LUISS

Corso di laurea in Giurisprudenza

Cattedra di European Union Law

THE ITALIAN SEASIDE CONCESSIONS SAGA UNDER EU LAW

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Anno Accademico 2024/2025

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INTRODUCTION

In recent years, the issue of seaside concessions in Italy has emerged as a central and controversial topic, not only within the domestic administrative system but also in the broader context of the European Union's internal market. The so-called "seaside concessions saga" encapsulates the complex intersection of a wide range of interests.

At the European level, the Italian regulatory framework on maritime concessions has raised significant concerns regarding compliance with EU law, in particular with Directive 2006/123/EC on services in the internal market (the Services Directive) and with the principles of competition and transparency.

The need to safeguard and promote the fundamental principles of the European Union within the legal systems of the Member States – ensuring their effective respect and correct application - has been increasingly affirmed, particularly through the jurisprudence of the Court of Justice and numerous interventions by EU institutions.

More specifically, the subject addressed in this thesis concerns the freedom to provide services (Article 56 TFEU) and the freedom of establishment (Article 49 TFEU) - two of the fundamental freedoms underpinning the proper development and functioning of the EU internal market. In addition to these, the principles of free competition and non-discrimination are of particular relevance as well: the European Union requires the protection of economic operators through the establishment of competitive procedures for the award of concessions and the definition of uniform conditions for market access.

The principle of the primacy of EU law over conflicting national legislation thus imposes upon the Italian government a binding obligation to align its domestic legal framework with the provisions of the Treaties and secondary legislation in this area, notably Directive 2006/123/EC.

At the national level, however, several additional and equally relevant challenges have emerged. The core issue lies in the challenging but necessary balancing act that the Italian government must perform between complying with EU law (and the implications thereof) and safeguarding the legitimate expectations of existing concessionaires.

The European Union has already extensively recognised the unlawfulness of the repeated attempts by the Italian legislature to extend concessions through automatic

legislative renewals. These extensions have been largely motivated by political pressures and concerns about the country's economic and social stability. As will be illustrated in the following chapters, the protraction of existing concessions has been regarded as the only viable solution to protect the economic interests of thousands of businesses - many of them small-scale operators - that have been managing public coastal areas for decades without being subject to open and competitive procedures.

The Italian case has therefore led to infringement proceedings, landmark rulings by the Court of Justice of the European Union, and growing scrutiny by EU institutions, placing Italy at the centre of a significant legal and political debate on the correct implementation of internal market rules.

This thesis aims to explore the legal developments surrounding Italian seaside concessions in light of the ongoing - yet unresolved - tension between national regulatory autonomy and supranational legal obligations. In analysing the conflict between norms issued by overlapping authorities, the thesis examines the concrete implications of EU legal principles in a sector that is both economically strategic and politically sensitive for Italy.

As regards the structure of this thesis, it is divided into four chapters.

The first chapter aims to provide an overview of the legislation on seaside concessions. It begins with an analysis of Italian domestic law, outlining the various reforms introduced over the years as a result of interventions by the European Commission and judgments of the Court of Justice of the European Union, up to the current regulatory framework. It then moves on to examine EU law, focusing in particular on the general principles governing the internal market, the 2006 Services Directive, and the relevant competition rules - all in the perspective of the regulation of seaside concessions.

The second chapter focuses on the actions taken by the European Commission in response to the Italian Government's misalignment with EU principles concerning the award of seaside concessions. It also examines the most significant judgments delivered by the Court of Justice of the European Union on this matter, discussing their consequences and impact on national legislation. Similarly, the chapter reviews the most important rulings by Italian courts, at various levels, with particular emphasis on the

jurisprudence of the *Consiglio di Stato* (Council of State) and its influence on the Italian legal landscape.

The third chapter begins with an analysis - without claiming to be exhaustive - of the key principles of the direct effect and the primacy of EU law, highlighting the interaction between the two. Special attention is given to the *Van Gend en Loos* judgment, where the test for assessing direct effect was first established. The chapter continues by tracing the evolution of this test over time to its modern-day interpretation. It then focuses more specifically on the complex issue of direct effect in relation to directives, examining its vertical, horizontal, and inverse vertical applications. This discussion serves to illustrate how the principle of direct effect has had tangible implications for the Italian seaside concession system. The chapter concludes by addressing the delicate intersection between EU market rules and Member States' discretion in managing public property, with a critical focus on Article 345 TFEU and its relevance to the debate on maritime concessions.

The final chapter highlights the current situation of uncertainty in Italy, particularly regarding both the management of new tender procedures for awarding seaside concessions and the identification of fair compensation mechanisms for existing concessionaires, in compliance with EU competition rules. Several possible solutions are put forward - purely for the sake of academic discussion - to balance the protection of market competitors and the legitimate expectations generated in existing concessionaires by long-standing domestic legislation. The chapter also includes a comparative analysis of how other EU Member States - namely France, Portugal, Spain, Croatia, and Greece - have addressed similar regulatory challenges. The concluding sections offer critical reflections and propose concrete recommendations.

