THE DOCTRINE OF DUAL PRELIMINARITY IN THE CASE LAW OF ITALIAN ADMINISTRATIVE COURTS

Livia Lorenzoni[*]

Abstract

This paper analyses the case law of the Regional Administrative Courts and the Council of State on the "dual preliminarity" doctrine established by the Italian Constitutional Court in its Judgment No. 269/2017 in the field of protection of fundamental rights. When rights protected by the Constitution and the CFREU are at stake, the Italian administrative courts tend to prefer to submit a reference for a preliminary ruling to the ECJ. This paper attempts to highlight the possible reasons behind this attitude, its benefits, and drawbacks, given the peculiarity of administrative case law.

TABLE OF CONTENTS

[*] Assistant Professor, Roma Tre University of Rome.

1. Foreword

This article will provide an overview of the interpretation offered by the Regional Administrative Courts and the Council of State of the "dual preliminarity" doctrine, established by the Italian Constitutional Court (ItCC) in its Judgment No. 269/2017, in the field of protection of fundamental rights.

In that judgement, with an historic *obiter dictum*, the ItCC stated that «where a law is the object of doubts concerning the rights enshrined in the Italian Constitution or those guaranteed by the Charter of Fundamental Rights of the European Union in those contexts where EU law applies, the question of constitutionality must be raised, leaving in place the possibility of making a referral for a preliminary ruling for matters of interpretation or of invalidity of Union law, under Article 267 TFUE»[1].

[1] Constitutional Court, Judgement of 07th November 2017, No. 269. The number and breadth of comments on the judgement are boundless. We limit ourselves here to recalling a few contributions, without any claim to exhaustiveness. G. Repetto, *Concorso di questioni pregiudiziali (costituzionale ed europea), tutela dei diritti fondamentali e sindacato di costituzionalità*, Giur. cost. 2958 (2017); A. Ruggeri, *Svolta della Consulta sulle questioni di diritto eurounitario assiologicamente pregnanti, attratte nell'orbita del sindacato accentrato di costituzionalità, pur se riguardanti norme dell'Unione self-executing (a margine di Corte cost. n. 269 del 2017)*, 3 Rivista di Diritti Comparati 234 ss. (2017); G. Scaccia, *Giudici comuni e diritto dell'Unione europea nella sentenza della Corte costituzionale n. 269 del 2017*, 6 Giur. cost. 2948 (2017); D. Tega, *La sentenza n. 269 del*

This statement was described by the Court itself as a "clarification" of established case law since Judgment No. 170 of 1984 (Granital), made necessary by the recognition of binding legal effects to the Charter of Fundamental Rights of the European Union (hereafter, CFREU or Nice Charter). The Charter, thus, presents a «typically constitutional content» and expresses principles and rights that largely intersect the principles and rights guaranteed by the Italian Constitution (and other national constitutions of member states), making *erga omnes* intervention by the judge of laws appropriate.

In the subsequent judgments of the ItCC, Nos. 20/2019, 63/2019, 102/2019, 11/2020, 254/2020, and Orders 117/2019, 182/2020, the above guidance was taken up and further clarified[2]. In

2017 e il concorso di rimedi giurisdizionali costituzionali ed europei, in Forum di Quad. Cost. (2018); A. Guazzarotti, *Un "atto interruttivo dell'usucapione" delle attribuzioni della Corte costituzionale? In margine alla sentenza n. 269 del 2017*, 2 Forum di Quad. cost. (2018); L.S. Rossi, *La sentenza 269/2017 della Corte costituzionale italiana: obiter "creativi" (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell'Unione europea*, 3 Federalismi.it (2018); D. Gallo, *Challenging EU Constitutional Law: The Italian Constitutional Court's New Stance on Direct Effect and the Preliminary Reference Procedure*, 25 Eur. Law J. 1 (2019) 11-14; D. Gallo, *Efficacia diretta del diritto UE, procedimento pregiudiziale e Corte costituzionale: una lettura congiunta delle sentenze n. 269/2017 e 115/2018*, 1 Rivista AIC (2019); C. Caruso, F. Medico, A. Morrone (eds.), *Granital revisited? L'integrazione europea attraverso il diritto giurisprudenziale*, Bononia University press, 2020; P. Cruz Mantilla de los Ríos, *Doble prejudicialidad: dos aproximaciones diversas ante una misma encrucijada,* 75 Revista de estudios europeos, (2020), 27-40. G. Martinico, *La doppia pregiudizialità nel diritto comparato*, 3 Diritto pubblico (2022), 757-774; M. Bobek, J. Adams-Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States*, Oxford, 2020; A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union*, Oxford University Press, 2022.

[2] G. Repetto, *Il significato europeo della più recente giurisprudenza della Corte costituzionale sulla "doppia pregiudizialità" in materia di diritti fondamentali*, 4 Rivista AIC (2019); D. Tega, *Tra incidente di costituzionalità e rinvio pregiudiziale: lavori in corso*, 3 Quad. cost. 635 (2019); S. Catalano, *Rinvio pregiudiziale nei casi di doppia pregiudizialità. Osservazioni a margine dell'opportuna scelta compiuta con l'ordinanza n. 117 del 2019 della Corte costituzionale*, 4 Rivista AIC (2019); M. Massa, *Dopo la «precisazione». Sviluppi di Corte cost. n. 269/2017*, 2 Osservatorio sulle fonti (2019); C. Amalfitano, *Il rapporto tra rinvio pregiudiziale alla corte di giustizia e rimessione alla consulta e tra disapplicazione e rimessione alla luce della giurisprudenza "comunitaria" e costituzionale*, 1 Rivista AIC (2020); Id., *Rapporti di forza tra corti, sconfinamento di competenze e complessivo indebolimento del sistema UE?*, https://www.lalegislazionepenale.eu/wp-content/uploads/2019/02/Amalfinato-Rapporti-pdf.pdf; N. Lupo, *Con quattro pronunce dei primi mesi del 2019 la Corte costituzionale completa il suo rientro nel sistema*

particular, the prior referral to the ItCC was qualified as an opportunity, rather than a duty, and the possibility for the ordinary Courts to refer to the CJEU any preliminary question they deem necessary on the same profiles tackled by the ItCC was confirmed (while it was originally excluded by Judgement No. 269/2017).

The point of greatest interest, for the purposes of this paper, lies in the extension of the possibility of prior referral to the ItCC even in the event of a conflict between national laws and EU secondary legislation, when principles provided for therein are «in singular connection with the relevant provisions of the CFREU»[3]. In fact, most administrative law cases concern the application of secondary EU legislation, somehow linked to fundamental rights, by the public administration.

The analysis of administrative jurisprudence offers a mixed picture, with a prevalence of referrals to the CJEU over incidents of constitutional legitimacy. This paper will, therefore, attempt to verify the reasons behind the attitude of administrative law judges in the presence of the requisites for applying the doctrine of "dual preliminarity", inaugurated by ItCC ruling 269/2017.

2. An overview of the Administrative Courts case law that did not apply the "dual preliminarity" doctrine

2.1. The case law on the State-owned maritime concessions with tourist-recreational purposes

The most recent and controversial issue concerns the compatibility with EU law of the *ex lege* extension of State-owned

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'*a rete*' *di tutela dei diritti in Europa*, 13 Federalismi.it (2019); D. Tega, *Tra incidente di costituzionalità e rinvio pregiudiziale: lavori in corso*, in 3 Quad. cost., 615 ss. (2019); D. Gallo, F. Nato, *L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza n. 182/2020 della Corte costituzionale*, in 4 Eurojus 308, 321-322 (2020); N. Lazzerini, *Dual Preliminarity Within the Scope of the EU Charter of Fundamental Rights in the Light of Order 182/2020 of the Italian Constitutional Court*, 5.3 European Papers 1463 ss. (2020); S. Leone, *Doppia pregiudizialità: i rischi di un dialogo senza ordine*, 1 Quad. Cost. 183 ss. (2021).

