Review of European Administrative Law

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The obligations for administrative authorities in light of the relationship between national and EU law, by Angela Cossiri

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On 20 April 2023 (*Comune di Ginosa* case C-348/22), the CJEU mainly upheld the legal framework regarding occupation of State-owned maritime property for tourism and recreational activities. There is a persistent and radical divergence between Italian and EU law in this matter, identified by the CJEU in *Promoimpresa* (joined Cases 458/14 and C-67/16), by the Plenary Assembly of the Italian Council of State (judgments nn.17 and 18/2021; 2192/2023; order n.8184/2023) and by the President of the Italian Republic, who addressed a letter on the question to the Presidents of the Chamber of Deputies and Senate and the President of the Council of Ministers on 24 February 2023.

EU law imposes the application of a transparent and competitive selection procedure for the authorisation of the economic exploitation of a public area on an exclusive basis, in the event of scarcity of natural resources. Consequently, the legislation entailing blanket and automatic renewals of the incumbent concessions is not in conformity with European law. The decision specifies that the absence of a cross-border interest does not change the assessment. Article 12 paragraphs 1 and 2 of the [illegible]e 2006/123/CE necessitate that Member States apply an unbiased and open selection procedure [illegible] potential contenders. The prohibition on the automatic renewal of an authorisation is uncondi[illegible]nd sufficiently precise to be regarded as having direct effects.

In points from 76 to79, the CJEU confirms that both national judges and administrative authorities, including municipalities, are under an obligation to apply the unconditional and sufficiently precise provisions of the directive. They must refrain from applying national law which are incompatible with the EU regulation (*Costanzo*, C-103/88,; *Farrell*, C-413/15,).

In the *Promoimpresa* case of 2016, the CJEU attributed to the national judge the competence to determine whether the condition of scarcity of natural resources laid down in Article 12 paragraph 1 of Directive 2006/123 was met. However, in the latest *Ginosa* case C-348/22, the Court clarifies that this "cannot mean that the national courts alone are required to ensure that that condition is satisfied. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources, any administrative authority is required under that provision to organise a selection procedure for potential candidates and to ensure that all the conditions laid down in that provision are satisfied, if necessary by disapplying any incompatible rules of national law" (point 78).

This reflection does not deal with the method of verifying the scarcity of natural resources, a topic on which the judgement provides some elements. Instead, it is focused on the assessment of the direct effect, in connection with the obligation to disapply conflicting national provisions, which lies with the national judges and with the administrative public authorities, including municipal authorities.

The Council of State has reached the same conclusion, as echoed in its 2021 rulings (nn.17 and 18).

Two main aspects have to be emphasised.

1. **Adaptation to EU law**

With regards to the obligation of local authorities to disapply domestic regulations that contradict self-executing EU rules, the situation appears to be established. The Italian Constitutional Court (judgement 389/1989), following the CJEU's *F.lli Costanzo* judgement, considered that in the Italian legal system, all competent authorities responsible for applying laws have a legal obligation to disapply internal provisions that are incompatible with self-executing EU provisions. These judicial and administrative institutions must acknowledge the directly enforceable EU directive, while also disapplying any State or regional law that contradicts it.

Moreover, the Constitutional Court emphasised that Member States must also make the necessary changes to their legislation in order to eliminate, *erga omnes*, any incompatibilities or disharmonies with

EU rules. There are, first of all, reasons from the national law perspective, linked to the principle of legal certainty. Disapplication is a way of resolving antinomies which, presupposing the simultaneous applicability of the conflicting rules, does not have an effect on their existence. In particular, it does not lead to the annulment or modification of those provisions. The maintenance of national rules that are incompatible with EU law means that different *inter partes* decisions can be assumed case-by-[illegible] the detriment of the principle of formal equality. From an EU law perspective, the revision of na[illegible]aw is an essential guarantee of the primacy principle: EU law must be effective and directly applic[illegible] throughout all member States without any reception and implementation of domestic acts (Ita[illegible] Constitutional Court, nn. 183/1973 and 170/1984).

The legal base of direct effect is traditionally identified in Article 11 of the Italian Constitution, which authorises the limitations of sovereignty as may be necessary to promote and foster international organisations aimed at ensuring peace and justice among nations. By joining the Community Treaties, Italy became part of a broader order of a supranational nature, surrendering part of its sovereignty, including its legislative power, in the areas covered by the Treaties. The only limit is the inviolability of the principles and fundamental rights guaranteed by the Constitution. The national and EU systems are autonomous and self-governing, but also cooperate and interact with each other. The "incorporation" of EU law, which is directly applicable, into the national legal system is the consequence of the recognition of its derivation from an (external) source with a reserved competence. According to the *Granital* doctrine (judgment n.170/1984), directly applicable EU law prevails over national law in the field reserved to it, without producing any extinguishing effects. More precisely, any conflict between EU law that is directly applicable and domestic law does not produce abrogation or derogation, nor does it lead to forms of annulment or cancellation due to the invalidity of the incompatible domestic provision. Domestic law clashes with a rule originating from an external source, which has its own legal regime and is authorized to create law within its distinctive area of competence. On the other hand, it leads to a suspension of the latter, albeit temporary and within the material boundaries where EU competences are authorized to operate.

