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THE IMPACT OF EU LAW ON
THE SYSTEM OF
CONCESSIONS
FOR NAUTICAL PORTS IN
ITALY

PART ONE: THE LEGAL REGIME CONCERNING THE BUILDING AND OPERATION OF LEISURE PORTS IN ITALY

The regulation contained in the President of the Italian Republic Decree 2 December 1997, n. 509

Principles:

Companies interested in the building and operation of a leisure harbour (marina) must submit a formal request of concession to the competent Municipality, including the harbour project and the related business plan (including all financial aspects)

Very simplified procedure, which ends up in an administrative “conference”, to which all the competent authorities participate and give their authorization to the initiative.

The duration of the concession and the amount of the concession fee is directly related to the amount of the investment needed;

In case of future investments necessary for the further development of the port, the duration of the concession can be correspondingly extended

PART ONE: THE LEGAL REGIME CONCERNING THE BUILDING AND OPERATION OF LEISURE PORTS IN ITALY

Problems:

The possibility to have an extension the concession period is it compatible with the EU law?

Can a law approved by the Parliament after the signature of the concession contract increase the amount of the concession fee?




PART TWO: THE LEGAL REGIME OF THE CONCESSIONS OF THE PUBLIC (MARITIME) DOMAIN FOR USE RELATED TO TOURISM ACTIVITIES AND THE POSSIBILITY OF THEIR PROROGATION AND THE EUROPEAN LAW

Article 37 of the Italian Navigation Code (1942): The favour for the previous concessionaire who asks for the renewal of the concession (incumbent) vis à vis the newcomers.

The automatic renewal of the concessions (for the benefit of the concessionaire) provided by the Law n. 172/2003. The infringement proceedings commenced by the European Commission

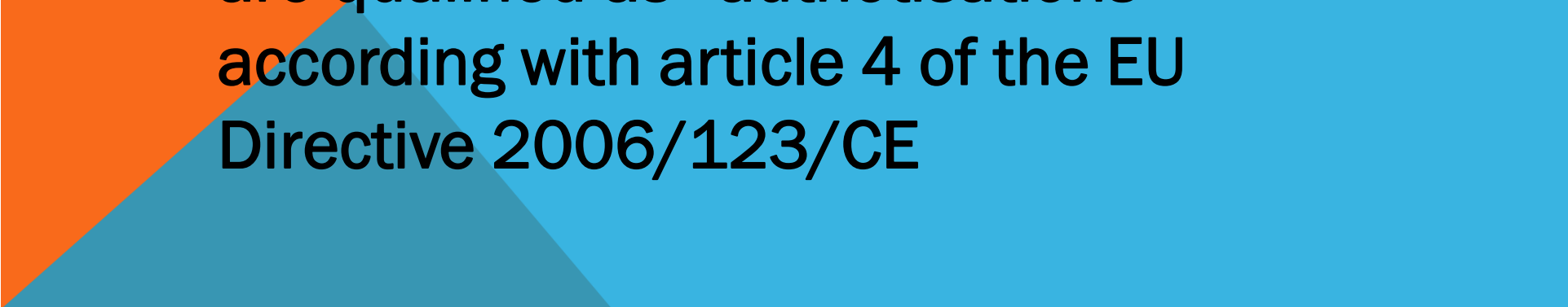
The automatic extension of all concessions of public domain areas related to tourism activities to the year 2020 according with the Law, n. 179/2012. The incidental recourse before the ECJ by two Italian administrative courts.



PART THREE: THE ECJ DECISION DATED 14 JULY 2016 (C-458/14)

The concessions of public domain areas are excluded from the field of application of the EU Directive n. 2014/23 (“Concessions Directive), according with paragraph 15 of the preamble.

The concessions of public domain areas are qualified as “authorisations” according with article 4 of the EU Directive 2006/123/CE



EU DIRECTIVE 2066/123 (SERVICE DIRECTIVE)

Applicability of article 12 par. 1 of the EU Directive 2066/123

- 1. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity, Member States shall apply a selection procedure to potential candidates which provides full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch, conduct and completion of the procedure.**



PART THREE: THE ECJ DECISION DATED 14 JULY 2016 (C-458/14)

The approach adopted by the ECJ is not correct, because the concessions of public domain areas, within the Italian legal system, cannot be considered as a peculiar form of authorisation to provide services, but must be qualified as “concession of goods”. This is confirmed by the content of a number of Italian law provisions and was recognized in the past by the the ECJ itself (ECJ 27 ottobre 200, C-174-06, in which a concession of public domain areas was qualified as a leasing of real estate contract). Therefore the EU Directive 2006/123/CE is not applicable.



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In any case, in the decision dated 14 July 2016, the ECJ established that article 12 of the Directive 2006/23/CE applies only if

1) the scarcity of the resources is effectively ascertained in the case concerned by the member state competent authority:

“As regards the question of whether those concessions are necessarily subject to a limited number of authorisations on account of the scarcity of natural resources, it is for the referring court to determine whether that condition is satisfied. In that regard, the fact that the concessions at issue in the main proceedings are not granted at national level but at a municipal level must be taken into account in establishing whether such State land available for economic exploitation is scarce”.



PART THREE: THE ECJ DECISION DATED 14 JULY 2016 (C-458/14)

2) that the legitimate expectations of the persons who concluded a contract of concession when the law allowing the prorogation of the concessions was in force should be protected.

«the protection of legitimate expectations as a justification entails an assessment on a case-by-case basis whether the holder of the authorisation could reasonably expect its authorisation to be renewed and made the corresponding investments. Such a justification cannot therefore be relied on in support of an automatic extension enacted by the national legislature and applied indiscriminately to all of the authorisations at issue»



PART FOUR: THE POSSIBILITY THAT A NEW LAW INCREASES THE CONCESSION FEE APPLICABLE TO CONCESSION CONTRACTS THAT WERE ALREADY SIGNED

The Italian Council of State (Supreme administrative court) expressed the view that such a situation was in contrast with the principle of the freedom of economic activity recognized by article 41 of the Italian Constitution.

The Italian Constitutional Court, with the decision n. 29/2017, did not share such view, as, in her opinion, the increase in the amount of the concession fees was “foreseeable” for the concessionaire, in the light of the fact that the Parliament had passed a number of bill for this purposes (even if such bill has never entered in force).

It remains open the question if in such a situation the concessionaire can plead legitimate expectation as the Administration, in signing the concession contract, gave her a precise (even if implied) assurance that the concession fee would remain the same for all the duration of the concession.



EU DIRECTIVE N. 2014/23 - RECITALS

(15) In addition, certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land or any public property, in particular in the maritime, inland ports or airports sector, whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services, should not qualify as concessions within the meaning of this Directive. This is normally the case with public domain or land lease contracts which generally contain terms concerning entry into possession by the tenant, the use to which the property is to be put, the obligations of the landlord and tenant regarding the maintenance of the property, the duration of the lease and the giving up of possession to the landlord, the rent and the incidental charges to be paid by the tenant



