

## THE CONSTITUTIONAL COURT AND BEACH CONCESSIONS

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Italian Regional laws on State-owned maritime concessions protect the interests of current concessionaires. However, the Constitutional Court considers, on the first hand, that the national legislator has the competence on competition matter and, on the second hand, that the protection of this constitutional interest prevails over regional matters. The essay reviews this case-law and highlights its limits.

## TABLE OF CONTENTS

1. Introduction.....	323
2. Beaches and the pandemic.....	324
3. Duration of concessions.....	325
4. Economic benefit.....	328
5. Other benefits.....	329
6. Conclusions.....	330

**1. Introduction**

The desire on the part of the regions to favour concession holders is apparent throughout the constitutional case law on beach concessions. On the other hand, the Government is more sensitive to the need to protect competition, and thus also to the interests of potential new operators. Nonetheless, the State's overall position appears to be rather ambiguous, as the legislator has recently extended, yet again, concessions over the State-owned maritime property.

The case law of the Constitutional Court starts from the premise that the issue of beach concessions involves the intersection of matters under respectively State and regional competence. However, the Court takes the view that protection of competition, over which the State has competence, is without doubt more weighty than other interests, and this argument has inevitably led

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it to conclude that the respective regional legislation is unconstitutional.

The Constitutional Court's case law also takes account of the Services Directive, which aims to remove barriers to the freedom of establishment for service providers and obstacles to the free movement of services within the European Union<sup>1</sup>. These are rules that also apply to the beach concessions sector<sup>2</sup>.

## 2. Beaches and the pandemic

Holders of concessions over State-owned maritime property granted for tourist and recreational purposes have also been eligible to benefit from the packages adopted in Italy to support

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<sup>1</sup> For an up-to-date discussion of the issues, see M. Conticelli, *Il regime del demanio marittimo in concessione per finalità turistico-ricreative*, 4 Riv. trim. dir. pubbl. 1069 (2020); F. Gaffuri, *La disciplina nazionale delle concessioni demaniali marittime alla luce del diritto europeo*, 3 Ceridap 37 (2021); A. Giannaccari, *Stessa spiaggia, stesso mare. Di concessioni demaniali marittime e (assenza di) concorrenza*, 2 Mercato Concorrenza Regole 307 (2021); R. Rolli, D. Granata, *Concessioni demaniali marittime: la tutela della concorrenza quale Nemese del legittimo affidamento*, 5 Riv. giur. ed. 1624 (2021); G. Sorrentino, *L'insostenibile proroga delle concessioni del demanio marittimo tra tutela della concorrenza ed esigenze di ripartenza*, 2 Amministrativamente.com (2021). For an overview of the choices made in various countries see G. Cerrina Feroni, *La gestione del demanio costiero. Un'analisi comparata in Europa*, 4 Federalismi.it 43 (2020); A. Monica, *Le concessioni demaniali marittime in fuga dalla concorrenza*, 2 Riv. it. dir. pubbl. comunit. 437 (2013).

<sup>2</sup> The Court of Justice of the EU has held that "Article 12(1) and (2) of Directive 2006/123/EC (...) must be interpreted as precluding a national measure (...) which permits the automatic extension of existing authorisations of State-owned maritime and lakeside property for tourist and leisure-oriented business activities, without any selection procedure for potential candidates" (judgment of 14 July 2016 in Joined Cases C-458/14 and C-67/15). On this issue see M.E. Bartoloni, *Le concessioni demaniali marittime nel contesto delle libertà di circolazione: riflessioni sulla sentenza Promoimpresa*, in A. Cossiri (ed.), *Coste e diritti. Alla ricerca di soluzioni per le concessioni balneari* (2022); L. Di Giovanni, *Le concessioni demaniali marittime e il divieto di proroga ex lege*, 3-4 Riv. it. dir. pubbl. comunit. 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*, 2 *European Papers* 767 (2017); A. Cossiri, *La proroga delle concessioni demaniali marittime sotto la lente del giudice costituzionale e della Corte di giustizia dell'UE*, 14 *Federalismi.it* 1 (2016); M. Magri, *Direttiva Bolkestein e legittimo affidamento dell'impresa turistico balneare: verso una importante decisione della Corte di giustizia U.E.*, 4 Riv. giur. ed. 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*, 2 Riv. reg. merc. 182 (2016).

economic sectors particularly affected by the pandemic. In particular, one regional law extended the duration of concessions until 2033 with the stated purpose of combatting the epidemiological emergency<sup>3</sup>.

However, the Government challenged the regional legislation before the Constitutional Court on the grounds that it violates the principle of protection of competition, which falls under exclusive State jurisdiction pursuant to Article 117(2)(e) of the Constitution. The Court allowed the challenge brought by the State, confirming its settled case law according to which extensions and automatic renewals of beach concessions impinge upon the protection of competition in “hindering the entry of other potential economic operators into the relevant market” (Judgment no. 139/2021).