[3] Constitutional Court, Judgement of 23rd January 2019 No.20, point No. 2.1.

maritime concessions with tourist-recreational purposes[4]. The national measure which permitted the automatic extension of existing concessions, without any selection procedure, was declared by the ECJ as conflicting with Article 12(1) and (2) of Directive 2006/123/EC on services in the internal market[5] and with Article 49 TFEU, in so far as those concessions are of certain cross-border interest[6]. Nevertheless, the Italian legislature has continued to extend the expiration date of existing concessions, until the administrative law judge intervened with the two well-known pronouncements of the Plenary Assembly of the Council of State of November the 9th, 2021, numbers 17 and 18[7],

[4] Provided by Article 1, paragraphs 682 and 683, Law No. 145 of 2018 and by Article 100, paragraph 1, of Decree-Law No. 104 of August 14, 2020, converted, with amendments, by Law No. 126 of October 13, 2020.

[5] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (so-called Bolkestein). See, among others, N. Longobardi, *Liberalizzazioni e libertà di impresa*, in Riv. it. dir. pubbl. comunit., 2013, 607; E. L. Camilli, *Il recepimento della direttiva servizi in Italia*, in Giorn. Dir. Amm., 2010, 12.

[6] ECJ, Fifth Chamber, judgment of 14th July 2016 Promoimpresa s.r.l. In Joined Cases C-458/14 and C-67/15C, on which see, among many, E. Boscolo, *Beni pubblici e concorrenza: le concessioni demaniali marittime*, in Urb. app., 2016, 11, 1217; L. Di Giovanni, *Le concessioni demaniali marittime e il divieto di proroga ex lege*, in Riv. it. dir. pubbl. com., 2016, 912; A. Squazzoni, *Il regime di proroga delle concessioni demaniali marittime non resiste al vaglio della Corte di giustizia*, in Riv. regolaz. mercati, 2016, 166.

[7] Council of State, Ad. Plen., Judgements of 9th November 2021, No.17 and No.18. The comments on these two judgements are countless. See, among others, M.A. Sandulli, *Sulle "concessioni balneari" alla luce delle sentenze nn. 17 e 18 del 2021 dell'Adunanza Plenaria*, Giustiziainsieme.it (16 feb. 2022)); F. Francario, *Se questa è nomofilachia. Il diritto amministrativo 2.0 secondo l'adunanza plenaria del Consiglio di Stato (recensione al fascicolo monotematico dalla Rivista Diritto e Società n. 3/2021 "La proroga delle "concessioni balneari" alla luce delle sentenze 17 e 18 del 2021 dell'Adunanza Plenaria")*, Giustiziainsieme.it (2022); C. Contessa, *Recentissime - Consiglio di Stato*, 1 Giur. it. 22-28 (2022); A. Cossiri, *Il bilanciamento degli interessi in materia di concessioni balneari*, 9 Federalismi.it (2022); E. Zampetti, *Le concessioni balneari dopo le pronunce Ad. Plen. 17 e 18/2021. Definito il giudizio di rinvio innanzi al C.G.A.R.S. (nota a Cgars, 24 gennaio 2022, n. 116)*, Giustiziainsieme.it (2022); M. Santini, "*Save the date*" *dalla Plenaria per le gare balneari: prime note (su tasti bianchi)*, 1 Urbanistica e appalti 67-76 (2022); C. Feliziani, *Norma interna in contrasto con il diritto europeo, doveri del funzionario pubblico e sorte del provvedimento amministrativo "antieuropeo"*, 2 Diritto processuale amministrativo 459-488 (2022); E. Lubrano, *Le concessioni demaniali marittime ieri, oggi e domani. L'applicazione delle regole sulla concorrenza, secondo i principi del Diritto Europeo [nota a sentenza: Cons. Stato, Ad. Plen., 9 novembre 2021, nn. 17 e 18]*, in 2 GiustAmm.it

2 (2022); A. Lazzaro, *Le concessioni demaniali marittime ad uso turistico-ricreativo tra principi europei e norme interne. La soluzione del conflitto nelle sentenze dell'Adunanza plenaria n. 17-18 del 9 novembre 2021 [Nota a sentenza: Cons. Stato, ad. plen., 9 novembre 2021, nn. 17 e 18]*, 1 Diritto dei trasporti 120-129 (2022); R. Coroneo, *Spunti di riflessione sulle sentenze del Consiglio di Stato in Adunanza Plenaria nn. 17 e 18 del 9 novembre 2021 in merito alle proroghe delle concessioni demaniali marittime*, 1 Vita notarile 123 (2022); G. Finocchiaro, *Qualche risposta ai numerosi interrogativi suscitati dall'anticipata retrocessione delle concessioni demaniali marittime al 31 dicembre 2023*, 1 Vita notarile 127 (2022); 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*, 20 Federalismi.it 1-20 (2021); A. De Siano, *Disapplicazione per difformità dal diritto UE e protagonismo giurisprudenziale*, 18 Federalismi.it 1-23 (2021); E. Di Salvatore, *Proroghe legislative automatiche, non applicazione e disapplicazione: l'Adunanza plenaria del Consiglio di Stato si pronuncia sulla direttiva servizi*, 6 Giur. cost., 2935 (2021); A. Giannelli, G. Tropea, *Il funzionalismo creativo dell'Adunanza Plenaria in tema di concessioni demaniali marittime e l'esigenza del "katékon"*, in 5-6 Riv. it. dir. pubb. com., 723-760 (2021); M.P. Chiti, *"Juger l'administration c'est aussi légiférer"? L'Adunanza Plenaria sulle concessioni demaniali marittime*, 5-6- Riv. it. dir. pubb. com. 869-884 (2021); R. Rolli, D. Granata, *Concessioni demaniali marittime: la tutela della concorrenza quale Nemesi del legittimo affidamento*, 5 Rivista giuridica dell'edilizia 1624-1694 (2021); A.M. Colarusso, *Concessioni demaniali: le "relazioni pericolose" tra illegittimità comunitaria e il giudicato amministrativo sui rapporti di durata. Spunti a margine delle sentenze dell'Adunanza Plenaria del Consiglio di Stato, nn. 17 e 18/2021* in 4 Amministrativ@mente 841-870 (2021); E. Cannizzaro, *Demanio marittimo. Effetti in malam partem di direttive europee? In margine alle sentenze 17 e 18 dell'Ad. plen. del Consiglio di Stato*, Giustiziainsieme.it (2021); F.P. Bello, *Primissime considerazioni sulla "nuova" disciplina delle concessioni balneari nella lettura dell'Adunanza plenaria del Consiglio di Stato*, Giustiziainsieme.it (2021); M. Timo, *Concessioni balneari senza gara… all'ultima spiaggia*, 5 Riv. giur. edil. (2021); AA. VV., *La proroga delle "concessioni balneari" alla luce delle sentenze 17 e 18 del 2021 dell'Adunanza Plenariaia,* 3 *Dir. soc.*, (2021); A. Circolo, *L'epilogo della proroga ex lege delle concessioni balneari*, 3 Studi sull'integrazione europea 573-590 (2021); F. Capelli, *Evoluzioni, splendori e decadenza delle direttive comunitarie. Impatto della direttiva CE n. 2006/123 in materia di servizi: il caso delle concessioni balneari* (2021); A. Lucarelli, B. De Maria & M.C. Girardi, *Governo e gestione delle concessioni demaniali marittime, Principi Costituzionali, beni pubblici e concorrenza tra ordinamento europeo e ordinamento interno*, in 7 Quaderni della Rassegna di diritto pubblico europeo (2021); R. Dipace, *All'Adunanza plenaria le questioni relative alla proroga legislativa delle concessioni demaniali marittime per finalità turistico ricreative*, Giustiziainsieme.it. (2021); A. Giannaccari, *"À la guerre comme à la guerre". Concessioni demaniali marittime, Adunanza plenaria e procedure selettive (al 2023?)*, in 3 Mercato concorrenza regole 581-591 (2021); P. Gaggero, *Diritto comunitario, disapplicazione del diritto interno e creatività della giurisprudenza (a proposito della proroga della durata delle concessioni demaniali marittime)*, in 2 Riv. trim. dir. econ. 76 (2021); A. Cossiri, *L'Adunanza Plenaria del Consiglio di Stato si pronuncia sulle concessioni demaniali a scopo*

