

ITALIAN BEACH CONCESSIONS:  
TOWARDS A SUSTAINABLE EPILOGUE FOR THE NATURAL  
HERITAGE AND THE COASTAL ECONOMY?

*Angela Cossiri\**

*Abstract*

This article illustrates recent developments in the law applicable to concessions of State-owned maritime property in Italy, highlighting issues of constitutional significance. It focuses first of all on the relationship between national law and EU law, following the “twin judgments” adopted by the Plenary Session of the Council of State in November 2021. By applying a consolidated framework, these decisions appear to have brought national law into line with the *Promoimpresa* judgment of the European Court of Justice, issued in 2016. The essay will then analyse the proposed reform approved by the Council of Ministers on 15 February 2022, considering whether it strikes a balance between competition and other public and private fundamental interests engaged. The author argues that this reform would not only resolve the contrast with EU law but might also provide an opportunity for promoting the sustainable development of national coastal areas, within a context of re-established legal certainty.

TABLE OF CONTENTS

1. Concessions of State-owned maritime property for tourist and leisure-oriented businesses before the courts.....	306
2. Towards a sustainable epilogue? The Government’s initiative.....	312
2.1. Competition and other public interests: environmental and social sustainability.....	314
2.2. Economic public interests.....	317
2.3. Competition and private interests: incumbent beach undertakings.....	318
3. Concluding remarks.....	320

\* Associate Professor of Constitutional Law, University of Macerata.

### 1. Concessions of State-owned maritime property for tourist and leisure-oriented businesses before the courts

The Member States have competence to regulate property rights and the regime applicable to public ownership.<sup>1</sup> In Italy, the award of a concession of State-owned maritime property for tourist and leisure-oriented purposes establishes the right to carry on economic activity on public land on an exclusive basis in return for the payment of a licence fee. For this reason, EU law requires that beach concessions must be issued following the completion of a selection procedure that is open to any candidates that may be interested in operating on the market. Member States are not permitted to adopt statutory extensions for existing concessions. Despite the prohibition under European law, for more than a decade, national lawmakers have repeatedly enacted rules to this effect. This has given rise to still unresolved conflicts between the EU, regions and beach undertakings.<sup>2</sup>

---

<sup>1</sup> As there is no EU competence over property law, or in particular over State-owned property, each coastal Member State has established its own individual system for awarding licences to use public spaces. Cf. G. Cerrina Feroni, *La gestione del demanio costiero. Un'analisi comparata in Europa*, in 4 *federalismi.it* 21 (2020), which compares experiences in Spain, Portugal, France and Greece, and A. Monica, *Le concessioni demaniali marittime in fuga dalla concorrenza*, in 2 *Riv. It. Dir. pubbl. com.* 437 (2013). On Italian law, from a constitutional law perspective, see M. Esposito, *I fondamenti costituzionali del demanio* (2018).

<sup>2</sup> The complex issue of concessions of State-owned maritime, lakeside and waterway property for tourist and recreational purposes came to the fore around ten years ago. The national provisions in this area have given rise to a wide array of conflicts, most of which are still unresolved, involving the State, the EU, the regions, the local authorities and beach undertakings. This issue has been considered from various academic perspectives, which have highlighted its inevitable technical complexity. Amongst the most recent studies, see M. Conticelli, *Il regime del demanio marittimo in concessione per finalità turistico-ricreative*, in 4 *Riv. Trim. dir. pubbl.* 1069 (2020); A. Giannicari, *Stessa spiaggia, stesso mare. Di concessioni demaniali marittime e (assenza di) concorrenza*, in 2 *Merc. Conc. Reg.* 307 (2021); R. Rolli, D. Granata, *Concessioni demaniali marittime: la tutela della concorrenza quale Nemesis del legittimo affidamento*, in 5 *Riv. Giur. Edil.* 1624 (2021); G. Sorrentino, *L'insostenibile proroga delle concessioni del demanio marittimo tra tutela della concorrenza ed esigenze di ripartenza*, in 2 *amministrativamente.com* (2021); N. Romana, *Alcune osservazioni su recenti provvedimenti legislativi in tema di concessioni demaniali per finalità turistico-ricreative*, in 19 *Riv. Dir. econ. Trasp. Amb.* 35 (2021); C. Tincani, *L'illegittimità costituzionale della proroga delle concessioni demaniali marittime stabilita dalla Regione Liguria*, in 28 *Riv. it. Dir. tur.* 48 (2020); F. Mazzoni, *Le spiagge italiane e le concessioni demaniali marittime tra normativa interna e principi comunitari: la tela di Penelope*, in 1 *Munus* 175 (2020).

The most recent extension of concessions was provided for under Article 1(682) and (683) of Law no. 145 of 30 December 2018 (Budgetary Law for 2019), which was followed by Decree-Law no. 34 of 19 May 2020 (so-called “relaunch” decree), converted into Law no. 77 of 2020 containing necessary measures following the COVID-19 epidemiological emergency. The legislator has confirmed the validity and efficacy of the extension, as previously provided for, until 2033.<sup>3</sup>

The justification for the new extension has been disputed first by the EU Commission and subsequently by the administrative courts. The legislation was found by the Council of State to be dysfunctional having regard to its stated objective of containing the economic consequences of the epidemiological emergency.