The problem therefore lies with the instrument chosen in order to support this economic sector. Had regional lawmakers chosen a simple financial subsidy, rather than extending concessions, this would not have violated the principle of protection of competition. As such, the suspicion that the actual objective of the regional legislation was to favour current concession holders, rather than supporting the economic sector during the pandemic, appears to be well-founded.

### 3. Duration of concessions

As is shown by the Friuli Region legislation, the regions have a tendency to extend the duration of beach concessions, thereby favouring the current holders to the detriment of new concession holders<sup>4</sup>. Regional legislation has pursued this goal in various ways.

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<sup>3</sup> Friuli-Venezia Giulia Regional Law no. 8/2020 entitled “Urgent measures to combat the COVID-19 epidemiological emergency with regard to the State-owned maritime and watercourse property”.

<sup>4</sup> M.C. Girardi, *Principi costituzionali e proprietà pubblica. Le concessioni demaniali marittime tra ordinamento europeo e ordinamento interno*, 1 DPER online 238 (2019). On the November 2021 judgments of the Plenary Session of the Council of State, which held that the legislative extensions breached the EU law requiring a selection procedure amongst potential interested candidates, see A. Cossiri, *L’Adunanza plenaria del Consiglio di Stato si pronuncia sulle concessioni demaniali a scopo turistico-ricreativo. Note a prima lettura*, 2 DPER online 232 (2021); A. Monica, *Il futuro prossimo delle “concessioni balneari” dopo il Consiglio di Stato: nihil medium est?*, 1 Ceridap 63 (2022); Vv.Aa., *La proroga delle “concessioni balneari” alla luce delle*

First of all, regional laws may provide for the automatic renewal of concessions<sup>5</sup>. The Court objects that any such automaticity “gives rise to unequal treatment between economic operators in breach of the principles of competition, as those who have not previously managed the State-owned maritime property do not have any opportunity, upon the expiry of the concession, to replace the old concession holder, unless the latter fails to seek an extension or applies for one without presenting a valid investment programme” (Judgment no. 180/2010)<sup>6</sup>. In such cases, provision is made for the renewal of existing concessions according to transitory rules, pending the adoption of a comprehensive municipal beach plan. The Court objects that such forms of renewal end up “being exempt from public tendering procedures in accordance with principles, endorsed under Community and State law, on the protection of competition laid down in relation to the grant of new concessions, thus *de facto* permitting the simple continuation of

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*sentenze 17 e 18 del 2021 dell'Adunanza Plenaria*, 3 Dir. & soc. (2021); L. Vitulli, *La cessazione delle concessioni balneari in essere al 31 dicembre 2023 nelle sentenze dell'Adunanza plenaria n. 17 e 18 del 2021*, Diritticomparati.it (2021); M. Timo, *Concessioni balneari senza gara ... all'ultima spiaggia*, 5 Riv. giur. ed. 1596 (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*, 4 Amministrativamente.com (2021).

<sup>5</sup> One critical aspect is that the renewal was ordered in general terms by a law rather than by the administrative authorities following an assessment of the specific circumstances (see A. Giannelli, *Il rinnovo in favore del concessionario uscente quale forma di tutela del valore identitario di determinati locali “storici”: dalla dittatura della concorrenza alla dittatura della cd. eccezione culturale?*, 1 Dir. proc. amm. 186 (2019).

<sup>6</sup> The judgment (commented on by M. Esposito, *La triade schmittiana à rebours*, 3 Giur. Cost. 2167 (2010); C. Benettazzo, *Il regime giuridico delle concessioni demaniali marittime tra vincoli U.E. ed esigenze di tutela dell'affidamento*, 25 Federalismi.it 16 (2016)) states that “this case concerns an extension of a concession that had already expired, and therefore there was no legitimate expectation to be protected in terms of the need to have sufficient time to recoup the costs incurred in order to obtain the concession because, at the time it was issued, the concession holder was already aware of the period of time it could expect to have in order to recoup the investments, on which it was able to rely”. This approach is confirmed by judgment 340/2010 (commented on by G. Lo Conte, *Rinnovo di concessione di beni demaniali e tutela della concorrenza: un matrimonio impossibile*, 2 Gazzetta amministrativa 32 (2011)) and by judgment 213/2011 (on which see A. Greco, *Il legislatore interviene (ancora) in materia di demanio marittimo. Problemi di costituzionalità e “tenuta comunitaria” nel bilanciamento tra tutela dell'affidamento, libera concorrenza e parità di trattamento*, 4 Federalismi.it 6 (2011)).

existing concession relations, with extensions being essentially automatic – or in any case not subject to competition law – for existing concession holders” (Judgment no. 10/2021)<sup>7</sup>.