CHAPTER I

THE LEGAL FRAMEWORK: ITALIAN AND EUROPEAN PERSPECTIVES

1. The Italian legal framework on seaside concessions

The regulation of seaside concessions in Italy have been defined, in the last years (especially since 2006), by a complex and evolving legal framework, shaped by both national legislation and European Union law. Historically, Italy has adopted a system in which the allocation and renewal of seaside concessions have been governed by national and local authorities, granting long-term rights to current operators without open competitive procedures. This legal regime, however, has come into conflict with EU legal principles, particularly those concerning the free movement of services, freedom of establishment and fair competition.

The introduction of Directive 2006/123/EC (so-called Services Directive or Bolkestein Directive, hereinafter also "the Directive")[1], which aims to eliminate restrictions on the free provision of services within the internal market, has posed significant challenges for the Italian pre-existing regulatory system. In fact, Italy has repeatedly failed to implement a legal framework fully aligned with European requirements. Over the years, several legislative interventions and reforms have occurred, prompted by rulings from both national and European courts and infringement proceedings by the European Commission; however, these have often resulted in temporary extensions and delays, rather than providing a solution capable of resolving the issue. The lack of a definitive reform has led to continued legal uncertainty, extensive litigation and increasing pressure from EU institutions urging Italy to comply with its obligations.

The first part of this chapter will, therefore, focus on providing an overview of the legal framework governing seaside concessions, analysed from both a national and European Union perspective. Namely, an examination of the numerous changes that have characterised the Italian regulatory landscape is necessary, with the purpose of facilitating its framing within the broader context of the EU legal order. The latter will

[1] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

then be exposed, with particular attention being paid to the core principles of the internal market that influence national legislation in this field.

In order to properly understand the context in which the concessions need to be applied, the concepts of free movement of services and freedom of establishment will be assessed. Those freedoms are inherently linked to the discipline of the Services Directive, which specifically aims to enhance their effectiveness and practical enforcement within the internal market. The Directive and its scope will be presented in detail, followed by a final section devoted to a brief outline of the relevance of EU competition law in shaping the governance of seaside concessions.

1.1 Historical evolution of Italian legislation

In the framework of state-owned concessions, beach concessions for tourism and recreational purposes represent a *unicum,* compared to the wider category of state concessions that have beaches as their object as well, but with the aim of employing them for distinct purposes (e.g. industrial).[2]

According to Article 822, paragraph 1, of the Italian Civil Code[3], beaches fall within the necessary public domain of the State; as such, they are inalienable and imprescriptible. Their management was initially entrusted to the regions and later delegated to municipalities.

Before the adoption of the Services Directive, the system of seaside concessions in Italy was primarily regulated by the Shipping Code[4] and its implementing Regulation.[5]

Article 36 of the Shipping Code established that public maritime domain assets could be temporarily granted for private occupation and use, provided that such concessions were compatible with public access requirements. Concession holders were granted the right to special use of these areas in exchange for the payment of a fee to the

[2] F. Di Lascio, *Le concessioni di spiaggia tra diritti in conflitto e incertezza delle regole*, Diritto Amministrativo – n.4 – 2022, Giuffrè Francis Lefebvre S.p.A., p. 1.

[3] Italian Civil Code, approved by Royal Decree n. 262, 16 March 1942, Article 822, para 1.
[4] Italian Shipping Code, Royal Decree No. 327/1942.
[5] Presidential Decree No. 328/1952.

State, the amount of which was determined in the concession agreement and in accordance with the applicable legal provisions.

Article 37 of the same Code established a comparative evaluation procedure for applicants in cases where multiple concession requests were submitted for the same public asset. Furthermore, its second paragraph introduced a "preferential right" (*diritto di insistenza*) in favour of the previous concession holder, granting them priority over other applicants in the allocation process.

Additionally, Article 01, paragraph 2, of Decree-Law No. 400/1993, converted into Law No. 494/1993, set the duration of concessions at six years, "*regardless of the nature or type of facilities required for the activity*"[6]. Moreover, it stipulated that concessions were to be automatically renewed for an additional six years upon expiration.

Finally, the 2007 Finance Law[7] established that seaside concessions should have a duration of no less than six years and no more than twenty years.

The established practice thus provided for the automatic renewal of concessions, allowing existing holders to retain the use of public assets without undergoing a competitive selection process. This approach was intended to encourage investment by seaside operators, ensuring them long-term economic and legal stability. However, as it will be underlined by both the EU Commission and the Italian ad European courts in the subsequent years, such a system distorted the legitimate expectation of the hypothetical future concessionaires, effectively eliminating expiration dates and sanctioning the perpetual occupation of state-owned maritime property. As a result, it restricted market competition, as the lack of open bidding procedures essentially excluded potential new entrants from accessing the sector.

Directive 2014/23/EU[8], which for the first time regulated the procedures for awarding public service concessions, explicitly excluded property concessions from its scope of application. Similarly, EU case law, in the *Teleaustria*[9] ruling - which

[6] Article 01, para 2, of Decree-Law No. 400/1993, converted into Law No. 494/1993, modified by Law No. 88/2001.
[7] Law No. 296/2006, *Provisions for the Formation of the State's Annual and Multi-Year Budget*, 27 December 2006.
[8] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014.
[9] Case C-324/98 *Telaustria Verlags GmbH v Telekom Austria AG* [2000] ECR I-10745.

established the obligation to uphold the principles of publicity, transparency, and impartiality in the selection of public contractors - referred to the distinct field of public procurement and concessions for public works and services. The latter, as explicitly clarified by Article 01 of Decree-Law No. 400 of 1993[10], do not include concessions granted for tourism and recreational purposes.[11]

This framework changed with the entry into force of the Services Directive, which introduced the obligation to ensure free competition in the services market and extended its scope to include state-owned maritime concessions[12].