The judgments of the Plenary Session of the Council of State issued on 3 November 2021 concerning concessions of State-owned maritime property<sup>4</sup> applied a consolidated framework as regards relations between EU law and national law.<sup>5</sup> Through these decisions, Italian law has been brought into line with the ruling of

---

<sup>3</sup> Criticisms of the extensions granted under this measure have been voiced within the literature by E. Cavalieri, *Le misure a sostegno della cultura e del turismo nella seconda fase dell'emergenza sanitaria*, in 1 *Giorn. Dir. Amm.* 30 (2021). Cf., more generally, A. Lazzari, *Le concessioni demaniali marittime tra principi comunitari e ordinamento interno: gli attuali sviluppi normativi e giurisprudenziali. Quali prospettive?*, in 1 *Il dir. mar.* 21 (2021); S. Trancossi, *La sentenza 118/2018 della Corte costituzionale: tra tutela della concorrenza e confini di competenza in materia di concessioni demaniali marittime*, in 2 *Il dir. mar.* 320 (2019). A general overview is provided by S. Gobbato, *Ten Years of State Beach Concession in Italy*, in 13 *Eur. Proc. Pub. Priv. Partn. Law Rev.* (2018); A. Giannaccari, *The Italian Marine Concessions: A History of Defective Competition*, in 2 *Merc. Conc. Reg.* 307 (2021); J. Wolswinkel, *Concession Meets Authorisation*, in 4 *Eur. Proc. Pub. Priv. Partn. Law Rev.* 396 (2017); F. Prada, *Proroga ex lege della durata delle concessioni demaniali marittime: tra diritto europeo e nazionale*, in 22 *Riv. it. Dir. tur.* 45 (2018).

<sup>4</sup> Council of State, Plenary Session, judgments nos. 17 and 18/2021 published on 9 November 2021 concerning the applications filed as R.G. nos. 14 and 13.

<sup>5</sup> The duty incumbent upon the public administration not to apply any national law that is incompatible with EU law (insofar as it is self-applying) is consolidated within European and national case law. Cf. Council of State, judgment no. 452/1991, *F.lli Costanzo*; Constitutional Court, judgment no. 389/1989 (cf. G. Grasso, *La disapplicazione della norma interna contrastante con le sentenze della Corte di Giustizia dell'Unione Europea*, in 2 *Giustizia civile* 525 (2017)).

the EU Court of Justice<sup>6</sup> in the *Promoimpresa* judgment from 2016<sup>7</sup> as well as the position stated by the European Commission in its letter of formal notice of 3 December 2020,<sup>8</sup> which has not been officially acted upon, and is thus presumably still the object of institutional dialogue.

The *Promoimpresa* judgment recognised the self-executing nature of the EU law invoked. As such therefore, there is no scope for any margin of interpretation: this rule has been enshrined within both European and national case law since the 1990s.<sup>9</sup>

---

<sup>6</sup> On the alignment with EU law within the decisions of the Council of State, see the very interesting discussion in E. Cannizzaro, *Demanio marittimo. Effetti in malam partem di direttive europee? In margine alle sentenze 17 e 18/2021 dell'Adunanza Plenaria del Council of State*, in *Giustizia Insieme* (30 December 2021). The author argues that the Council of State adopted an innovative solution that did not feature within the *Promoimpresa* judgment, consisting in direct effect *in malam partem* by imposing on concession holders the adverse consequences of the State's failure to implement the Directive. The adoption of solutions of this type without making a preliminary reference "could undermine the formal authority and substantive authoritativeness of this legal principle". For one of the first commentaries on the twin judgments, see also R. Carocchia, *Maritime Concessions in Italy: The New Perspective After the Twin Rulings of the Council of State*, in 1 *Slov. Yearbook of EU Law* 59 (2021).

<sup>7</sup> CJEU, 5th Chamber, judgment in *Promoimpresa and Melis*, 14 July 2016 in Case C-458/14 and C-67/15. On which see L. Di Giovanni, *Le concessioni demaniali marittime e il divieto di proroga ex lege*, in 3-4 *Riv. it. Dir. pubb. com.* 912 (2016); V. Squaratti, *L'accesso al mercato delle concessioni delle aree demaniali delle coste marittime e lacustri tra tutela dell'investimento ed interesse transfrontaliero certo*, in 2 *Europ. Papers* 767 (2017); M. Magri, *Direttiva Bolkestein e legittimo affidamento dell'impresa turistico balneare: verso una importante decisione della Corte di giustizia U.E.*, in 4 *Riv. giur. Edil.* 359 (2016); F. Sanchini, *Le concessioni demaniali marittime a scopo turistico-ricreativo tra meccanismi normativi di proroga e tutela dei principi europei di libera competizione economica: profili evolutivi alla luce della pronuncia della Corte di Giustizia resa sul caso Promoimpresa v. Melis*, in 2 *Riv. reg. merc.* 182 (2016).

<sup>8</sup> See C(2020)7826 def.