followed by the annual Market and Competition Law 2021, that enshrined the obligation to award concessions on the basis of public procurement procedures starting from December 2023 (or, under certain conditions, 2024) and delegated the government to reorganize and simplify existing regulations[8].

In this matter, the Council of State radically ruled out the applicability of the "dual preliminarity" doctrine to the case at hand. The Plenary Assembly of the Council of State denied the existence of both the two criteria for activating the incidental constitutionality review on the national anti-community law, prior to a possible preliminary reference to the ECJ. These requirements have been identified in the infringement of fundamental personal rights, protected both by the Constitution and by the Nice Charter, and in the contrast with a non-self-executing EU directive[9].

Some authors, on the contrary, have advocated the application of the "dual preliminarity" doctrine precisely in cases like that,

turistico-ricreativo. Note a prima lettura, 2 Diritto Pubblico Europeo - Rassegna online 232-248 (2021).

[8] See Articles 3 and 4 Law of 5th August 2022, No. 118. Lastly, art. 10 quater of Law Decree of 29 dicembre 2022, n. 198 as modified by Law 24 febbraio 2023, n. 14. - Disposizioni urgenti in materia di termini legislativi (MILLEPROROGHE 2023) established a technical comittee to define «the technical criteria for determining the existence of scarcity of the available natural resource, taking into account both the overall national and regionally disaggregated data, and transboundary economic significance» and extended the deadline for opening the market to december 2025.

[9] The judgement stated that: «a national law in conflict with a European norm having direct effect, even if contained in a self-executing directive, cannot be applied either by the judge or by the public administration, without there being any need (as clarified by the Constitutional Court starting from Judgement No. 170 of 1984) for a question of constitutional legitimacy. Indeed, it should be recalled that an incidental review of constitutionality on an anti-EU national law is nowadays possible only if that law is in conflict with a non-self-executing EU directive or, according to the recent theory of the so-called dual preliminarity, in cases where the national law is in conflict with the fundamental rights of the person protected both by the Constitution and by the Charter of Fundamental Rights of the European Union (see, in particular, Corte Cost. Judgments No. 289/2017 (*rectius* 269/2017), No. 20/2019, No. 63/2019, No. 112/2019). Neither of the two "exceptions" applies in the present case, because the Community rules infringed are self-executing and no constitutionally protected fundamental personal rights are at stake» Council of State, Ad. Plen., Judgements of 9th November 2021, No.17 and No.18.

namely, when the national legislature has persisted in circumventing the content of European directives[10]. Many comments on the Council of State's position have observed how the latter has "borrowed," unduly, instruments typical of the ItCC, to exercise, in fact, a power that belongs to the latter[11], thus, implicitly, affirming the need for its intervention.

On the other hand, the ItCC, in fact, has already judged on the matter on several occasions, affirming the need to adapt EU the Italian regulation of State-owned maritime concessions for tourism-recreational purposes to EU law. However, the Court's decisions only concerned the compatibility of regional laws on the matter with the division of legislative powers between the State and the Regions established in the Constitution. In fact, the constitutional legitimacy of the State law, providing for the extension of the concessions, was never brought to the Court's attention[12].

A recent order of the Lecce Regional Administrative Court, while expressly referring to the protection of fundamental rights

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[10] C. Amalfitano, *Il rapporto tra rinvio pregiudiziale alla corte di giustizia e rimessione alla consulta e tra disapplicazione e rimessione alla luce della giurisprudenza "comunitaria" e costituzionale*, 1 Rivista AIC (2020).

[11] E. Lamarque, *Le due sentenze dell'Adunanza plenaria… le gemelle di Shining?*, 3 Dir. soc. 474 – 475 (2021). See, also, M.A. Sandulli, *Introduzione al numero speciale sulle "concessioni balneari"*, 3 Diritto e società 351-352 (2021).

[12] See, among others, Constitutional Court, Judgement of 20th May 2010 No. 180; Id. 26th November 2010 No. 340; Id. 4th July 2013 No. 171; 26th June 2015 No. 117; Id., 11 January 2017, No. 40; Id. 5th December 2018 No. 221; Id. 11th April 2018 No. 109; Id. 9 January 2019 No. 1, with comment of 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)*, 1 Diritti fondamentali (2019); G. Dalla Valentina, *La proroga ope legis delle concessioni demaniali marittime dalla sentenza n. 1/2019 della Corte costituzionale al Decreto Rilancio*, 3 Forum di Quad. Cost. (2020). See also Constitutional Court, Judgement of 29 January 2021 No. 10. Among the recent articles on the constitutional jurisprudence on the matter, see S. De Nardi, *Il sindacato della Corte costituzionale sulle (cosiddette) proroghe regionali delle concessioni demaniali marittime ad uso turistico-ricreativo*, 1 Munus 373 ss. (2018); A Lucarelli, *La concorrenza principio tiranno? Per una lettura costituzionalmente orientata del governo dei beni pubblici,* 6 Giur. cost. 2898 (2020); M. Conticelli, *Effetti e paradossi del legislatore statale nel conformare la disciplina delle concessioni del demanio marittimo per finalità turistico-ricreative al diritto europeo della concorrenza*, 5 Giur. cost. 2475 ss. (2020); M. Mazzarella, *Le concessioni dei beni demaniali marittimi: conflitto Stato – Regioni e tutela della concorrenza*, Diritti regionali (2022).

«recognized as deserving privileged protection in the EU legal system and in the Charter of Fundamental Rights»[13], proposed a preliminary reference before the ECJ, rather than raising the issue of constitutional legitimacy. The judgement is in line with the previous stance taken by the same Tribunal, that disagreed with the Council of State and denied the PA's power to disapply the Italian anti-EU provision on extensions of maritime State concessions. While considering the incident of constitutionality before the ItCC, among the interpretative support tools available to national judges, the Tribunal referred to the ECJ, pursuant to Article 267 TFEU, a set of complex questions. These concerned, *inter alia*, the relationship between the immediate applicability, the self-executing character, and the effectiveness of a European harmonisation directive; the public administration's power of disapplication with the effect of mere exclusion or merely obstruction of the national law[14]; and a series of critical elements that had emerged in previous case law, such as the cross-border relevance and scarcity of the resource in question. Although the matter is currently pending before the ECJ, the Council of State, in a later Judgement, addressed the same issues raised by the Lecce Regional Administrative Court order, providing an interpretive clarification on the nature and applicability of Article 12 of directive 2006/123/CE[15].