The Italian government formally complied with the Bolkestein Directive, but substantially continued to delay its full implementation through successive legislative measures. These interventions, often prompted by notifications and infringement procedures, failed to establish a clear timeline for compliance.

A first warning regarding competition distortions, arising from the duration and automatic renewal of maritime concessions, was issued by the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*, AGCM)[13]. In the report of 20 October 2008, the need to revise the sector through amendments to national legislation was addressed, "*aimed at overcoming the mechanisms of automatic extension and establishing tendering or public procedures, as a general rule for the award of beach concessions*"[14]. In fact, according to the AGCM, such a reform could generate economic benefits, including higher fees for the granting authority and enhanced service quality for users. The authority has expressed particular concern regarding "*distortions of competition and the proper functioning of the market*"[15]; it has addressed the hypothesis of the "preferential right" (*diritto di insistenza*) being compatible "*with the*

[10] Article 01, para 2, of Decree-Law No. 400/1993, converted into Law No. 494/1993, modified by Law No. 88/2001.
[11] M. A. Sandulli*, Introduzione al numero speciale sulle "Concessioni balneari" alla luce delle sentenze NN. 17 e 18 del 2021 dell'Adunanza Plenaria*, DeS, 3, 2021– Editoriale Scientifica SRL, p. 8.

[12] *See infra* Chapter I, section 2.2.
[13] AGCM, *Bollettino AS481 No. 39 of 12 November 2008.*
[14] C. Benetazzo, S. Gobbato, *Italian state beach concessions and Directive 2006/123/EC in the European context*, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, p. 28.
[15] AGCM, *Bollettino AS481 No. 39 of 12 November 2008.*

Community principles of equal treatment, equality, non-discrimination, adequate publicity and transparency"[16].

Subsequently, the European Commission opened an infringement procedure against Italy, No. 2008/4908[17], sending a letter of formal notice on 29 January 2009, in which it challenged the compatibility of the national legislation with EU law and the principle of freedom of establishment, especially concerning the preferential treatment granted to the outgoing concessionaire in the allocation process. The Commission stated that: "*the rules in question, which confer a preference for the outgoing concessionaire (the so-called preferential right), constitute restrictions on the freedom of establishment and imply discrimination as to their place of establishment, contrary to Article 43 of the Treaty (now Article 49 TFEU)".*[18]

Directive 2006/123/EC was transposed into the Italian legal system through Legislative Decree No. 194/2009, later converted into Law No. 25/2010[19], which repealed the previous "preferential right" (*diritto di insistenza*). The new provisions explicitly prohibited the automatic renewal of private seaside concessions, as it was deemed incompatible with the European principle of free competition. Consequently, the competent authorities were required to issue new concessions through a public tender process, based on the principles of impartiality and transparency, ensuring that the contract was awarded to the highest bidder. Legislative Decree No. 59/2010[20] provided for the implementation of the Directive.

This legislative development led to the closure of the ongoing infringement procedure of the European Commission. On that occasion, the Italian government was also granted a mandate to revise and comprehensively reorganize the regulatory framework governing seaside concessions.[21]

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[16] ibid.
[17] Infringement Procedure No. 2008/4908; European Commission, letter of 29 January 2009, C(2009) 0328.

[18] European Commission, *Letter of Formal Notice to Italy in Infringement Procedure No 2008/4908* (29 January 2009) C(2009) 328 final, paras 8-9.
[19] Decree-Law of 30 December 2009, No 194, converted with amendments by Law of 26 February 2010, No 25.
[20] Legislative Decree No 59 of 26 March 2010, Implementation of Directive 2006/123/EC on Services in the Internal Market.
[21] Law No 217 of 15 December 2011, 'Provisions for the fulfilment of obligations arising from Italy's membership in the European Communities – Community Law 2010', (Gazzetta Ufficiale No 297 of 22 December 2011), Article 11(2) delegated the Government "*to adopt, within fifteen months from the date*

However, this reform was never implemented. Instead, the expiration of existing concessions was repeatedly postponed, initially until 31 December 2012, and subsequently extended to 31 December 2020 through a series of additional legislative measures. These extensions were justified by the need to allow concession holders sufficient time to recoup their investments in state-owned assets. By doing so, the system remained closed to competition, consolidating a de facto exclusive management of concessions by the same economic entities, not allowing new operators to enter the market.

This non-compliance, and the resulting incompatibility between national and EU regulations, was sanctioned by the Court of Justice of the European Union (CJEU) in the landmark preliminary ruling *Promoimpresa and Mr. Melis* (thereinafter *Promoimpresa*) of 2016[22].

The AGCM, with additional reports and opinions, also reiterated the need to introduce competitive mechanisms for the allocation of usage rights over state-owned assets.[23]

Despite this, through Law No. 145/2018[24], the Italian legislator once again postponed the effective implementation of EU rules, extending the concessions that were nearing expiration until 31/12/2033, without a competitive selection process.