<sup>9</sup> Council of State, judgment no. 452 of 1991, *F.lli Costanzo*; Constitutional Court, judgment no. 389/1989: "all subjects competent within our legal system to implement the law (as well as acts with the force or value of law) – whether, as judicial bodies, they have powers to declare what the law is or whether, as administrative bodies, they do not have any such powers – are legally required to disapply any national provisions that are incompatible with provisions" of EU law as interpreted by the Court of Justice. See recently, specifically in relation to concessions, Council of State judgment no. 7874 del 2019, which held that all State bodies, thus including also administrative bodies, are obliged to disapply any internal law that contrasts with harmonised EU law. This judgment has since been followed within various judgments of regional administrative courts, with the sole exception of the Regional Administrative Court in Lecce, the rulings of

The Court of Justice applied a two-stage argument. It specified those cases in which EU law is applicable to concessions of State-owned maritime property for tourist and leisure-oriented businesses, limiting the scope of EU obligations.

First of all, concessions are “authorisations” within the meaning of Directive 2006/123:<sup>10</sup> in granting concessions, the national authorities consent to the private usage of property for business purposes. The national courts have competence to establish whether there is any “scarcity of natural resources”, which is a prerequisite for the applicability of the Services Directive. If natural resources are available, the requirement for a public selection procedure no longer applies. However, if the Services Directive is not applicable, it is necessary to apply the general Treaty rule on freedom of establishment: this is specifically the promotion on the adoption by Member States of measures that discriminate directly or indirectly in favour of national undertakings and against undertakings from other EU Member States.<sup>11</sup> Under such a scenario, in order to fall within the scope of this Treaty rule there must be some cross-border interest. If there is no such interest, the matter falls definitively outside the scope of EU law.<sup>12</sup>

If there is such a transnational element, the ECJ has held that the scope of the constraints imposed by EU law are not absolute:

---

which were challenged in proceedings that resulted in the twin judgments of the Council of State examined in this paper.

<sup>10</sup> On the Directive see *inter alia* M. Klamert, *The Services Directive: Innovation and fragmentation*, in M. Klamert, *Services Liberalization in the EU and the WTO: Concepts, Standards and Regulatory Approaches* (2014); G. Davies, *The Services Directive: extending the country of origin principle, and reforming public administration*, in *E.L. Rev.*, 2007, p. 232 et seq; P. Delimatsis, *Standardisation in services - European ambitions and sectoral realities*, in 32 *Eur. Law Rev.* 513 (2016); U. Stelkens, W. Weiß, M. Mirschberger (eds.), *The Implementation of the EU Services Directive Transposition, Problems and Strategies* (2015), reviewed by A. Usai, in 52 *Comm. Law. Mark. Rev.* 870 (2015); M.R. Botman, *The EU Services Directive - Law or Simply Policy?* (2014), reviewed by M. Wiberg, in 1 *Comm. Mark. Law Rev.* 311 (2017).

<sup>11</sup> On freedom of establishment, see P. Craig, G. de Búrca, *EU Law* (2015); V. Hatzopoulou, *Regulating Services in the European Union* (2012); S. Van den Bogaert, A. Cuyvers, I. Antonaki, *Free Movement of Services, Establishment and Capital*, in *The Law of the European Union* (2018); H.-J. Blanke, S. Mangiameli (eds), *Treaty on the Functioning of the European Union - a commentary* (2021).

<sup>12</sup> See M.E. Bartoloni, *Le concessioni demaniali marittime nel contesto delle libertà di circolazione: riflessioni sulla sentenza Promoiimpresa*, in A. Cossiri (eds.), *Coste e diritti. Alla ricerca di soluzioni per le concessioni balneari* (2022).

the difference in treatment may be justified, but only by “overriding reasons relating to the public interest”. These include, for example, the need to respect the principle of legal certainty. For example, provision may be made for a transition period for an old concession, which enables the parties to the contract to wind down their respective relations under conditions that are acceptable in financial terms, thus protecting the outgoing concession holder’s legitimate expectation to recoup the investments made.

In the wake of this ruling by the European Court, in a dispute between the Italian State and the regions concerning legislative competence over beach concessions, the Constitutional Court used its power to decide how the issues were to be dealt with. However, it did not specify whether the regional legislation violated EU law, but limited itself to disputing the regions’ encroachment on the State’s exclusive competence over competition law. Nonetheless, the special link between national law and EU law was still stressed, as the competitive structure of the market is also protected under EU law.

In the face of the uncertainties shared by the public administrations and the administrative courts,<sup>13</sup> in November 2021 the Council of State became involved, with the Plenary Session issuing two “twin judgments”. The supreme administrative court held that the extension violated both Article 49 TFEU, which prohibits the Member States from imposing restrictions on freedom of establishment, as well as Article 12 of the Services Directive, which requires transparency within procedures for selecting concession holders.<sup>14</sup>

The Council of State held that there was both a cross-border interest (a necessary prerequisite for falling within the scope of Article 49) as well as scarcity of natural resources (a prerequisite for the application of Article 12, even if the relevant case involves purely internal matters).<sup>15</sup>

---

<sup>13</sup> On the uncertainties within the case law before the ruling by the Plenary Session, see S. Agosto, *Gli incostanti approdi della giurisprudenza amministrativa sul tema delle concessioni del demanio marittimo per finalità turistico ricreative*, in 5 *Riv. it. Dir. pubbl. com.* 648 (2020).