A further issue, related to the maritime concessions legislation, was referred by the Council of State to the ECJ for a preliminary ruling. The case concerned the compatibility with EU of Article 49 of the Code of Navigation with EU law in so far as it provides for «the transfer, free of charge and without compensation (…) of the building works carried out on the State-owned land»[16]. In fact, Article 49 of the Code of

[13] TAR Puglia – Lecce, Sez. I, ord. of 11th May 2022 n. 743. On the former jurisprudence of the same Tribunal on the matter see E. Chiti, *False piste: il T.A.R. Lecce e le concessioni demaniali marittime,* 6 Giorn. dir. amm., (2021), pp. 801-810.

14 For an exhaustive and critical analysis of these issues, see D. Gallo, L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa, Milano, 2018.

[15] Council of State, sez. VI, 1st March 2023, Judgement No. 2195.

[16] Council of State, sez. VII, 15 September 2022, Order No. 8010. The order posed the following question to the ECJ: «do Articles 49 and 56 TFEU and the principles inferable from the Laezza judgment (C- 375/14), if deemed applicable, preclude the interpretation of a national provision such as Article 49 of the Code of Navigation. In the sense of determining the transfer for non-interest and without compensation by

Navigation provides for a regime of provisional ownership by the concessionaire over the non-removable works built on the State property, and the subsequent forfeiture of the latter by the State, without compensation, on expiry of the concessionary relationship[17]. Administrative jurisprudence clarified that this mechanism does not operate in the presence of an automatic extension but applies in the case of a renewal of the concession by virtue of a new measure[18]. Even in this case, the Italian provision at stake affects a fundamental right protected both by the Nice Charter and the Italian Constitution, as it narrows the scope of the concessionaire's right of ownership over the non-removable construction works which it has built[19].

2.2. The case law on the State concessions in the field of gaming and betting

The choice of the Lecce Regional Administrative Court to refer the case to the ECJ is in line with a lesser-known strand of case law about the Italian extension of administrative concessions in the field of gaming and betting.

In this case law, the subject of the review was an administrative measure that provided the extension of the concession in favour of the national incumbent for the activity of collection of national instant lotteries (so-called scratch cards), without competitive procedures. The applicants claimed the infringement of both the European principles of freedom of establishment, competition, equal treatment, transparency, and proportionality, as well as of constitutionally protected principles of equality (Art. 3 Const.), freedom of economic

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the concessionaire on expiry of the concession when it is renewed, without interruption, even under a new measure, of the construction works carried out on the State-owned area forming part of the set of assets organized for the operation of the bathing business, since such an effect of immediate forfeiture could configure a restriction exceeding what is necessary to achieve the objective actually pursued by the national legislator and therefore disproportionate to the aim».

[17] Royal Decree of 30 March 1942 - No. 327 (Code of Navigation), Article 49, entitled 'Devolution of non-removable works'. On the effect of this provision on concessionary fees, see Corte cost. sent. of 10 January 2017, no. 29.

[18] Council of State, Sez. VI, 10 June 2013 n. 3196; Sez. VI, 17 February 2017 n. 729; Sez. IV, 13 February 2020 n. 1146.

[19] See M. Calabrò, *Concessioni demaniali marittime ad uso turistico-ricreativo e acquisizione al patrimonio dello Stato delle opere non amovibili: una riforma necessaria*, 3 Dir. soc. 441 ss. (2021).

initiative (41 Cost.) and freedom of competition (Article 117, second paragraph, letter e) Cost.).

The Council of State ruled out the possibility of invoking the ItCC's guideline set out in ruling No. 269/2017, considering that there was no question of the protection of a subjective situation, protected by the Charter of Fundamental Rights of the European Union, but, instead, a question of interpretation of Union law, under Article 267 TFEU. The Court also specified that «even in the hypothesis of a conflict with the said Charter, nevertheless, the prior raising of the issue of constitutionality should be understood as a possibility, and not an obligation, for the judge *a quo*»[20].

The Administrative Court emphasised the necessary priority of the European preliminary ruling, as opposed to the issue of constitutionality, even in situations of dual protection (internal and European) of subjective legal situations. The Council of State stated that «at the procedural level, the possible raising of the issue of constitutionality, postulates the positive appreciation of the relevance and not manifestly unfoundedness of the question. In the logic of a possible order of referral to the ItCC, in fact, the domestic Court has the burden of deliberating the European question, to assess the applicability of the domestic law in the case before it, giving reasons on the relevance of the question, which is always pegged to a prognostic assessment of the applicability of the rule to the specific case»[21]. Therefore, the Court reserved the right to raise the question of constitutional legitimacy, only in cases of a prior favourable ruling by the ECJ on the European compatibility of the challenged Italian provision.

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[20] Council of State sez. IV, Judgements of 3rd September 2019, Nos. 6079 and 6080; Council of State, sez. IV, Orders of 5th September 2019, Nos. 6101 and 6102.

[21] The Chamber expressly reserves the right to examine at a later date the non-manifest groundlessness and the relevance of the question of constitutionality, according to the internal parameters (namely Articles 3, 24 and 117 of the Constitution), considering also that, in the event that a possible judgement before the Constitutional Court concludes with a ruling that the provision is unconstitutional, this would entail the expulsion of the rule from the Order with *erga omnes* effects, rather than limited effects, as in the other hypothesis, to the disapplication in the individual case. See Council of State sez. IV, 3 September 2019, Judgement No. 6080; Council of State sect. IV, 3 September 2019, Judgement No. 6079.

Further arguments for giving priority to the reference for a preliminary ruling to the ECJ were the mandatory character of such European reference, when the referring court is also a court of last instance; the importance of the interpretative question underlying the double reference, such as to shape, for the future, the exercise of discretion by the domestic legislature; the specific nature of the case, which requires the prompt resolution of the dispute.

2.3. The case law on age discrimination

Several orders by Regional Administrative Courts and the Council of State have referred to the ECJ regulatory hypotheses for which a possible violation of Article 21 of the Charter of Fundamental Rights of the European Union, paragraph 1, emerged[22].

The contested national frameworks imposed, for example, an upper age limit of 50 years for participation in the notary competition[23]; an age limit of 30 years for the competition for technical psychologist commissioner in the career of State Police officers[24]; a ban on former retired PA employees from receiving remuneration for consultancy assignments[25], with a possible age discrimination effect in public competitions.

Here too, the question of constitutionality could have been raised, with reference to the principle of equality and the right to work, in conjunction with the principle of non- discrimination enshrined in the Nice Charter. However, similar to the cases examined above, the administrative judge chose the path of a preliminary reference to the ECJ, using the European directive on equal treatment in employment and occupation[26] as a European parameter.

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[22] According to that article, «any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation» is prohibited.

[23] Council of State, IV Sec. Ord. of 28 November 2019, No 8154.

[24] Council of State, IV sec. Ord. of 02 September 2021, No. 6206; Council of State, IV sec. Ord. 23 April 2021, N. 3272.

[25] TAR per la Sardegna, I sez., ord. of 19 October 2018, No. 881.

[26] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

2.4. Other judgments that did not apply the "dual preliminarity" doctrine

A further case of preliminary referral to the ECJ by the administrative law judge concerned the right of pre-emption of the special company and its employees, in the event of the transfer of the ownership of a municipal pharmacy. Also in this case, an internal provision distorting free competition was contested for having disregarded the principles of freedom of establishment, non-discrimination, equal treatment, competition, and free movement of workers. Articles 15 and 16 of the Charter of Fundamental Rights of the EU were also mentioned, nonetheless, the Court omitted to mention the doctrine established in judgment No. 269/2017[27].