As a result, a situation of severe legal uncertainty emerged for both operators and public administrations, with municipal authorities adopting divergent approaches, leading to multiple legal disputes.

To further exacerbate an already concerning situation, Decree-Law No. 34/2020, converted into Law No. 77/2020[25], adopted in response to the COVID-19 epidemiological emergency, ordered the suspension of administrative procedures for the allocation of maritime state concessions.

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of entry into force of this law, a legislative decree on the revision and reorganization of the legislation relating to state-owned maritime concessions".

[22] Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558.

[23] AGCM, *Report AS184* of 1 July 2020 and *Opinion AS1701* of 4 August 2020.

[24]Law No 145 of 30 December 2018, Budget of the State for the Financial Year 2019 and Multiannual Budget for the Three-Year Period 2019–2021, Art 1(682) and (683).

[25] Decree-Law No 34 of 19 May 2020, coordinated with the Conversion Law No 77 of 17 July 2020, on "*Urgent measures on health, employment and economic support, as well as social policies related to the COVID-19 epidemiological emergency*".

On December 2020, the European Commission issued a new letter of formal notice, challenging once again Italy's failure to comply with EU law with a new infringement procedure.[26]

In this context, the *Consiglio di Stato* (thereinafter Council of State) - the highest administrative court in Italy - intervened, ruling on the matter in its so-called "twin judgments" No. 17 and No. 18 of 2021[27], through which it invalidated the automatic legislative extension of maritime state concessions as being contrary to EU law.

In compliance with the Council of State's decision, Law No. 118/2022[28] was enacted. This law set 31 December 2023 as the expiration date for existing concessions, while also allowing for a potential technical extension until 31 December 2024, in cases where public authorities (due to objective reasons) were unable to complete the ongoing tender procedures within the deadline.

However, Decree-Law No. 198/2022, converted into Law No. 14/2023[29], further postponed the expiration date until 2025, prompting another ruling from the Council of State. In Judgment No. 2192/2023[30], the court reaffirmed the necessity to disapply national legislation that directly conflicts with EU law.

In conclusion, the European Commission, on 16 November 2023, sent a letter of reasoned opinion, whereby it explicitly indicated that "*adopting Law 14/2023, the Italian legislator reproduces the measures and maintains the validity of 'bathing concessions' contrary to the law of the Union. It can therefore be concluded that the Italian authorities have not replied to the objections raised in the letter of formal notice[31], […] and the legislative actions taken […] substantially maintain the status of legislation in force at the time of issue of that letter*".[32]

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[26] European Commission, Infringement Procedure No 2020/4118 against Italy concerning the automatic extension of seaside concessions, 3 December 2020.
[27] Council of State, Plenary Assembly, Judgment No 17 e No 18 [2021].
[28] Law No 118 of 5 August 2022, "*Annual Law for the Market and Competition 2021*".
[29] Decree-Law No 198 of 29 December 2022, "*Urgent provisions on legislative deadlines*", converted with amendments by Law No 14 of 24 February 2023.

[30] Council of State, Sixth Section, Judgement No 2192 [2023].
[31] Editor's note: European Commission, *Letter of Formal Notice to the Italian Republic concerning the legal framework on seaside concessions*, 3 December 2020, Infringement Procedure No 2020/4118.
[32] European Commission, Reasoned Opinion Addressed to Italy Concerning the Incompatibility of the Automatic Extension of Seaside Concessions with EU Law, 16 November 2023, Infringement Procedure No 2020/4118.

1.2 The current legal framework

The Court of Justice of the European Union and the Italian courts, such as the aforementioned Council of State and the *Corte Costituzionale* (thereinafter Italian Constitutional Court), have repeatedly ruled on this matter, urging the national legislator to take measures to align with EU law. Despite those repeated interventions, the current legislative framework in Italy remains highly uncertain and fragmented.

As evidenced by the doctrine, "*within this unstable context, the only constant appears to be the inertia of the national legislator*"[33]. Over the past two decades, none of the proposed reforms in this sector have been enacted. The only measures adopted have either been programmatic provisions (which are not immediately applicable) or have merely extended the status quo in anticipation of comprehensive reforms that have never materialized.

The legislator intervened once again in September 2024 with Decree-Law No. 131, later converted into Law No. 166/2024[34], introducing a new automatic extension until 30 September 2027, with the possibility of a technical extension until 31 March 2028.

The key question now concerns the relationship between this new legislative extension, introduced by the so-called "Infringement-Saving decree", and the rulings of the Council of State since 2021[35]: in particular, whether, and to what extent, the new legislative provisions can override the principles established by administrative judges based on EU law.

In the meanwhile, the situation at the regional level remains extremely chaotic.