The adaptation of the domestic legal system to Eu law, which resulted from the constitutional jurisprudence described above, was confirmed in Article 117 paragraph 1 of the Constitution, which was introduced with the constitutional reform of 2001. It obliged the national lawmakers to respect EU law, thus confirming the role of EU norms as an intermediate parameter of constitutional legitimacy, regardless of their self-applicative character. In judgments nn. 348 and 349 of 2007, the Italian Constitutional Court emphasised the distinction between ECHR rules and EU rules, confirming its previous orientation. International law binds the State, but does not have direct effect (id. judgments n. 80 of 2011). It is the responsibility of the judge to interpret the domestic norm in a manner that is consistent with the international provision, to the extent that this is permitted by the text of the norm. But if the conforming interpretation is not possible, he must refer the question of legitimacy to the Constitutional Court, appealing to Article 117, paragraph 1. EU law, on the other hand, produces direct effects and national judges are competent to apply it in disputes brought before them, without using any conflicting national rules.

2. Direct effect and vertical relations

The CJEU's elaboration of the notion of direct effect was functional to the development and consolidation of European integration: the doctrine of direct effect has guaranteed the primacy of EU law over domestic law, even in the case of non-compliance of the State's legal system with an act, as a directive, that is not directly applicable. Direct effect, as a characteristic of the rule emerging through interpretative activity, has a sanctioning aspect of the State's non-fulfilment and a guarantee a[illegible] the right (rectius: the advantage) claimed by individuals under the EU law.

That is the reason why direct effects are recognisable only in so-called vertical relations betwe[illegible] private subjects and the State and only *in bonam partem*. This excludes the possibility of the State from benefiting from its own breach, producing through direct effect a disadvantage for the subjects (individuals or companies) who have relied on domestic law.

Italian Constitutional Court Judgment n.389/1989 held that direct effect is the characteristic of a rule from which persons operating within the legal systems of the Member States may derive legal situations that are directly protectable by a judge. The case examined by the Constitutional Court was a conflict between different entities of the State: on the one hand, the central government, representing the State level, and on the other hand the Autonomous Province of Bolzano, which contested the invasion of the competences assigned by the Constitutional level.

In the case of occupation of State-owned maritime property, the conflict arises in front of the internal administrative judge between the independent administrative Authority for the market and the competition and the central government. The public nature of the body requesting recognition of direct effect does not appear to be relevant, what is rather relevant is the content of the EU rule.

A EU rule may have direct effect, if:

a. it is sufficiently precise, unconditional, and clear and
b. it gives rise to rights (or advantages) recognised to individuals that can be claimed.

Both the requirements seem to be present in the commented case.

a) The present case concerns a negative obligation imposed by EU law on the Member State to refrain from certain acts, namely the automatic extension of authorisations. As a prohibition, the rule is considered by its very nature to be unconditional. That is why in front of a prohibition for the Member State the test of whether the requirement of clarity, precision and unconditionality is met is applied by the CJEU in a very bland manner, or even taken for granted. No further domestic legislation is required to implement the EU rule. It is sufficient that the State does not maintain or introduce a measure which prevents the effects of the EU rule from unfolding.

b) Article 12 paragraphs 1 and 2 of the Services Directive could attribute positive legal positions to private entities, as private companies or entrepreneurs, potentially interested in the beach tourism services market, who are excluded from entering the market, because there are no areas available for public selection procedures. The Italian Market and Competition Authority acts in the public interest, such as the principle of competition, consumer protection and the freedom of establishment. Behind those

general interests, on a substantive level, diffuse interests and subjective legal positions of advantage, directly deriving from EU law, can be identified. Those interests, in terms of refundable missed opportunities, concern privates and derive from EU law. The individual in question could invoke the prohibition contained in the European rule; what s/he wants to obtain is the realisation of an advantage as a result of the disapplication of domestic rules. The individual does not directly obtain a fav legal position from EU law. Instead, s/he relies on an EU rule to obtain the disapplication of a unfavourable rule coming from domestic level; the benefits result from the modification of the ory situation. The doctrine has referred to “objective/opposite” direct effects in order to qualify th produced by an EU rule, which may consist in the disapplication of a national rule contrary to EU law, even apart from the direct attribution of an individual favourable position deriving from the EU rule. When a domestic law, in violation of EU law, is “outclassed”, the “surviving” national law is again applicable. In this sense, EU law protects individuals from detrimental domestic rules (D. Gallo, *Effetto diretto del diritto dell’Unione europea e disapplicazione*, 2019). The *in malam partem* effects, that would fall on incumbent concessionaires, are produced directly by the internal law, once domestic law has been adapted to EU law. Based on this reasoning, it is not relevant if, in addition to the benefit for someone, there is a restriction of individual prerogatives for someone else (in-depth analysis in D. Gallo, *L’efficacia diretta del diritto dell’Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa*, Giuffrè, 2018).

A continuation of the conflict is envisaged: the administrative judge declared the authority’s appeal inadmissible due to lack of interest, as a consequence of *ius superveniens* constituted by a new shorter automatic extension established by law of the State (TAR Lecce, nnn.1223 and 1224/2023).

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