Lastly, the Council of State referred to the ECJ the interpretation of EU law, with regard to an Italian provision that excludes price revisions in contracts with an instrumental link to the so-called "special sectors" in public procurement law (gas, electricity, water, transports…), such as the cleaning of stations, installations, offices and workshops, inherent to the railway transport network[28]. In that case, the right of workers and employers «to negotiate and conclude collective agreements» protected by art. 28 of the Nice Charter was at stake.

3. Cases referred to the ECJ following a previous ruling by the ItCC, but *outside* the scope of the 269/2017 doctrine

3.1. The case law on mutual cooperative banks

In some cases, the administrative law judge referred the question to the ECJ for a preliminary ruling, following a statement of inadmissibility or unfoundedness by the ItCC, but without following the 269/2017 doctrine. This approach has been adopted in relation to the Italian legislation requiring the transformation of a mutual cooperative bank into a joint stock company if a certain asset threshold is exceeded, providing for limitations on the redemption of shares by the shareholder in the event of withdrawal, to avoid the possible liquidation of the transformed bank. The ItCC had intervened on the

[27] Council of State, sez. III, ord. del 4 luglio 2018, n. 4102.
[28] Council of State, sez. IV, ord. del 15 luglio 2019, n. 4949.

issue, in Judgment No. 99/2018, which found the rules on shareholder withdrawal to be largely compliant with the relevant EU law. The ItCC mentioned the Nice Charter only to deny the existence of «a disproportionate and intolerable interference with the right to property recognised by Article 17 CFREU» and to exclude the need for a reference to the ECJ for a preliminary ruling on the validity of the above-mentioned European legislation under the third paragraph of Article 267 TFEU[29]. It did not make any reference to judgment 269/2017.

Nevertheless, the Council of State did later refer the issue to the ECJ[30]. The Court of Luxembourg was called upon to assess the compatibility of Italian regulatory framework with several articles of the TFEU on competition and State aid, with some European regulations[31], and the legitimacy the relevant EU secondary legislation in the light of Articles 16 and 17 CFREU on freedom of enterprise and the right to property.

3.2. The case law on incentives for renewable energies

Another issue that was raised, first, before the ItCC and, later, before the ECJ, but without mentioning the 269/2017 doctrine, concerns the changes to the incentive regime to produce energy from renewable sources. The Italian regulation has forced operators in the sector to switch to a different tariff system, remodeled in a pejorative sense.

Judgment 16/2017 of the ItCC (issued before judgment 269/2017) found such an intervention to be in line with the public interest «in terms of a fair balancing of the opposing interests at stake,

[29] ItCC Judgement of 21 March 2018, n.99.

[30] Council of State VI sec. ord. of 26 October 2018 nos. 6086, 6129; Council of State VI sec. ord. of 05 February 2019 No. 883, that requested the ECJ to «assess the European legitimacy of Article 10 of EU Delegated Regulation No. 241/2014 of the Commission, in light of Article 16 and Article 17 of the Charter of Fundamental Rights of the European Union».

[31] Regulation (Eu) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation Commission Delegated Regulation (EU) No 241/2014 of 7 January 2014, supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for Own Funds requirements for institutions.

aimed at combining the policy of support for the production of energy from renewable sources with the greater sustainability of the correlative costs to be borne by end users of electricity»[32]. The ItCC also confirmed the legitimacy of the internal rule in relation to EU law concerning the violation of the users' trusts on the quantification of the incentives.

The Regional Administrative Court, however, considering that certain aspects not covered by the ItCC's judgment were unresolved, deemed it necessary to obtain a ruling from the ECJ. It was necessary, according to the referring Court, to clarify, also in the light of secondary EU legislation on energy production, whether the relevant national provision is compatible with the general EU law principles of legitimate expectations, legal certainty, loyal cooperation, and useful effect, as well as with Articles 16 and 17 of the CFREU[33].

3.3. The case law on the pension of administrative judges

The last question referred to the ECJ, following a ruling by the ItCC, but without following the "dual preliminarity" doctrine, concerned the prohibition for persons already receiving a pension from a public body or administration to receive, from another public body or administration, all-inclusive payments which, when added to their pension, exceed the gross annual amount equal to that granted to the First President of the Court of Cassation. Here too, the question of constitutionality was declared unfounded by the Court in Judgment No. 124/2017[34], before Judgement No. 269/2017 was issued. Also here, the Lazio Regional Administrative Court referred the matter to the ECJ, considering that the Italian rule, by discriminating against certain workers only on the grounds of their personal wealth, violated Article 21 of the CFREU. To highlight the relevance of the issue, the Regional Administrative Court emphasised that there were 21 other appeals pending, brought by magistrates of the Council of State, and concerning the same question of law (and 10 other appeals with identical content)[35].

[32] Constitutional Court, Judgement 7 December 2016, No. 16.
[33] TAR Lazio, sez III ter, ord. of 16 November 2018, no. 11124; TAR Lazio, sez III ter, ord. of 20 November 2018, 11206.
[34] Constitutional Court, Judgement of 22 March 2017, No. 124.
[35] TAR Lazio, Roma, I sez., ord. 04 December 2018, no. 11755; TAR Lazio, Roma, I sez., ord. 13 December 2018, no. 12153.

4. The Administrative Courts' orders submitting a prior reference to the ItCC based on fundamental rights protection

4.1. The case law on bingo concessions operating under technical extension regime

In a recent case, again concerning the extension of concessions for games and betting, contrary to the case law previously described (par. 2.2), the Lazio Regional Administrative Court opted to raise the issue of constitutionality first, in line with the "dual preliminarity" doctrine[36]. In this case, Italian law postponed the deadline for calling for tenders for the re-allocation of concessions for the game of bingo, at the same time increasing the amounts owed monthly by concessionaires operating under the technical extension regime. The question of constitutionality was raised in relation to the principles of free economic initiative, equality, and non-discrimination, enshrined in the Constitution and the Nice Charter.

In its Judgment No. 49/2021, the ItCC declared unfounded the questions raised by the Lazio Regional Administrative Tribunal. The increase in the concession fee, under the technical extension regime, was considered reasonable, given the competitive advantages deriving therefrom for private parties. The ItCC recognised the overlap between the CFREU principles and the constitutional values of equality, reasonableness and freedom of private economic initiative: «in fact, the protection of the principle of equality and of the freedom to conduct a business takes place in our Constitution and in the CFREU on the basis of normative formulations and interpretative criteria that may be considered to coincide. Therefore, in the case at hand, having ascertained the non-existence of the infringement of the canon of reasonableness, there is also no infringement of the similar principles, inferable from Articles 20 and 21 of the CFREU, of equality before the law and non-discrimination. Similarly - the infringement of the freedom of private economic initiative having been excluded - there is

[36] TAR Lazio, Roma, sez. II, order of 26 March 2019, nn. 4021 and 4022.

also no breach of Article 16 of the CFREU, which contains the recognition of the freedom to conduct a business»[37].

It must be emphasised that this case did not concern, as those examined above, a new operator willing to penetrate a monopolistic market. This case dealt with an incumbent operator complaining about legal uncertainty and infringement of their right to choose freely whether to continue operating under a prolongation regime, with all the burdens that this entails, or to move to different markets. Therefore, the issue of freedom of enterprise, in this case, was not related to the principle of competition within the single market, but rather to the protection of the certainty of economic relations for incumbent entrepreneurs.