<sup>14</sup> On the direct effect of the Directive, see M. Manfredi, *L’efficacia diretta della “direttiva servizi” e la sua attuazione da parte della pubblica amministrazione italiana: il caso delle concessioni balneari*, in 1 *JUS* 63 (2021).

<sup>15</sup> On the application of the provisions concerned also to situations that are purely internal, cf. CJEU, Grand Chamber, judgment of 30 January 2018 in Joined Cases C-360/15 and C-31/16. For a detailed discussion of this complex yet unavoidable

This is a ruling that the national legislator is competent to review, exercising its discretion in a responsible fashion, within the context of a reform of the overall system for awarding concessions, whether in a manner compatible with EU law, or even outside of its scope. The State legislator could entirely overhaul the system for managing and allocating these public spaces, for example by no longer making them exclusively available to private undertakings and withdrawing them from the market, creating new management models that involve civil society and local government bodies.<sup>16</sup>

In any case, EU law does not require national legislators to afford absolute priority to competition, entirely sacrificing any other countervailing interest. Even within the scope of EU law, competition is only one of many fundamental interests protected. This is apparent both from the preamble as well as from Article 12(3) of the Services Directive.<sup>17</sup> The reference to “overriding reasons relating to the public interest, in conformity with Community law”, which was interpreted by the Court of Justice and the Constitutional Court, opens up scope for the exercise of legislative discretion that is anything but limited in. The task of

---

issue, see M.E. Bartoloni, *Ambito d'applicazione del diritto dell'Unione europea e ordinamenti nazionali. Una questione aperta* (2018). With reference to the specific sector of freedom of establishment, see E. Faustinelli, *Purely Internal Situations and the Freedom of Establishment Within the Context of the Services Directive*, in 44 *Leg. Iss. Ec. Int.* 77 (2017).

<sup>16</sup> Cf., *inter alia*, A. Lucarelli, *Il nodo delle concessioni demaniali marittime tra non attuazione della Bolkestein, regola della concorrenza ed insorgere della nuova categoria “giuridica” dei beni comuni* (Nota a C. cost., sentenza n. 1/2019), in 1 *Dirittifondamentali.it* (2019); A. Lucarelli, *La democrazia dei beni comuni. Nuove frontiere del diritto pubblico* (2013); M.C. Girardi, *Principi costituzionali e proprietà pubblica. Le concessioni demaniali marittime tra ordinamento europeo e ordinamento interno*, in 1 *Dir. pubbl. eur. Rass. Online* (2019); A. Lucarelli, L. Longhi, *Le concessioni demaniali marittime e la democratizzazione della regola della concorrenza*, in 3 *Giur. Cost.* 1251 (2018); L. Longhi, *Concessioni demaniali marittime e utilità sociale della valorizzazione del patrimonio costiero*, in 1 *Riv. cort. Conti* 184 (2019); see recently A. Lucarelli, B. De Maria, M.C. Girardi (eds.), *Governo e gestione delle concessioni demaniali marittime. Principi costituzionali, beni pubblici e concorrenza tra ordinamento europeo e ordinamento interno* (2021).

<sup>17</sup> I. Maletic, *Servicing the Internal Market: The Contribution of Positive Harmonization Through the Services Directive and Its Interaction with Negative Integration*, in 48 *Leg. Iss. Ec. Int.* 521 (2021); U. Stelkens, W. Weiß, M. Mirschberger (eds.), *The Implementation of the EU Services Directive Transposition, Problems and Strategies* (2015), reviewed by A. Usai, in 52 *Comm. Law. Mark. Rev.* 870 (2015); M.R. Botman, *The EU Services Directive - Law or Simply Policy?* (2014), reviewed by M. Wiberg, in 1 *Comm. Mark. Law Rev.* 311 (2017).

lawmakers is thus to strike an appropriate balance, with reference both to domestic principles of constitutional law, as well as the requirements of pan-European harmonised rules. It is necessary to avoid affording absolute priority to competition,<sup>18</sup> elevating its miraculous effects to mythical status, and rather to comply with the model of the social market economy,<sup>19</sup> which takes account of the interests of local communities, the socio-economic systems of which are closely linked to the beach tourism industry.<sup>20</sup>

## 2. Towards a sustainable epilogue? The Government's initiative

Following the judgment by the Council of State, a negotiation round was launched between the Government and sectoral associations with a view to drafting legislation to overhaul the law applicable in this area.