Indeed, due to this legal uncertainty, some municipalities have applied Law No. 145 of 2018 and granted an extension until 31 December 2033. Others have refused to automatically renew concessions but have also failed to apply EU law (by not calling for public tenders, thus endorsing, albeit unofficially, the continuation of concessions already in place). Additionally, some local authorities initially granted the extension but later revoked it. Furthermore, certain public administrations have chosen to remain

[33] F Di Lascio, *Le concessioni di spiaggia tra diritti in conflitto e incertezza delle regole* (2022) *Diritto Amministrativo* no 4, Giuffrè Francis Lefebvre S.p.A., p. 3.
[34] Decree-Law No 131 of September 2024, converted into Law No 166 of 2024, art 3(1) and (3).
[35] *See infra*, Chapter II.

passive, neither granting nor denying the requested extensions. This fragmented regulatory framework has had a detrimental impact on the entire beach tourism sector.[36]

Most recently, the Regional Administrative Court of Liguria (TAR Liguria), in its Judgment No. 183/2025, ruled that the extension until 2027 must be disapplied and that selection procedures must be initiated immediately. The ruling states that: "*based on the current regulatory framework, […] maritime state concessions for tourism and recreational activities, which have benefited from multiple legislative extensions, ceased to have effect on 31 December 2023. Consequently, new allocations must take place through impartial and transparent selection procedures among potential candidates, in compliance with Article 12 of Directive 2006/123/EC and Article 49 TFEU*"[37].

Moreover, the Ministry of Infrastructure and Transport (MIT) must determine, through an implementing provision, the mechanisms for calculating compensation for outgoing concession holders, which will be borne by the incoming operators.

The proposal under consideration by the MIT is to allow for the revaluation of assets, with the aim of ensuring higher compensation for outgoing concession holders, beyond the mere unamortized investments referenced in the Infringement-Saving Decree.

In an official statement, the MIT clarified that the compensation "*must be calculated based on the investments made and not yet amortized at the end of the concession, in addition to fair remuneration for investments made in the last five years*."[38]

However, it added that "*the European Commission has issued strict remarks on this matter*"[39]. As a matter of fact, this proposal clashes with the position of Bruxelles, which considers it an undue advantage for the outgoing operator.

As will be unfolded in the subsequent chapters, the issue of compensation represents a particularly complex and significant aspect, also in relation to the protection

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[36] A Nato, '*Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa'* (2023) *Eurojus.it* no 4, p. 26.

[37] TAR Liguria (Regional Administrative Court of Liguria), Section I, Judgment No 183/2025 [2025], para 2.1.

[38] Communication of the Ministry of Infrastructure and Transport (Italy), *'Balneari: al Mit tavolo tecnico sulle concessioni demaniali marittime'*, Italian Government, [2025].

[39] ibid.

of competition. Indeed, it is likely to play a crucial role in the resolution of the legal and regulatory challenges surrounding seaside concessions.[40]

2. The European legal framework: general principles of the Internal Market

The Treaty of Rome[41] of 1957 established the European Common market, with the purpose of removing trade barriers between Member States and ensuring the free movement of goods, services, capital, and people (the so-called "four freedoms").

The realization of the common market followed a gradual process, rooted in the objectives established by the Treaty of Rome. One of the earliest and most significant steps was the establishment of the Customs Union in 1968, which entailed the complete elimination of customs duties and charges of equivalent effect among Member States, as well as the adoption of a common external tariff for goods imported from third countries. This was followed by the progressive abolition of quantitative restrictions on imports and exports between Member States, a measure aimed at fostering the free circulation of goods within the internal market.[42]

Simultaneously, considerable efforts were made to ensure the free movement of workers: any discrimination based on nationality as regards employment, remuneration and other conditions of work and employment was prohibited.[43] Furthermore, in the field of taxation, the European Economic Community began promoting an initial harmonization of indirect taxes, in order to prevent distortions in cross-border trade and to ensure fair competition.

Taken together, these steps marked the foundational pillars for the internal market, and they laid the groundwork for the later liberalization of services, capital, and establishment, all of which have been progressively enhanced through secondary legislation and the jurisprudence of the CJEU.

However, despite these advancements, full economic liberalization was still hindered by the persistence of anti-competitive practices imposed by national authorities

[40] *See infra*, Chapter IV.
[41] Treaty establishing the European Economic Community (Treaty of Rome) [1957] OJ 224.
[42] CVCE, 'The customs union' (CVCE.eu by UNI.LU).
[43] European Parliament, *Free Movement of Workers* (Fact Sheets on the European Union, 2023).

and the need for more detailed legislative harmonization, other than the requirement of unanimity within the Council.[44]

A significant shift occurred in the 1970s with the intervention of the Court of Justice of the EU, which played a crucial role in redefining the legal framework for intra-community trade.

In the *Dassonville* judgment (C-8/74)[45], the CJEU adopted a broad interpretation of measures having equivalent effect to quantitative restrictions, asserting that any trading rule enacted by a Member State which is capable of hindering intra-Community trade - whether directly or indirectly, actually or potentially - should be regarded as such a measure under Article 34 TFEU. This expansive approach was further refined in the *Cassis de Dijon* case (C-120/78)[46], where the Court introduced the principle of mutual recognition[47].[48][49]

According to this principle, a product lawfully marketed in one Member State can be sold in other Member States regardless of complying or not with their national technical rules. The products must be allowed to circulate freely within the single market, unless restrictions can be justified by overriding reasons of public interest.

These rulings marked a turning point, helping to eliminate protectionist barriers and providing new momentum for the realization of the internal market within the European Economic Community.