Nevertheless, in a later order, also on the extension of bingo concessions, the Council of State, regardless of the ItCC ruling No. 49/2021, revived the exact same arguments of the jurisprudence on game and betting concessions described at par.2.2 for excluding the applicability of the "dual preliminarity" doctrine to the case and referred the issue to the ECJ for preliminary ruling, excluding the involvement of fundamental rights in the matter[38].

4.2. The case on the duty to publish public managers income data

In only one case, the administrative judge raised the sole issue of constitutional legitimacy, with reference to an alleged violation of constitutional provisions and of the Nice Charter.

The Lazio Regional Administrative Court's order is known to have led to the ItCC's ruling 20/2019, which took up the theory of "dual preliminarity", with some 'temperaments' with respect to what was stated in ruling 269/2017[39]. The order was issued in September

[37] Constitutional Court, Judgment of 23 February 2021, No. 49.

[38] Council of State VII sec. Ord. of 21 November 2022 no. 10261 and 10264.

[39] For the comments to this Judgment, see the literature mentioned at note No. 2. See, also, among others, A. Ruggeri, *La Consulta rimette a punto i rapporti tra diritto eurounitario e diritto interno con una pronunzia in chiaroscuro (a prima lettura di Corte cost. n. 20 del 2019)*, Consulta Online, 25 febbraio 2019, 1, p. 113 ss., www.giurcost.org; C. Amalfitano, *Il dialogo tra giudice comune, Corte di giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017*, 2 Oss. Fonti (2019); O. Pollicino, G. Repetto,

2017, a few months before the ItCC Judgment No. 269/2017 was published. Therefore, of course, it cannot be stated that the administrative court has followed the dual preliminary doctrine in this case[40].

The case dealt with the delicate relationship between the transparency of public administration and the confidentiality of personal data. The rule brought to the attention of the ItCC concerned the obligation of public administrations to publish on their website certain data on holders of managerial positions, about their income situation[41].

The issue of constitutional legitimacy was addressed with reference to a number of European and constitutional principles (such as proportionality, relevance and non-excessiveness in the processing of personal data; the principle of formal and substantive equality), but also with reference to secondary with EU law on the protection of privacy (Directive 95/46/EC, replaced by Regulation No. 2016/679/EU), which was considered to be similar in nature and underlying principles to the relevant provisions of the CFREU.

The ItCC concluded in the sense of declaring the extension of the obligation of publicity to all holders of managerial positions, for any reason whatsoever conferred, including those conferred discretely by the political body without public selection procedures, rather than only for the holders of managerial positions, to be constitutionally unlawful due to violation of Article 3 of the Constitution.

The other questions raised with reference to EU law were declared inadmissible and unfounded. In particular, the Court held that it was the responsibility of the legislature, in the context of the

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Not to be Pushed Aside: the Italian Constitutional Court and the European Court of Justice, Verfassungsblog, https://verfassungsblog.de/not-to-be-pushed-aside-the-italian-constitutional-court-and-the-european-court-of-justice/; G. Martinico, G. Repetto, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath*, Eur. Const. Law Rev., 2019, p. 731 ss.; G. Repetto, *Judgment No. 269/2017 and dual preliminarity in the evolution of the jurisprudence of the Italian Constitutional Court*, in this Special Issue, p. 8-24.

[40] TAR Lazio, Roma, sez. I quater, 19 September 2017, No. 9828.

[41] Article 14(1-bis) and (1-ter) of Legislative Decree No 33 of 14 March 2013 - Reorganisation of the rules concerning the obligations of publicity, transparency, and dissemination of information by public authorities.

urgent overall revision of the subject, the provision of less pervasive ways of publication and the pursuit of similar transparency requirements in relation to other types of managerial positions in all administrations, not only state administrations.

5. The different approaches taken by the Administrative Courts while dealing with fundamental rights

In the light of the case law so far examined, a possible explanation for the administrative Court's heterogeneous attitude may lie in the nature of the EU legislative principles allegedly violated by national law.

In the first line of case law examined (concerning the extension of the duration of maritime concessions and game and betting concessions), the fundamental rights in question are mainly related to economic relations, especially, freedom of enterprise, the protection of competition and the rights to property. These constitutional parameters have been profoundly affected by the set of values and principles of EU law.

European rules on competition and freedom of economic initiative have been interpreted in the context of the fundamental principles of the common market and, consequently, have been extended to state measures to ensure that companies can operate on an equal ground, without privileges arising from distorting public interventions. The growing influence of the principle of competition led the legislators of the Member States to drastically reduce public interventions that alter the functioning of the markets[42]. EU law has shaped the institutional set-ups of the Member States and, consequently, their administrative rights[43], leading to limitations in the

[42] M. D'Alberti, *Riforme amministrative e sistema economico*, in G. D'Alessio; F. Di Lascio (eds.), *Il sistema amministrativo a dieci anni dalla "riforma Bassanini". Proceedings of the international conference* (Rome, 30-31 January 2008), 3 (2009).

[43] F. Merusi, *Nuove avventure e disavventure della legalità amministrativa*, 4 Dir. Amm. 747 (2011).

use of certain instruments typical of administrative law, among which concessions[44].

The ItCC has interpreted the European notion of competition according to an evolutionary-dynamic meaning that, in connection with the principles of freedom of movement, «embraces as a whole the competitive relations on the market»[45] , including «State interventions aimed at both promoting and protecting the competitive structure of the market»[46]. The protection of competition has been conceived as one of the levers of state economic policy, to the point of conforming the notion of social utility, provided for in Article 41 of the Constitution, as a limit to the free development of private economic initiative, in the sense of including the interest of economic operators, consumers and workers in operating on a market not distorted by an unjustifiably

[44] M. D'Alberti, *Gli studi di diritto amministrativo: continuità e cesure fra primo e secondo novecento*, 4 Riv. Trim. Dir. Pubbl. 1317 (2001); M. D'Alberti (eds.), Concessioni e concorrenza (1998).

[45] See Constitutional Court, Judgement of 17 July 2012, No. 200; Constitutional Court, Judgement of 11 December 2012, No. 299; Constitutional Court, Judgement of 7 May 2014, No. 125. See, among others, F. Saitto, *La Corte Costituzionale, la tutela della concorrenza e il "principio generale della liberalizzazione" tra Stato e Regioni*, 4 Rivista AIC (2012); V. Onida, *Quando la Corte smentisce se stessa*, 1 Rivista AIC, (2013). Constitutional Court, Judgement of 18 December 2003 - 13 January 2004, No. 14. Among the many comments on the judgment see V. Onida, *Applicazione flessibile e interpretazione correttiva del riparto di competenze in due sentenze "storiche*; A. Anzon Demmig, *Istanze di unità e istanze autonomistiche nel 'secondo regionalismo': le sentenze nn. 303 del 2003 e 14 del 2004 della Corte costituzionale e il loro seguito*; R. Bifulco, *La tutela della concorrenza tra parte I e II della Costituzione (in margine alla sent. 14/2004 della Corte costituzionale,* 4-5 Le Regioni 771 ss. (2008); L. Buffoni, *La "tutela della concorrenza" dopo la riforma del Titolo V: il fondamento costituzionale ed il riparto di competenze legislative*, Ist. Federalismo 345-387 (2003); D. Gallo, *Functional Approach and Economic Activity in EU Competition Law, Today: The Case of Social Security and Healthcare*, 3 European Public Law 26 (2020), 569 – 586; Id. *Public services and EU competition law. The social market economy in action*, Routledge-Giappichelli, 2021.