On 15 February 2022, the Council of Ministers approved a proposal to amend the annual markets and competition bill for 2021,<sup>21</sup> which was currently under consideration before the Senate. It is possible that the decision to amend draft legislation that had already been tabled in Parliament was made in order to push

---

<sup>18</sup> Regarding the fundamental interest in competition under constitutional law, see *ex multis* G. Amato, *Corte Costituzionale e concorrenza*, in 3 *Merc. Conc. Reg.* 425 (2017); A. Morrone, *La concorrenza tra Unione Europea, Stato e Regioni*, in M. Ainis and G. Pitruzzella (eds.), *I fondamenti costituzionali della concorrenza* (2019); F. Trimarchi Banfi, *La tutela della concorrenza nella giurisprudenza costituzionale. Questioni di competenza e questioni di sostanza*, in 2 *Dir. pubbl.* 595 (2020); F. Trimarchi Banfi, *Il "principio di concorrenza": proprietà e fondamento*, in 1-2 *Dir. amm.* 15 (2013); F. Trimarchi Banfi, *Ragionevolezza e bilanciamento nell'attuazione dei principi costituzionali. Il principio di concorrenza nei giudizi in via principale*, in 4 *Dir. amm.* 623 (2015); F. Trimarchi Banfi, *La tutela della concorrenza nella giurisprudenza costituzionale. Questioni di competenza e questioni di sostanza*, in 2 *Dir. pubbl.* 595 (2020); R. Bin, *Il governo delle politiche pubbliche tra Costituzione ed interpretazione del giudice costituzionale*, in 3 *Le Regioni* 509 (2013).

<sup>19</sup> See for a particularly clear account B. Caravita, G. Carlomagno, *La proroga ex lege delle concessioni demaniali marittime. Tra tutela della concorrenza ed economia sociale di mercato. Una prospettiva di riforma*, in 20 *federalismi.it* (2021), the conclusions to which set out a series of balanced normative solutions that could offer alternative ways forward for national lawmakers that are not at odds with EU law.

<sup>20</sup> Cf. 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*, in 2020 *federalismi.it* (2020).

<sup>21</sup> Acts of the Senate 2469.



through new rules as quickly as possible. It was necessary not only to bring the European Commission’s infringement procedure to a halt but also to take account of the deadline set by the Council of State for all existing concessions that, thanks to the extensions, had been awarded without competitive procedures.

Article 2-ter(1) of the Government’s amendment provides that the proposed amendment will seek to ensure a more rational and sustainable usage of State-owned maritime property, to favour its public usage and to promote greater competitive dynamism within the sector, in accordance with EU law as well as the requirement for environmental and cultural heritage protection.

Thus, although the provisions appear within draft legislation on competition, the Government appears to consider it necessary to balance out the different interests at stake.<sup>22</sup>

In line with the judgments of the Council of State, the bill provides that concessions currently benefiting from extensions will remain valid until 31 December 2023 and that public tendering procedures for their award will be held sufficiently in advance of their expiry.

The proposed amendment includes a provision authorising the Government to simplify and rearrange the law applicable to concessions of State-owned maritime, lakeside and waterway property for tourist and recreational purposes (including those awarded to non-profit entities), as well as concessions relating to the management of facilities intended for pleasure boating. The Government will issue one or more legislative decrees within six months of the law’s entry into force. These decrees will contain details of the reform. However, it is already possible to identify the direction of travel. The delegation of authority to issue secondary legislation refers to a series of general principles and criteria, which the Government must comply with.

---

<sup>22</sup> In the opinion examining the draft legislation, which was requested by the examining parliamentary committee and concerned in particular public services, A. Lucarelli recalls an aspect of constitutional significance deserving attention, as a perspective that is also relevant for concessions of State-owned property: the relevant applicable constitutional principles constitute an indispensable substrate for reflections. “In particular, it must be recalled that the principles of solidarity and equality, which are rooted also in the economic provisions of the Constitution (Articles 41-43), cannot and must not in any way be upset by the need to identify efficient and effective management methods [...]” (Opinion, p. 1, in *senato.it*).

It is possible that amendments may be tabled in Parliament and it remains to be seen what specific form the final text will take.

### **2.1. Competition and other public interests: environmental and social sustainability**

Under the terms of EU law, concessions must be awarded on the basis of transparent public tendering procedures, as required by the European Commission and as established by the Council of State. However, the requirements of competition appear to be suitably balanced against other interests. It is important to consider these interests in greater detail.

First of all, the need for there to be some balance between those areas of State-owned maritime property that are granted under concession and those parts that can be freely used, subject to a right of access to the foreshore along the entire coastline, is reasserted. The provision creates a protected space both for natural and landscape resources in and of themselves, and also for the local community, for which the area is first and foremost a public space. As such, it must remain freely accessible, at least in part, also for those who choose not to use remunerated services.

As regards areas that are granted under concession, the idea underlying the reform is lay down “from the centre” uniform rules to govern selective award procedures.

As regards the procedure for approving the legislation, in accordance with the principle of loyal cooperation the legislative decrees will only be adopted after agreement has been reached within the Standing Conference for relations between the State, the regions and the autonomous provinces of Trento and Bolzano and following the issue of an opinion by the Council of State. The draft legislative decrees will then be subject to parliamentary scrutiny, involving the issue of opinions by the parliamentary committees with substantive competence, and as regards financial aspects.