Secondly, regional laws may transform seasonal concessions into concessions that last for a number of years. The Constitutional Court has also held that such arrangements violate the principle of the protection of competition as the transformation results in concessions of indefinite duration “for one single holder, who is thus unjustifiably privileged over and above any other potential interested party” (Judgment no. 10/2021).

Thirdly, regional laws may grant an extension to concessions in the event of storm surges and/or exceptional weather events that cause damage to beach resorts, to State-owned property or to the respective immovable property built on State-owned maritime property<sup>8</sup>. The Court has held that any such measure will violate the constraints imposed by EU law on the freedom of establishment and the protection of competition. In addition, a measure of this type results in “different treatment for different economic operators, in breach of Article 117(2)(e), as those who have not been managing the State-owned maritime property will not have any opportunity to replace the previous concession holder upon expiry of the concession”. In addition, “it prevents the entry of other potential economic operators into the market, imposing entry barriers liable to distort competition” (Judgment no. 171/2013).

Fourthly, regional laws may extend the duration of concessions with the aim of creating “appropriate guarantees for the maintenance of the right to continuity of concessions”<sup>9</sup>. The Constitutional Court’s response is that the purpose of protecting “the legitimate expectations of and legal certainty for local operators cannot offset the violation caused by the provision under examination of the State’s exclusive competence over the protection of competition” (Judgment no. 1/2019)<sup>10</sup>. This judgment also recalls

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<sup>7</sup> On the judgment, see 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 (2021); M. Romeo, *La Corte costituzionale interviene nuovamente in merito alla disciplina della proroga delle concessioni demaniali marittime da parte di leggi regionali, pronunciandosi sulla legge della Regione Calabria n. 46 del 25 novembre 2019*, *Dirittiregionali.it* (2021).

<sup>8</sup> Liguria Regional Law no. 24/2012, Article 1.

<sup>9</sup> Liguria Regional Law no. 26/2017, Article 1.2.

<sup>10</sup> A. Lucarelli, *Il nodo delle concessioni demaniali marittime tra non attuazione della Bolkestein, regola della concorrenza ed insorgere della nuova categoria “giuridica” dei*

European law in noting that the excessive duration of the concessions in place entailed a tangible risk of inefficient management.

Fourthly, regional legislation may grant an extension even to operators who do not fulfil the statutory prerequisites. According to the Constitutional Court, this legislation violates the EU law principles of free competition as well as Article 117(1) of the Constitution, which provides that State and regional laws must respect the constraints imposed by European law. "In particular, in permitting the automatic renewal of the concession, the regional provision violates the principle of competition in that those who have not previously been managing the State-owned maritime property are not allowed any opportunity to replace the previous concession holder upon expiry of the concession" (Judgment no. 233/2010).

Under all of these circumstances, the Court has clearly objected to the extension of beach concessions in the name of free competition. However, in some cases it would have been appropriate for the constitutional review to have assessed whether the legislation providing for the extension was reasonable and proportionate, with the aim of favouring a gradual move to a competitive regime based on public tendering procedures, as is required under EU law<sup>11</sup>.

#### **4. Economic benefits**

In some cases, the regions have directly protected the economic interests of concession holders. For example, a law enacted by Tuscany Region provided that the incoming concession holder was obliged to pay compensation to the outgoing concession holder. The Court ruled that provision unconstitutional on the grounds that it violated the principle of the protection of competition on the grounds that it interfered with "the ability to

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*beni comuni* (Nota a C. cost., sentenza n. 1/2019), 1 *Dirittifondamentali.it* 1 (2019); L. Longhi, *Concessioni demaniali marittime e utilità sociale della valorizzazione del patrimonio costiero*, 1 *Riv. Corte dei conti* 184 (2019); G. Dalla Valentina, *La proroga ope legis delle concessioni demaniali marittime dalla sent. 1/2019 della Corte costituzionale al Decreto Rilancio*, 5 *Le Regioni* 1196 (2020).

<sup>11</sup> S. Agosto, *Gli incostanti approdi della giurisprudenza amministrativa sul tema delle concessioni del demanio marittimo per finalità turistico ricreative*, 5 *Riv. it. dir. pubbl. comunit.* 648 (2020).

access the relevant market and that market’s uniform regulation, as it may establish a disincentive for undertakings other than the outgoing concession holder to participate in tendering procedures leading to the award” (Judgment no. 157/2017)<sup>12</sup>.