[46] Constitutional Court, Judgement of 13th July 2004, No. 272, with comment by F. Casalotti, *La Corte costituzionale e i criteri di riparto delle competenze con riferimento ai servizi pubblici locali dopo la riforma del Titolo V Parte II della Cost.: la sentenza n. 272 e l'ordinanza n. 274 del 2004*, Le Regioni 262 (2005).

intrusive regulation of economic activities[47]. This way, «economic freedoms have become fundamental rights»[48].

Moreover, according to the well-established orientation of the ECJ, the European rules protecting competition and the four fundamental freedoms of movement attribute subjective legal situations to private individuals and, therefore, have direct effect, both vertically and horizontally, and this should, as a rule, automatically render national law that conflicts with them inapplicable[49].

The influence of EU law on the economic rights at stake in the examined case law, however, does not appear conclusive for explaining the Italian Administrative Courts attitude.

Firstly, the referral to the Court of Luxembourg has also been chosen in cases not concerning economic relationships. For example, the several orders of the Regional Administrative Courts and the Council of State that have referred to the ECJ for possible age discrimination in the Italian legislation on public employment concerned a personal right, rather than an economic one. The issue was raised in relation to Article 21 of the CFREU, that protects the right of non-discrimination, falling within the title on equality.

At the same time, the maritime concessions case law also involves profiles of personal freedom, of rule of law in criminal matters and of non-retroactivity of the criminal law, given the possible criminal liability of operators who illegally occupy State-owned land based on concessions extended by an anti-European state law. The Council of State expressly mentioned those principles «also recognised by the EU Court of Justice, are part of the constitutional traditions of the Member

[47] See L. Lorenzoni, *I principi di diritto comune nell'attività amministrativa*, Napoli, Jovene, 2018, 267 ss.

[48] G. Morbidelli, *Corte costituzionale e Corti europee: la tutela dei diritti (dal punto di vista della Corte del Lussemburgo)*, 2 Dir. proc. amm. 285 (2006).

[49] With regard to EU competition law, ECJ 9 September 2003, case C-198/01, Consorzio Industrie Fiammiferi (CIF), Giorn. Dir. Amm. 2003, 11, 1129, La prevalenza del diritto comunitario sul diritto nazionale in materia di concorrenza with comments by S. Cassese, *Il diritto comunitario della concorrenza prevale sul diritto amministrativo nazionale*; M. Libertini, *La disapplicazione delle norme contrastanti con il principio comunitario di tutela della concorrenza*; G. Napolitano, *Il diritto della concorrenza svela le ambiguità della regolamentazione amministrativa*. As for freedom of establishment, see ECJ, 21 June 1974, case 2-74, Reyners.

States and as such are an integral part of the Community order itself (and would in any case represent internal counter-limits to the principle of primacy) »[50].

Secondly, in different occasions, the administrative Courts chose to first raise the issue to the ItCC and, only later, to the ECJ, when the same above-mentioned economic rights were at stake. This was, for example, the case of the extension of concession for the game of bingo where free competition principles were claimed to be violated. Also, the case of mutual cooperative banks dealt with articles 16 and 17 CFREU on freedom of enterprise and the right to property, as one of the main points regarded the expropriatory effect of the contested provision.

Thirdly, heterogeneous attitudes of the administrative law judges show in the case law regarding the right to good administration and, specifically, the protection of the citizen's legitimate expectations. This right finds its foundation in the principles affirmed by Articles 3, 23, 53 and 97 of the Constitution, and permeates all public law relationships[51]. In the context of EU law, the principle of the protection of legitimate expectations is a corollary of the principle of the certainty of legal situations and constitutes one of the foundations of the rule of law in its various articulations, limiting administrative (and legislative) activity. It implies that all subjects operating in the Community sphere must be guaranteed the legal framework of their action and relations with the institutions, since the predictability of legal situations and relations must always be ensured and, therefore, the position of those in whom «well-founded hopes have been raised because of precise assurances» must be protected[52].

In the case of legislative extension of State maritime concessions, the protection of legitimate expectations emerged

[50] Council of State, Ad. Plen., Judgements 9 novembre 2021, No. 17 and No. 18, cit.

[51] Central to the theme remains the work of F. Merusi, *L'affidamento del Cittadino* (1970), republished in Id. *Buona fede e affidamento nel diritto pubblico: dagli anni Trenta all'alternanza* (2001).

[52] Cfr. CJEU, Judgement of 28th February 2008, Case C-293/06, Deutsche Shell; Id. 10 settembre 2009, Case C-201/08, Plantanol; Court of First Instance of the European Union, Judgement of 14th April 2011, No. 461, case Visa Europe Ltd; Id., 29 April 2004, in cases T-236/01, T-239/01, from T-244/01 to T-246/01, T-251/01, T-252/01, Tokai Carbon e a./Commissione.

regarding historical concession holders, who, for decades, have constantly seen their concessions automatically renewed[53]. The same right was at stake in the case law regarding the modification of incentive regime to produce energy from renewable sources, where existing operators have been compelled to switch to a different tariff system, which affected in a pejorative sense their position. Also, the case of concessions for bingo gaming dealt with the legitimate expectations of concessionaires under the technical extension regime, who have seen increased their concession fee. Nevertheless, while maritime concessions issue was directly raised before the ECJ, these last two issues were brought before the ItCC first. Finally, a different case, still concerning the right to good administration, specifically, the duty of transparency of public administrations, was raised only before the ItCC.

6. The self-executing nature and direct effects of the relevant EU directives

The consolidation and incorporation into the Constitution of the theory of integration between European and national legal systems has led administrative jurisprudence to consider EU law as a direct parameter of legality of administrative activity[54]. By contrast to civil law and criminal case law, administrative law judgments concern the

[53] The need to protect legitimate expectations was recognised by the Advocate General's conclusions of 25 February 2016 in Promoimpresa judgment of 14 July 2016 quoted above (note no.6) for justifying the admissibility of a 'case-by-case' extension of state concessions, based on the possible need to amortise the concession holder's excess investments, as opposed to the indiscriminate and generalised ex lege extension, which is contrary to EU law.

[54] See, *ex multis*, Council of State sez. V, 10 January 2003, n. 35, 4 Urbanistica e Appalti 422 (2003), with coment by C.E. Gallo, *Impugnazione, disapplicazione ed integrazione del bando di gara nei contratti della p.a.: una pronuncia di assestamento.* On the effects of the administrative act in violation of EU law see, among many, G. Gardini, *Rinvio pregiudiziale, disapplicazione, interpretazione conforme: i deboli anticorpi europei e la "forza sovrana" dell'atto amministrativo inoppugnabile*, 1-2 Dir. amm. 217-263 (2014); G. Massari, *L'atto amministrativo antieuropeo: verso una tutela possibile*, 3-4 Riv. ital. dir. pubbl. comunitario 648-651 (2014). C. Feliziani, *Il provvedimento amministrativo nazionale in contrasto con il diritto europeo. Profili di natura sostanziale e processuale*, Ed. Scientifica, Naples, 2023.

legitimacy of a decision assumed by a public body, that is itself compelled by EU law, to the extent that it must give direct application to secondary EU law, «when the conditions under which individuals may rely on the provisions of a directive before the national courts are met»[55]. Most administrative law cases concern the application of secondary EU legislation, as large areas of administrative law are regulated by EU provisions. Therefore, in this field, the choice to refer the issue to the ECJ is often justified by the need to clarify the direct applicability of EU secondary legislation by the public administration in that specific case.

