred in the polity, where economic interest groups can make their weight felt.<sup>73</sup> Furthermore, the administrative complexity of the Italian system, regarding the distribution of legislative powers between the State, Regions and other local authorities, makes the situations more difficult to handle. State-property belongs to the State or to the Regions but for the regulation of the concessions, Regions can define some punctual aspects, with the due respect of principles embedded in national law, e.g., the competition protection within the national borders. It goes without saying that competition policy is supposed to comply with EU principles as defined in the TFEU. Besides, local municipalities and authorities exercise the specific administrative functions regarding each act of concession. So ‘services’ are often governed by specific regulations, which may deviate from general principles

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<sup>71</sup> The role of the consumer is well outlined in G Carullo, A Monica, ‘Le concessioni demaniali marittime nel mercato europeo dei servizi: la rilevanza del contesto locale e le procedure di aggiudicazione’ cit., 46.

<sup>72</sup> Case C-614/17 *Queso Manchego* [2019], ECLI:EU:C:2019:344, para 47.

<sup>73</sup> G della Cananea, ‘The European Administration: *imperium* and *dominium*’, in C Harlow, P Leino, G della Cananea, *Research Handbook on EU Administrative Law* (Elgar 2017) 68.

included in Italian Law n. 241/1990 on administrative procedure,<sup>74</sup> being more closely focused on defending local interest. Furthermore, specific regulations can also be different among Regions: State-property is, again, one of them. Even though the Articles 49 and 56 TFEU have direct effect, and it is the duty of Member States to ensure free movement within the Union; equally it is the Member State that ensures that its law (regulation, decisions and procurement activity) is in line with the EU law.<sup>75</sup> In this framework, the complexity of the administrative side has not helped to achieve a real liberalization in the sector. Moreover, Article 9 on ‘authorization schemes’ and Article 12 on ‘selection for among several candidates’ of the Services Directive, have been impacting the national administrative procedure,<sup>76</sup> also leading to the opening of infringement procedures. The direct effect of Article 12 clearly represents the changeset in EU administrative law – it can be argued that administrative *law is always in action* and called to be flexible to new challenges, as a consequence of an approach focusing on the relevance of the facts at stake. The jurisprudence examined here clearly points out the complexity of the subject for the Courts and the need for an intertwined dialogue among them, as not to restrict the effectiveness of the EU law due to a mere interpretative conflict. Rather, the duty is to accept the consequences of the ‘primacy principle’.<sup>77</sup>

This paper does not look into the differences between the legal systems within the European Union.<sup>78</sup> Apart from the fact that a single market for tourism and seaside services has been pursued differently in the Member States, the decisive factor for providing a service, characterized by ‘economic nature’, in the Union is the evidence that the activity ‘is

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<sup>74</sup> Law n. 241 - New rules on administrative procedures and the right of access to administrative documents [1990]. Art. 19 has replaced existing authorization with a simple notification if discretionary powers are not implied or if the activity is not subject to public plans or programs, as well there are no limits to the number of the authorization to be delivered.

<sup>75</sup> On state liability for non-implementation of EU Directives, joined case C-6/90 and C-9/90 *Francovich* [1991] ECLI:EU:C:1991:428.

<sup>76</sup> S Torricelli, *The Implementation of the Services Directive in Italy*, in U Stelkens, W Weiss, M Mirschberger (ed), *The Implementation of the EU Services Directive: Transposition, Problems and Strategies* cit., 353.

<sup>77</sup> J Ziller, ‘La primauté du droit de l’Union européenne’ (2022) European Parliament Studies 24 of May [https://www.europarl.europa.eu/thinktank/it/document/IPOL\\_STU\(2022\)732474](https://www.europarl.europa.eu/thinktank/it/document/IPOL_STU(2022)732474) 39.

<sup>78</sup> On the contrary, the Italian legal doctrine has often looked across borders to underline the considerable differences between the legislation of Member States bordering the sea such as Spain, Portugal, France, Greece and Croatia, with the intention of highlighting the differences between the various national laws in transposing the Directive and inspire the national legislator in its reform. For a comparative outlook, F Di Lascio, ‘La concessione di spiaggia in altri ordinamenti’ in M De Benedetto (ed), *Spiagge in cerca di regole* (Il Mulino 2011), GC Feroni, ‘La gestione del demanio costiero. Un’analisi comparata in Europa’ (2020) 4 *Federalismi.it* 21-44.