There appears perhaps to be only one limit to the legislative changes proposed: it will establish shared, uniform rules applicable in different geographical, natural, social and economic circumstances, which in some cases are highly disparate; these rules are likely to be fairly detailed and also to impinge upon regional competence. From this perspective, it is hoped that the Standing Conference will provide its own input. However, considering the current situation (i.e. impending infringement proceedings, no detailed inventory of existing concessions or available coastal

natural resources, and the absence of any cross-border interest in participating in a specific tendering procedure), it would appear to be difficult to provide for different rules.

As regards the public interests at stake in this area, it is specified that the reform will have to take account of social policy objectives, the health and safety of employees, the protection of the environment and the preservation of cultural heritage. This criterion reflects the general clauses set out in Article 12(3) of the Services Directive: these clauses specifically indicate interests that are recognised at both national and supranational level. They may therefore be legitimately offset at both levels against the interest in competition, which is also recognised as fundamental in both Italian and EU law.

More specifically, the protection of the public interest operates along two axes.

First of all, from the viewpoint of environmental sustainability and the interests of future generations - both of which are now relevant under constitutional law - the legislator intends to ensure that the impact on the landscape, the environment and the ecosystem is kept to a minimum, and has established here a preference in favour of initiatives involving non-fixed and fully removable facilities. This aspect appears to represent a significant safeguard against beach development plans that have permitted the overbuilding of beaches, in some cases entirely unchecked. It also provides that a portion of the licence fee must be reserved for coastal defence projects and the related natural capital.

Secondly, placing significant emphasis on the social dimension to sustainability, the legislator appears to have fully understood the characteristics of a *sui generis* community system, which is typical of Italian coastal areas. At least in some local areas, this system is undoubtedly fragile due to the small sizes of the micro-enterprises involved. Action is thus required to protect both the overall tourist hospitality system as well as the interest of local communities, which have been built up also (or in some cases exclusively) around the wider economy surrounding beach undertakings.

It will therefore be necessary to establish the prerequisites for dividing up areas of State-owned maritime property that are granted under concession into smaller lots, as well as the circumstances under which this is possible, in order to favour the broadest level of participation by micro and small enterprises. This

is an important corrective measure by the public authorities, which takes account of the prevalent economic structure of traditional Italian beach undertakings. In addition, according to the criteria underpinning the reform, the prerequisites for admission will have to favour the broadest level of participation by undertakings, including small enterprises and third sector entities. As well as encouraging competition according to rules that should not leave small enterprises behind, but should rather support them, the reference to third sector undertakings could enable the maintenance and the emergence of new forms of civic management of common goods.

In order to protect the market access of small and micro-enterprises, in accordance with the principles of adequacy and proportionality, the reform also provides for the stipulation of a maximum number of concessions that can be held directly or indirectly by one single concession holder at municipal, provincial, regional or national level, subjecting awarding bodies to reporting obligations as regards the areas granted under concession.

Premium criteria will also be introduced into tendering procedures for undertakings holding gender equality certification, including those owned predominantly or entirely by young persons.

As regards the protection of sectoral workers, the reform should incorporate social clauses aimed at promoting the employment stability of staff working in the operations of the outgoing concession holder, in accordance with principles of EU law and having regard to the promotion and guarantee of social policy objectives related to the protection of employment.

There is one significant new aspect within the legislator's approach: the two fundamental public interests affected in this area - protecting the environment and protecting the local socio-economic system - are pursued through measures that are not anti-competitive, and which are thus not open to challenge on the grounds that they violate EU law. The latter public interest is supported even through the introduction of pro-competition measures.

The legislative instruments currently identified were also available in the past. This shows that the reason for the normative uncertainty, which blocked one of the country's key economic sectors for more than a decade, was not the European Union but rather the lack of political will within the national legislature.

The reform's interest in consumer protection is focused on vulnerable classes of user, who are moreover an important target of beach tourism, due both to the beneficial effects on health of heliotherapy and thalassotherapy, as well as the general ageing of the European population.<sup>23</sup> When choosing the concession holder the quality of and conditions applicable to the service offered to users will also have to be assessed in the light of the action plan presented by the bidder with the aim of improving access to and usage of State-owned maritime property also by persons with a disability. It is likely that the merely aspirational nature of this measure will not impair its efficacy and potential impact, as competitors will have a strong interest in submitting highly competitive projects.

## 2.2. Economic public interests

The investigation by the Court of Auditors, which was concluded by a ruling of 21 November 2021,<sup>24</sup> found that the State Exchequer must be able to manage coastal resources efficiently, given that the revenues generated have been even lower than the respective forecasts, due amongst other things also to inefficient data management; it also indicated that it would be appropriate to review the level of licence payments based on the potential profitability of the areas granted under concession. The unconditional ability to grant sub-concessions in itself demonstrates the existence, at least in some cases, of excessive and disproportionate profit margins, which should be recovered.