Regarding the case of beach concessions, the Lecce Regional Administrative Court ruled out the direct applicability of the EU directive, holding that its disapplication would result in a regulatory vacuum and a state of absolute legal uncertainty, being a so-called disapplication in the absolute sense, with an effect of "mere exclusion" (obstructive disapplication), with the risk of attributing excessive discretion to the individual public servant. Moreover, the literature expressed its concerns over the effects in *malam partem* that the non-application of national law may produce[56] and on the 'inverted vertical effect' of the directive[57]. Concerns that seem to be confirmed by the Criminal Court of Cassation's decision that ascertained the offence of abusive occupation of State-owned space, in relation to a concession that was not considered to fall within the scope of the tacit extensions provided for by Italian law[58].

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[55] ECJ, 22 June 1989, in case- 103/88, Fratelli Costanzo. See also Constitutional Court, Judgment of 11 July 1989, No. 389. On the interplay between direct effect, primacy, and disapplication and on the legitimate derogations from the obligation to disapply see D. Gallo *Effetto diretto del diritto dell'Unione europea e disapplicazione, oggi*, 3 Oss. fonti 5 (2019), and Id. *Rethinking direct effect and its evolution: a proposal*, 1 European Law Open 576-605 (2022).

[56] E. Cannizzaro, *Demanio marittimo. Effetti in malam partem di direttive europee? In margine alle sentenze 17 e 18 dell'Ad. plen. del Consiglio di Stato*, cit.

[57] P. Otranto, *Illegittima proroga ex lege della concessione balneare e reato di "abusiva occupazione dello spazio demaniale". Cronaca di un finale annunciato (nota a Cass. pen.22 aprile 2022 n. 15676)*, Giustiziainsieme.it (2022). On the notion of reverse vertical effects of directives see, for all, L. Daniele, *Diritto dell'Unione europea*, 292 ss. (2020).

[58] Court of Cassation, third section, Judgement No. 15676 del 13 aprile 2022, in Diritto & Giustizia, fasc. 78, 2022, pag. 10, with comment by D. Galasso, *La proroga legale non scrimina l'occupazione abusiva se non c'è una precedente concessione*. See, also, L. Boccacci,

Also, in the case law on game and betting concession, the Council of State denied the direct application of the so-called Concessions Directive[59], since the reasons for the possible conflict with EU law would not have been immediate, nor sufficiently clear, precise, and unconditional. The power of disapplication was, therefore, subject to a previous ruling by the Court of Luxembourg with the aim of clarifying the compatibility of the domestic provision with EU law. Finally, in the age discrimination case law, the Courts considered that «the possible conflict is not such that it can be overcome by direct application of the national rule in favour of the European rule»[60], (namely, the directive on equal treatment in employment and occupation).

7. Concluding remarks

The analysis carried out shows an overall reluctancy of the Administrative Courts to adhere to the "dual preliminarity" doctrine stated in the ItCC Judgement No. 269/2017. When rights protected by the Constitution and the CFREU are at stake, the administrative law judges tend to prefer to raise the issue before the ECJ for a preliminary ruling, even when the ItCC has already stated on the issue.

In the case law examined in part 2, Administrative Courts have simply excluded the relevance of fundamental rights and referred the issue only to the ECJ.

In the case law analysed in part 3, the Courts raised the constitutional legitimacy issue first, without considering the "dual preliminarity" doctrine. However, after a judgment of inadmissibility or unfoundedness by the ItCC, Administrative Courts referred the issue to the ECJ for a preliminary ruling, often claiming the incompatibility of the relevant Italian provisions with the CFRUE.

In the two cases considered in part. 4, Administrative Law orders raised the constitutional legitimacy issue first, expressly

Le concessioni demaniali marittime: tra Consiglio di Stato, Cassazione e Corte di giustizia UE, 2 La Giustizia Penale 93-107 (2022).

[59] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts

[60] Council of State, IV sec. Ord. 23 April 2021, No. 3272.

considering the rights enshrined by the CFREU.

In the bingo concessions case law, even though the Regional Administrative Tribunal and the ItCC adhered to the 269/2017 doctrine, in a following ruling on the same matter, the Council of State explicitly excluded the applicability of theory of "dual preliminarity". Inexplicably, it argued for a priority referral to the CJEU, employing the exact same arguments of the case law on game and betting concessions, where the issue was only raised before the Luxemburg Court and excluded the involvement of fundamental rights.

In the case on the duty to publish public managers income data, the Administrative Court's order was issued earlier than judgement No. 269/2017. Nevertheless, the following ItCC judgment was issued later and expressly considered the "dual preliminarity" doctrine, adding some further clarifications to it. It specified that the application of the doctrine is possible when secondary legislations a stake (in that case, concerning the right of privacy) is «in singular connection with the relevant provisions of the CFREU: not only in the sense that they provide specification or implementation of them, but also, in the reverse sense, that they have constituted "models" for those norms, and therefore participate in the evidence of their very nature»[61].

The majority of the administrative case law examined concerned the application of EU secondary legislation, and contain a generic reference to the Charter, «for the simple literal similarity of its provisions to those of the Constitution (or the ECHR), without any reference to how those provisions were elucidated and constructed in the case law concerning same or similar situations»[62].

This is particularly evident in the first orders examined, where the fundamental rights at stake concern economic relations, linked to the requirements of liberalization, protection of competition and integration of the single market. In the beach concessions cases, for example, the referral to the ECJ appears justified by the fact that the constitutional principles in these matters have been profoundly affected by EU law, that Italian legislation on the matter was already subject of an infringement proceeding, that the ECJ already ruled on

[61] Constitutional Court, Judgement of 23rd January 2019 No.20, point No. 2.1.
[62] M. Massa, *The «dual preliminarity» doctrine in the case-law of ordinary courts of first instance and appeals*, in this Special Issue, 30.

the matter, leaving open some questions, and that the national Courts have taken conflicting positions with reference to the direct effect of the relevant directive.

More generally, it appears that the Administrative Courts did not deepen the nature of the secondary legislation considered and tend to choose the Luxembourg route even in cases concerning, for example, the principle of equality or the right to work.

In some cases, the same issues were referred to the ECJ, as questions of interpretation of EU law, after a declaration of unfoundedness, in terms of constitutional legitimacy. The possibility of referral to the CJEU for a preliminary ruling, even in cases already examined by the ItCC, has been confirmed by the ItCC itself and constitutes a fundamental guarantee of the maintenance of the principle of the primacy of EU law over national rights.

Nonetheless, some of the issues examined by the administrative jurisprudence are of fundamental importance, from an economic, political, social, and of the interests at stake, point of view. This seems to make it advisable for the judge of laws to intervene, also in the light of EU law, and not to allow that the same issue is subsequently called into question by a different judge, endowed with different sensitivities and powers, as to avoid that «kind of forum shopping» referred to in the previous chapter[63].

In the light of the reconstruction carried out, it seems desirable that the administrative law judges will be more prone to exploit fully the potential applicability of the doctrine of ItCC Judgment No. 269/2017.

The assessment of the constitutional legitimacy of the legislative provisions contested in the examined case law would have been enriched, if the inherent nature of the fundamental rights contained in the Charter of Nice and constitutionally protected had been taken into consideration. The referral to the ItCC of the decision would have allowed for a more complete weighing, aware of the implications of the decision on the right of free competition, of ownership, on the protection of the legitimate expectations, as well as

[63] M. Massa, *The «dual preliminarity» doctrine in the case-law of ordinary courts of first instance and appeals*, in this Special Issue, 37.

on the free private economic initiative, interpreted in light of European principles.

Secondly, such a solution would have allowed the administrative Court to overcome the problem of the debated relationship between direct effectiveness and direct applicability of the directives in the domestic legal system and would have removed it from the criticism of adopting decisions, in fact, exceeding the boundaries of jurisdictional power (especially in the case of maritime concessions).