*not provided for nothing*'.<sup>79</sup> This point cannot be overlooked, even in the case of a new attempt of regulation of the service market. As highlighted by the Plenary Assembly of the Council of State, the economic potential and the attractiveness of the maritime-concession is self-evident; this is the argument outlined as to justify the *a priori* existence of a cross-border interest. Even though, on this point, the Plenary Assembly has judged in a restrictive manner, compared with the margin left for public administration in joined case C-458/14 and C-67/15 *Promoimpresa* and *Mr Melis*, it is also true that the Council of State recalls how the reform could consider some peculiar aspects characterizing the potential provider in the adjudication phase.<sup>80</sup> Additionally, the modulation of the time effect of the ruling expiring at the end of 2023 is designed by the administrative judge to avoid unequal treatment in the awarding of maritime-concession, with the additional provision of some social clauses. In any case, all of the effective attempts to reform the sector imply a negotiation with the EU Commission.

Many references to the reasoning of the Council of State are included in the competition law of 2021, currently being discussed in the Italian Parliament.<sup>81</sup> Above all, the legislator recognizes the implementation of the Council of State ruling, assuming that:

*'in the presence of objective reasons preventing the conclusion of the selective procedure by 31 December 2023, connected, by way of example, to the pending litigation or to objective difficulties connected to the execution of the procedure itself, the competent authority, by means of a motivated act, may postpone the expiry date of the existing concessions for the time strictly necessary for the conclusion of the procedure and, in any case, not beyond 31 December 2024'*.<sup>82</sup>

Again, the Italian Parliament delegates the Government to arrange a reform that take care of 'the professionalism acquired, as well as the enhancement of social policy objectives, of the health and safety of workers, of environmental protection and of the environment, and preservation of the cultural heritage'.<sup>83</sup> Moreover, defining a common

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<sup>79</sup> Case C-281/06 *Jundt* [2007], ECLI:EU:C:2007:816.

<sup>80</sup> G Profeta, 'Stato e autonomie nell'assetto regolatorio delle concessioni demaniali secondo la legge di bilancio per il 2019: un approdo incompiuto' in A Cossiri (ed), *Coste e Diritti* cit., 127.

<sup>81</sup> For any updating, Senate of the Italian Republic, AS 2469, [https://www.senato.it/japp/bgt/showdoc/18/DDLMESS/0/1353662/index.html?part=ddlmess\\_ddlmess1](https://www.senato.it/japp/bgt/showdoc/18/DDLMESS/0/1353662/index.html?part=ddlmess_ddlmess1). art. 4, c.2, c). <https://www.senato.it/leg/18/BGT/Schede/Ddliter/54618.htm#>

<sup>82</sup> Author's translation.

<sup>83</sup> Author's translation.

regulatory framework for selective procedure handled by local administrations, the legislator asks that ‘the quality and conditions of the service offered to users’ is a distinctive criterion used in the adjudication.<sup>84</sup> In my opinion, this may represent the turning point, as well the meeting point, between the ‘state of the art’ of the Italian State-owned concessions and the obligations stemmed by the EU law. The Services Directive, attempting to eliminate barriers among Member States, tries to limit the use of the authorisation scheme, meanwhile it encloses the intervention of public power to areas where the public interest requires a strong presence of the public administration. It follows that local administrations are called to balance disputing and concurring interests whilst not abusing their discretionary power,<sup>85</sup> but rather exercising them within the boundaries of the legislative framework. That is also applicable to rules defined at the EU level, which impinge on the effects of national administrative acts. As far as State-owned maritime concessions are concerned, public administrations have to also ensure that the beach, as a ‘public good’, is used with due respect for the environment and for the benefit of the community.