In order to enhance public revenues from State-owned property, the reform provides that concessions should not be any longer than the period of time necessary in order to ensure that the concession holder is able to recoup the amounts invested, in addition to fair remuneration for investments authorised by the awarding body when granting the concession.<sup>25</sup> The duration must

---

<sup>23</sup> Cf. I. Pauhofova, G. Dovalova, *Potential of silver economy in the European Union (selected views)*, in *European Scientific Journal* (2015); M. Zsarnoczky, L. David, Z. Mukayev, R. Baiburiev, *Silver tourism in the European Union*, in *GeoJournal of Tourism and Geosites* (2016).

<sup>24</sup> Cf. resolution no. 20/2021/G granting approval, along with the indications stated, for the Report on the *Management ore Revenues from State-owned maritime property*, based on the investigation launched in 2018, available at [cortedeiconti.it](http://cortedeiconti.it).

<sup>25</sup> See also recital 62 to the Services Directive, which refers to a proportionality principle in the balancing of the interests of the market and undertakings against the interest in fair remuneration: "the duration of the authorisation granted

in any case be determined having regard to the scale and economic significance of the works to be carried out, with an express prohibition on extensions and renewals, including automatic extensions and renewals.

It will also be necessary to define uniform criteria for quantifying annual licence fees that take account of the natural prestige and effective profitability of State-owned property granted under concession, as well as the usage of those areas for sporting or recreational activities, or activities related to local traditions, whether carried out by individuals or non-profit associations, or for public interest purposes.

Finally, provision should be made for a share of the licence fee to be reserved to the awarding body in order to carry out coastal defence works and to enhance the usability of free State-owned property.

### **2.3. Competition and private interests: incumbent beach undertakings**

As regards the protection of the private interests of existing undertakings, the delegation stipulates that, when awarding concessions, adequate consideration will have to be given to investments, the business value of the undertaking along with any tangible and intangible assets as well as the expertise acquired.

Specifically, two types of initiative are envisaged on this front.

The first involves the consideration during tendering procedures of the position that the existing undertaking presumably has. This will involve an assessment in particular of the technical experience and expertise already accumulated in relation to the activity covered by the concession, or the management of similar public assets, according to the criteria of proportionality and adequacy, and in any case in such a manner as not to prevent new operators from entering the market. The assessment will also cover the position of those operators that have used the concession as their predominant source of income, both for themselves and for

---

should be fixed in such a way that it does not restrict or limit free competition beyond what is necessary in order to enable the provider to recoup the cost of investment and to achieve a fair return on the capital invested". Within the literature, on the relationship between duration and effective management, see A. Salomone, *La concessione dei beni demaniali marittimi* (2013), and B. Tonoletti, *Beni pubblici e concessioni* (2008).

their immediate families, over the five years prior to the launch of the tendering procedure. Here too, it is important to note the balancing operation involving a social aspect, which is indissolubly linked to the economic reality: a family that lives predominantly from the income generated by the beach undertaking.

The second type of initiative concerns outgoing concession holders, and operates downstream from tendering procedures. The reform will have to identify uniform criteria for quantifying the compensation that the incoming concession holder must pay to the outgoing concession holder.<sup>26</sup> This compensation will cover two aspects: a) the failure to recover any investments made during the course of the concession relationship that were authorised by the awarding body; and b) the value of the goodwill associated with commercial operations or those of tourist interest. Both of these aspects were called for by associations of beach undertakings. A requirement for the incoming concession holder to cover the residual cost of investments not yet recouped as well as the intangible value of the business transferred does not appear to raise any problems in terms of compatibility with EU law as it is a measure that would not impair the entry into the market of new operators. In fact, they should effectively receive the respective benefits by virtue of being granted the concession.

Should any critical issues arise in relation to this aspect with the European Commission, it must in any case be considered that

---

<sup>26</sup> The Constitutional Court has also ruled on the issue of compensation, which may act as an obstacle to the entry of new operators into the reference market. See, *inter alia*, judgments nos. 40/2017, 109/2018 and 222/2020. Within the literature, cf. M. Conticelli, *Effetti e paradossi dell'inerzia del legislatore statale nel conformare la disciplina delle concessioni di demanio marittimo per finalità turistico-ricreative al diritto europeo della concorrenza*, in 5 *Giur. Cost.* 2475 (2020).

<sup>26</sup> Regarding the fundamental interest in competition under constitutional law, see *ex multis* G. Amato, *Corte Costituzionale e concorrenza*, in 3 *Merc. Conc. Reg.* 425 (2017); A. Morrone, *La concorrenza tra Unione Europea, Stato e Regioni*, in M. Ainis and G. Pitruzzella (eds.), *I fondamenti costituzionali della concorrenza* (2019); F. Trimarchi Banfi, *La tutela della concorrenza nella giurisprudenza costituzionale. Questioni di competenza e questioni di sostanza*, in 2 *Dir. pubbl.* 595 (2020); F. Trimarchi Banfi, *Il "principio di concorrenza": proprietà e fondamento*, in 1-2 *Dir. amm.* 15 (2013); F. Trimarchi Banfi, *Ragionevolezza e bilanciamento nell'attuazione dei principi costituzionali. Il principio di concorrenza nei giudizi in via principale*, in 4 *Dir. amm.* 623 (2015); F. Trimarchi Banfi, *La tutela della concorrenza nella giurisprudenza costituzionale. Questioni di competenza e questioni di sostanza*, in 2 *Dir. pubbl.* 595 (2020); R. Bin, *Il governo delle politiche pubbliche tra Costituzione ed interpretazione del giudice costituzionale*, in 3 *Le Regioni* 509 (2013).

the Italian State can avoid requiring the incoming concession holder to pay compensation, or at least some of it, but that it must nonetheless ensure redress out of its own financial resources for outgoing concession holders whose concessions were extended. In fact, the State cannot decline to compensate market operators for effects *in malam partem* resulting from the failure by public bodies (legislature, courts and public administrations) to comply with EU law.