The Single European Act (SEA)[50], which entered into force on 1 July 1987, introduced for the first time the concept of the "internal market", which, following the

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[44] *The Internal Market: general principles*, Thematic notes on the European Union, European Parliament, europarl.europa.eu .

[45] Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.
[46] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.
[47] The principle was later codified in the Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 [2019] OJ L91/1.

[48] It is also important to highlight that the scope of Article 34 TFEU was clarified by the Keck judgment (Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097), which excluded certain non-discriminatory selling arrangements from its application, thereby narrowing the provision's reach.
[49] European Parliament, 'Free movement of Goods' (Fact Sheets on the European Union, 2023).
[50] Single European Act [1987] OJ L169/1.

entry into force of the Treaty of Lisbon[51] in 2009, completely replaced the previously used notion of the "common market".

The SEA set a precise deadline, establishing 31 December 1992 as the target date for the fulfilment of this project, marking a pivotal moment in the process of European economic integration. Furthermore, it strengthened the EU's decision-making mechanisms by introducing qualified majority voting on key issues such as the common customs tariff, the free provision of services, the free movement of capital, and the approximation of national legislations.

The adoption of this new voting system, which limited the veto power of individual Member States in internal market decisions, "*facilitated the adoption of measures of harmonization of national legislation and the elimination of administrative and regulatory obstacles to trade between Member States*".[52] This innovation represented a crucial step toward the establishment of a more integrated and efficient single market.

Article 3(3) of the Treaty on European Union (TEU) commits the Union to establish an internal market.[53] This market is defined in Article 26(2) of the Treaty on the Functioning of the European Union (TFEU) as "*an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty*."[54]

Overall, the provisions of the Treaties aim to hamper actions that could hinder the creation and maintenance of an internal market extending across the territory of all Member States: "*the core idea is that markets should not be artificially partitioned along national lines*"[55].

Furthermore, although certain numerical adjustments have been necessary, these provisions have largely retained their original structure. The legal framework governing the internal market is deeply rooted and, as opposed to numerous institutional and

[51] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/1.
[52] R Torino, *Introduction to European Union Internal Market Law* (Roma Tre Press, 2017), p. 6.

[53]Treaty on European Union [1992] OJ C191/1, Art. 3(3).
[54]Treaty on the Functioning of the European Union [2007] OJ C306/1, Art. 26(2).
[55] S Weatherill, *What is the EU's Internal Market?* in *Law and Values in the European Union* (Oxford University Press 2016, online edn, Oxford Academic, 18 August 2016), p. 306.

legislative norms that regulate the EU's expanding activities, has remained unchanged throughout the periodic revisions of the Treaties.

The internal market still represents one of the EU's strongest assertions of its transformative impact on the relationships among European states. From an economic perspective, ensuring the free movement of goods, persons, services, and capital between Member States is expected to enhance competition, leading to improvements in the quality of goods and services while fostering price reductions. In this context, "*trade should no longer be distorted by the chance fact of crossing a political border*"[56].

The concept of "internal market" has evolved considerably over time. Initially, it was conceived as the embodiment of a borderless area ensuring the four fundamental economic freedoms—the free movement of goods, persons, services, and capital. Today, however, it has expanded significantly in scope, encompassing the broader structure of relationships, which are not considered only under an economic perspective anymore. As a result, it has become increasingly receptive to and reflective of the values shared by market actors, including consumer protection, environmental sustainability, human rights (particularly workers' rights), gender equality, and other principles of social justice.[57]

The construction of the EU internal market remains a dynamic project. In 2002, the European Commission stated that it would never be "*completed*" and that "*the effort to maximize its performance is a process, not an event*."[58] In 2007, it further emphasized that "*the single market is evolving, it will never be finalised*," recalling that it is "*a means; it is not an end*"[59].[60]

Indeed, a significant factor in its evolution has been, and continues to be, the succession of various CJEU rulings, which have facilitated the harmonization of fundamental principles with the economic and social development of the market.

The concept of integration within this field has two dimensions. The first is negative integration, which entails the removal of barriers; the second is positive

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[56] ibid, p. 308.
[57] R Torino, *Introduction to European Union Internal Market Law* (Roma Tre Press, 2017), p. 3.
[58] European Commission, *Internal Market Scoreboard No 11* (11 November 2002).

[59] European Commission, 'A Single Market for Citizens: The Interim Report to the Spring 2007 European Council' COM (2007) 60 final, February 2007, 3, 10.
[60] S Weatherill, *What is the EU's Internal Market?* in *Law and Values in the European Union* (Oxford University Press 2016, online edn, Oxford Academic, 18 August 2016), p. 309.

integration, which involves harmonizing regulations that establish common standards to protect overriding requirements of general interest across the entire market. This second dimension includes the adoption of EU legislation and the identification of European standards by the EU institutions, which take precedence over national standards. The ultimate goal of both the negative and positive dimension remains the same: the strengthening of European integration.

The challenge of removing and preventing barriers extends to practices that disrupt fair competition among economic operators (so-called "level playing field") in the post-liberalization phase of the market. These include protectionist measures, state subsidies favouring domestic enterprises, and anti-competitive behaviour by businesses. Such distortions are countered through EU competition policy[61], with a particular emphasis on state aid control, a distinctive mechanism of European integration that imposes direct obligations on Member States.[62]

The concept of "internal market" simultaneously grants powers and imposes limitations on the European Union. The Treaty provisions that underpin the models of negative and positive integration are specifically crafted to advance its development. However, it remains essential to delineate the boundaries of EU intervention: where national measures do not interfere with the functioning of the internal market, the regulatory autonomy of Member States should be respected (the so-called "subsidiarity principle").