In another case, regional lawmakers had relied on an economic argument to justify extending the duration of concessions, as the provision referred to the period of time necessary for the cost of investments to be recouped in addition to a fair return on the capital invested. The Court however struck down this legislation on the grounds that it concerned a “matter reserved to the exclusive competence of the State legislator, which alone has authority to adopt uniform provisions to govern the arrangements applicable to and the limits on protection for the legitimate expectations of existing concession holders within selection procedures for the award of new concessions” (Judgment no. 1/2019)<sup>13</sup>. In a similar case, the challenge brought by the Government noted that the provision allowed for the prolonged usage of a scarce resource, thereby limiting competition, which proved to have a “particularly regressive effect, as against the requirements to enable the amounts invested to be recouped in full along with a full return on the capital invested by the concession holder”, which underpinned the regional law. Judgment no. 109/2018 endorsed this view, and declared the regional provision unconstitutional<sup>14</sup>.

## 5. Other benefits

The regions have also favoured concession holders in other ways. For example, one regional law purported to create the notion

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<sup>12</sup> This approach is confirmed by judgment 109/2018 and by judgment 222/2020 (commented on by 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*, 5 *Giur. cost.* 2475 (2020), who argues that the compensation paid to the outgoing concession holder “interferes with the ability to access the reference market and its uniform regulation, as it may constitute a disincentive for undertakings other than the outgoing concession holder against participating in the competition that establishes the legitimate expectation”.

<sup>13</sup> The judgment is commented on by A. Lucarelli, *Il nodo delle concessioni demaniali marittime*, cit. at 10.

<sup>14</sup> On the judgment, see A. Lucarelli, L. Longhi, *Le concessioni demaniali marittime e la democratizzazione della regola della concorrenza*, 3 *Giur. cost.* 1251 (2018).

of “Ligurian beach undertaking”, i.e. those which, “in characterising the coastal landscape, constitute part of the historical and cultural heritage and social fabric of the Region”<sup>15</sup>. The problem was that, as a result, award procedures favoured those undertakings that were already operating on the Ligurian coast, which “are the only beach undertakings ‘characterising the coastal landscape’, and that (...) can be imputed to the ‘historical heritage’ and cultural fabric of Liguria” (Judgment no. 221/2018)<sup>16</sup>.

Another example concerned a regional law governing situations in which concessions no longer complied with a municipal coastal plan. The law safeguarded concession holders in two ways: either by changing the area covered by the concession in order to compensate them for the part that had been withdrawn owing to the failure to comply with the plan “or by geographically moving the concession entitlement, entailing its outright transfer to an area different from that originally granted”. Judgment no. 40/2017 held that such a measure was tantamount to the issue of a new concession and violated the principle of protection of competition as it would be adopted without having followed an open and transparent public tendering procedure among economic operators<sup>17</sup>.

In a third example, a regional provision required municipalities to guarantee that the issue of new concessions would not “interfere with the legitimate expectations of beach operators that hold concessions”<sup>18</sup>. This provision was struck down by the Court as it allowed the municipalities to decide, at their discretion, whether to adopt measures that would interfere “with the protection of free competition and equal treatment for all aspiring concession holders” (Judgment no. 118/2018).

## 6. Conclusions

The constitutional case law on beach concessions features two main aspects. First of all, it is apparent that regional lawmakers

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<sup>15</sup> Liguria Regional Law no. 25/2017.

<sup>16</sup> The judgment is commented on by G. Dimitrio, *Stato, regioni e fascia costiera: un mercato unico nazionale per le “imprese balneari”*, 4 Giorn. dir. amm. 478 (2019).

<sup>17</sup> On the judgment, see M. Esposito, *Corte di giustizia UE e Corte costituzionale sottraggono allo Stato italiano la competenza sul regime della proprietà*, 1 Giur. cost. 370 (2017).

<sup>18</sup> Abruzzo Regional Law no. 30/2017, Article 3.3.



have consistently paid attention to existing concession holders as a group, which are protected through a wide variety of mechanisms, whereas the same regional lawmakers do not appear to have any awareness of issues relating to free competition among economic operators. Secondly, the Court has ascribed a central role to the protection of competition. However, the Constitutional Court has not explained why this matter under exclusive State competence should prevail over others, for example over matters under residual regional competence, such as tourism.

In actual fact, a recent decision has thrown this issue into sharp relief in asserting that “the significance of protection of competition cannot be considered to be so pervasive as to preclude any scope whatsoever for action by the regions in this area” (Judgment no. 161/2020). The judgment sets out a criterion: regional competence “must take second place behind the exclusive competence of the State over competition only where the substance of the legislation ends up affecting the manner in which the contracting party makes its choices, where it interferes with the competitive structure of the market to such an extent as to impair the free conduct of entrepreneurial initiatives”. Nonetheless, all of the regional laws referred to the Court to date interfere more or less directly with the manner in which a contracting party makes its choices. As such, this criterion does not appear to be capable of significantly altering the approach taken within constitutional case law.