### 3. Concluding remarks

The most appropriate way of dealing with a question that affects a significant sector of the national economy, has a significant impact on local social systems and impinges upon the environment and the interests of future generations is evidently the long-awaited reform of State legislation, duly adopted following consultation with local government bodies.

The reform is limited to changing the rules governing the public selection of concession holders, harmonising procedures at national level. Were this framework to be maintained also after passage through Parliament has been completed, regional lawmakers would retain residual scope for intervention within the areas falling under their own competence, which interact with the cross-cutting competence under Article 117(2)(e) of the Constitution.

The Government has chosen not to provide for different selection arrangements for different parts of the country, and based on the different characteristics of each individual concession, but to opt under all circumstances for competitive procedures. Different treatment was one available option, although was certainly more problematic in terms of the relationship between the State and the EU as well as the relationship between the State and the regions, and also due to the current lack of information on which such a decision could be based.

In fact, the Court of Justice has held that it is legitimate to assess the existence of a cross-border interest on a case-by-case basis, having regard to “the financial value of the contract, the place where it is to be performed or its technical features”.<sup>27</sup> The Council

---

<sup>27</sup> Paras. 66 et seq of the *Promoimpresa* judgment, cit.: “First of all, it should be noted that the existence of certain cross-border interest must be assessed on the basis of all the relevant factors, such as the financial value of the contract, the



of State did not take this approach, and considered the foreign interest in general terms, considering the attractiveness of Italy's coastal resources overall.<sup>28</sup> Where there is no cross-border interest and no scarcity of available natural resources – although such a conclusion can only be reached with reference to mapping work that has not yet been carried out<sup>29</sup> as well as a review of the scale of demand that the resources could generate amongst potential

---

place where it is to be performed or its technical features, and having regard to the particular characteristics of the contract concerned (see, to that effect, judgments of 14 November 2013 in *Belgacom*, C-221/12, EU:C:2013:736, paragraph 29 and the case-law cited, and 17 December 2015 in *UNIS and Beaudout Père et Fils*, C-25/14 and C-26/14, EU:C:2015:821, paragraph 30)". In its ruling, the Court of Justice identified differences between the two cases before it for examination, *Promoimpresa and Melis*.

<sup>28</sup> Para. 16: "the public administration provides private concession holders with a complex body of State-owned property which, considered overall in a unitary fashion, is one of the most famous and most attractive natural assets (in terms of coastline, lakes and rivers, and the related marine, lakeside or waterway areas) in the world. It is sufficient to note that estimated revenues for the sector are around fifteen billion euros per year [...]. The economic attractiveness is enhanced by the ability to grant sub-concessions", which have been possible in a general fashion and without any time limits since 2001. The ability to grant sub-concessions also demonstrates that the licence fees set for concessions are inadequate, as in some cases they leave an evidently disproportionate profit margin to private operators. This is another aspect that has led to calls for the adoption of rules. The judgment continues: "moreover, the importance and economic potential of the national coastal heritage must not be diminished by artificially breaking it up into small units in an attempt to assess the cross-border interest in the individual areas of State-owned property granted under concession. Any such fragmentation would not only distort the unitary nature of the sector, but would also be at odds with those very same national legislative provisions (which, when providing for extensions, have always done so without distinction for all operators, and not in relation to individual concessions following a case-by-case assessment) and above all would result in unjustifiable and absolute differences in treatment, enabling only some (but not all) to continue under the regime of statutory extensions".

<sup>29</sup> The annual markets and competition bill for 2021, which was tabled in Parliament on 3 December 2021, authorised the Government to adopt a legislative decree within six months of the law's entry into force concerning the establishment of a permanent information gathering system for concessions granting rights to the exclusive use of public property to either private or public entities. The objective of this general census, which has not previously been carried out, is to guarantee transparency within concession relationships as well as appropriate revenues from publicly owned assets. However, it would also enable a snapshot to be taken of differences between local territorial, entrepreneurial and socio-economic situations that could justify particular legal treatment.

competitors from other EU Member States – there will be no EU law constraints on award according to public procedures as the matter would fall outside the scope of EU law, and thus under exclusive Member State competence.

The proposed reform appears to take account of the many public and private interests at stake in this area and to balance them out in a proportional manner.

If this position were to be confirmed after passage through Parliament has been completed, it could mark a new departure both for municipalities as well as for beach undertakings. Against a backdrop of renewed certainty, it will be necessary to deploy creative and innovative project expertise with a view to making the best sustainable usage of local coastal resources.