The complexity arises from the broad reach of the internal market, whose harmonising effect often outweighs its limiting role, thereby making it difficult to clearly define the scope of its influence.

2.1 Free movement of services and freedom of establishment

The free movement of services and the freedom of establishment are fundamental principles of the EU internal market, ensuring that businesses and individuals can operate across Member States without unjustified restrictions. These freedoms play a crucial role in fostering economic integration and competition within

[61] *See infra*, section 2.4.
[62] S Micossi, *Trent'anni di mercato interno europeo* in *L'Italia nell'economia internazionale. Rapporto ICE 2016-2017* (ICE 2017) 79-87.

the Union. As set out in Article 49 TFEU, the freedom of establishment allows economic actors, so businesses and professionals, either persons or undertakings, to set up and manage enterprises stably and continuously in other Member States without impediments, under the same conditions as nationals.[63]

On the other hand, the free movement of services, enshrined in Article 56 TFEU, prohibits restrictions on the freedom to provide services within the Union, allowing economic operators to offer their services on a temporary and cross-border basis; it ensures that the providers don't face any discriminatory or disproportionate barriers.

However, the implementation of these principles has been shaped by extensive case law of the CJEU, which has defined their scope, limitations, and the balance between economic freedoms and public interest objectives, as indicated later in this paragraph.

Among the four fundamental freedoms, the free movement of services holds particular significance for businesses, self-employed workers, and professionals.

The definition of "service" is provided in Article 57 of the Treaty on the Functioning of the European Union, which states that *"services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons".*[64] Hence, the concept includes activities of an industrial or commercial character, as well as those performed by the liberal professions, provided they are regularly supplied for remuneration. By way of example, paragraph 2 of the same Article identifies as "services" industrial activities, commercial activities, craft activities, and the activities of the professions.

The freedom of establishment, in turn, guarantees the right to pursue an effective and continuous exercise of an economic activity within a host Member State for an indefinite period, implying a stable and ongoing presence in its economic environment. As affirmed in Article 49(1) TFEU, this principle prohibits "*restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member*

[63] P Craig and G De Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press 2015).
[64] Treaty on the Functioning of the European Union [2007] OJ C306/1, Article 57 (1).

State", including those affecting the "*setting up of agencies, branches, or subsidiaries*."[65]

Furthermore, Article 49(2) TFEU explicitly states that this freedom covers "*the right to take up and pursue activities as a self-employed person and to set up and manage undertakings, in particular companies or firms […] under the conditions laid down for its own nationals by the law of the country where such establishment is effected*"[66].

By guaranteeing these rights, the Article ensures that individuals and businesses can integrate into the economic life of another Member State on a stable and continuous basis, thereby fostering cross-border economic participation and enhancing the overall cohesion of the internal market.

This protection extends to both business entities and self-employed individuals: Recital 87 of the Services Directive specifies that "*the essential characteristic of an employment relationship […] should be the fact that for a certain period of time a person provides services for and under the direction of another person in return for which he receives remuneration. Any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity*"[67].

The development of the scope and the expansive interpretation given of Article 56 and 49 TFEU has been largely contingent upon the case law of the Court of Justice and subsequently upon secondary legislation produced by the EU institutions.

Starting with the free movement of services, as evidenced by the content of the Articles, the following three conditions must be fulfilled for their application: there must be a "*service*", which must be "*normally provided for remuneration*" and has to be "*temporary*".[68]

In relation to the first condition, the case law has gone considerably beyond the traditional definition of "service", affirming that it includes also, for example, the

[65] ibid, Article 49 (1).
[66] ibid, Article 49(2).
[67] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Recital 87.
[68] C Barnard and S Peers, *European Union Law* (4th edn, OUP 2023) ch 14, pp. 446-447.

provision of people by an employment agency[69], education[70], the provision of a television signal[71] and lotteries[72].

Regarding the second condition, it constitutes consideration for the service in question. The Court of Justice stated, in the *Skandia*[73] case, that it is irrelevant that the remuneration has been paid directly by the recipient of the service or by someone else.

With respect to the last condition, the CJEU recognized that, in order to assess the temporariness of the service, its regularity, periodical nature or continuity must be taken into account, along with its duration[74].

Articles 56 and 57 TFEU cover not only the freedom to travel to provide services (which is the situation envisaged by the Treaty), but also the freedom to travel to receive services and the cases where neither the provider nor the recipient travels. The last two situations were addressed throughout secondary legislation[75] and mostly by means of the case law of the Court of Justice.[76]

Moving on to the freedom of establishment, Article 49 TFEU comprehends two situations. On one side, it encompasses the right for natural or legal persons to set up and manage undertakings, in particular companies and firms, in other Member States: this is called primary establishment. On the other, it provides the right for legal persons to set up agencies, branches, or subsidiaries in another Member State: this is known as secondary establishment.[77]

In *Cadbury Schweppes*[78], the Court said that Article 49 TFEU presupposes:

- actual establishment of the company in the host State (permanent presence);
- the pursuit of a genuine economic activity there.