On this path, it is fair to recognize a ‘compensation to be paid to the outgoing concessionaire’ by the incoming operator.<sup>86</sup> Similar remarks can be inferred from the Court case law admitting the operator's need for a sufficient period of time to recover the investments made.<sup>87</sup> Consequently, any attempt – such as the recent Tar Lecce order of the 23<sup>rd</sup> of March 2022<sup>88</sup> – to refer to the EU Court for a preliminary ruling, challenging the validity of the Services Directive and (again) the interpretation of Article 12 stemming from *Promoimpresa* judgment, only generates new confusion among operators delaying the expected reform.

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<sup>84</sup> Such expectation in the consumer stems by the articles from 22 to 27 of the Services Directive.

<sup>85</sup> ‘Discretion is a complex concept, on which there is a considerable philosophical literature. The administrative law systems of the Member States have developed their own conceptions of discretion’, P. Craig, *EU Administrative Law* (Oxford 2018) 440. Generally, the classic administrative discretion is where the Judicial review was limited to deciding whether there was i.e., an error of evaluation, or a misuse of power applying the law.

<sup>86</sup> Senate of the Italian Republic, AS 2469 (art. 4, c. 5, i), n. 6) allowing concessionaires to recoup the cost of their investments is not excluded also in *Promoimpresa*, para 71.

<sup>87</sup> Case C-64/08 *Engelmann* [2010], paras 46 – 48 and Conclusion C-458/14 and C-67/15 *Promoimpresa* and *Mr. Melis*, para 88.

<sup>88</sup> Tar Lecce, order n. 743 [2022]. For a general comment C Burelli, ‘Un nuovo (discutibile) capitolo della saga “concessioni balneari”: il TAR Lecce investe la Corte di giustizia di un rinvio pregiudiziale ex art. 267 TFUE’ (2022) Blog AISDUE 30 of May.

## 5. Concluding Remarks

To recap, a competitive market for services is essential to promote economic growth and create jobs within the European Union, as a direct consequence of the possibility to settle activity beyond national borders. The pandemic crisis has shown not only how legal uncertainty undermines the possibility of cross-border establishment,<sup>89</sup> but how it has also limited the effectiveness of free movement, both for providers and users, with harmful effects from both an economic and social point of view. Service users, and in particular consumers, have been paying the price for the existence of internal market barriers and restrictions of different nature. As such, the reform of the maritime concessions cannot ignore the position of the ‘average consumer’. It is the information activity, targeted on the consumers, that makes the services known to potential users beyond any cross-border and boost real competition among operators. Thus, the quality and the peculiarity of the service offered on a State-owned maritime concession may have a chance to be protected. Reshaping the market, because of the updated reality of the service market (which is more fluid and interconnected compared with 2006), is the first step toward a reform of the sector which aspires to be proportionate and realistic.

From now on, national administrations are called to play a key role balancing different interests during the selection procedure, which can differentiate on a case-by-case basis, keeping the principles behind the reform. In this regard, some protection for outgoing operators is to be ensured as a way of protecting the peculiarity of the ‘natural resources’ object of the authorization scheme.<sup>90</sup> Last, but not least, social relevance cannot be neglected according to the principle of the solidarity that the pandemic has been raising. Its respect may, hopefully, protect and support services, workers<sup>91</sup> and consumers<sup>92</sup> too.

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<sup>89</sup> Directive 123/2006/CE, Recital 43.

<sup>90</sup> GC Feroni, ‘La gestione del demanio costiero. Un’analisi comparata in Europa’ cit., 44.

<sup>91</sup> Senate of the Italian Republic, AS 2469 art. 4, c. 2, e) attempts to provide ‘social clauses aimed at promoting the employment stability of the staff employed in the activity of the outgoing concessionaire, in compliance with the principles of the European Union and in the framework of the promotion and guarantee of the social policy objectives related to employment protection, also in accordance with the principles contained in Article 12(3) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006.

<sup>92</sup> See, among others, Commission Recommendation (EU) 2020/648 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic, C/2020/3125. So, the COVID-19 pandemic is shaping a new agenda combining investment, social concerns, the green transition, and more fiscal solidarity. See., A Crespy, ‘Can Scharpf be

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proved wrong? Modelling the EU into a competitive social market economy for the next generation' (2020) 5-6 European Law Journal 319.