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[69] Case 279/80 *Webb* [1981] ECR 3305.
[70] Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685.
[71] Case 62/79 *Coditel v Cine Vog Films* [1980] ECR 881.
[72] Case C-275/92 *Customs and Excise v Schindler* [1994] ECR I-1039.
[73] Case C-422/01 *Försäkringsaktiebolaget Skandia (publ) and Ola Ramstedt v Riksskatteverket* [2003] ECR I-6817.
[74] Case C-215/01 *Schnitzer* [2003] ECR I-14847.

[75] Art 1(b) of Directive 73/148 (OJ [1973] L172/14) required the abolition of restrictions on the movement and residence of 'nationals wishing to go to another Member State as recipients of services'.
[76] See Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377 and Case C-384/93 *Alpine Investments BV v Minister van Financien* [1995] ECR I-1141.
[77] C Barnard and S Peers, *European Union Law* (4th edn, OUP 2023) ch 14, p. 443.
[78] Case C-196/04 *Cadbury Schweppes v Commissioners of the Inland Revenue* [2006] ECR I-7995.

In the viewpoint of secondary establishment, the Court added that it doesn't matter if it cannot be formally classed as a branch or agency, Article 49 will still apply to the entity.[79]

Moreover, although the Treaty formally distinguishes only between primary and secondary establishment, the case law of the Court of Justice demonstrates a more flexible interpretative approach[80]. Indeed, the Court has shown a willingness to apply Article 49 TFEU broadly in order to safeguard the freedom of establishment, without trying to rigidly categorise factual scenarios within the perimeters of either primary or secondary establishment.

Articles 49 and 56 TFEU are applicable both in cases of direct and indirect discrimination. In the first hypothesis, the authorities or employers of the host Member State treat an applicant less favourably than they would treat a national in comparable circumstances: so, it concerns less favourable treatment on the grounds of origin. This was issued by the CJEU in the *Factortame* rulings[81]; later on, the Court established also in *Grzelczyk* (Case C-184/99)[82] that a UE citizen can't be treated differently based on his nationality.

In the second scenario, seemingly neutral conditions, criteria, or procedures result in a particular disadvantage for non-nationals: as the Court of Justice affirmed in the *Bressol* judgement (Case C-73/08)[83], an allegedly impartial criterion – which applies to all companies - is not admissible where it prejudices, in concrete, nationals of other Member States. These cases illustrate the broad interpretation given by the CJEU to the principles of equal treatment and market access within the internal market framework.

The implication of the discrimination-based approach is that only rules involving unequal treatment constitute a breach of the Treaty. However, this raises a critical question: how should the measures that (even formally non-discriminatory) still impede

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[79] See Case 33/78 *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183 and Case 205/84 *Commission v Germany* ('*Insurance*') [1986] ECR 3755.

[80] Case C-411/03 *SEVIC Systems* [2005] ECR I-10805.

[81] Case C-246/89 *Commission v UK* ('*Factortame*') [1991] ECR I-3125 and Case C-221/89 *R v Secretary of State for Transport, ex p Factortame* ('*Factortame II*') [1991] ECR I-3905.

[82] Case C-184/99 *Grzelczyk v CPAS* [2001] ECR I-6193.

[83] Case C-73/08 *Bressol and Others v Gouvernement de la Communauté française* [2010] ECR I-2735.

access to the internal market be assessed? The issue was examined, once again, by the Court of Justice in its case law, wherein it asserted that, even when a norm is non-discriminatory, if it "*directly affects access to the markets in services in the other Member States and is thus capable of hindering intra-Union trade in services*"[84], EU law must be applied.

National measures that are liable to prohibit or otherwise impede the activities of a service provider fall within the scope of Articles 49 and 56 TFEU and constitute a restriction, unless they can be objectively justified and are proportionate.

Under the traditional discrimination-based approach, the Court evaluates whether an operator from a different Member State is treated less favourably than a national provider in a comparable situation. In contrast, the market access approach, now prevalent in the Court's jurisprudence, focuses not on differential treatment, but on whether a national rule (regardless of its formal neutrality) hinders access to the market for service providers from other Member States.[85]

Thus, what matters under this last approach is not whether national and foreign providers are formally treated the same, but whether the contested rule creates an obstacle to the effective exercise of economic activity by out-of-State operators. Once a measure is found to restrict the freedom of establishment or the free provision of services, the burden shifts to the Member State to justify the restriction.

The Treaty provides a limited number of express derogations applicable to all four fundamental freedoms – for example public policy, public security, and public health - as laid down in Articles 52(1) and 62 TFEU (these are the only ones applicable in cases of direct discrimination). In addition, Article 51 TFEU excludes activities involving the exercise of official authority from the scope of the freedoms.

Beyond these explicit exceptions, the Court of Justice has developed a body of case law recognising a broader set of justifications for non-discriminatory or indirectly discriminatory measures (these can be justified also by expressed derogations).

The most important ruling on this matter is *Gebhard*, in which the Court stated that "*national measures liable to hinder or make less attractive the exercise of fundamental freedoms […] must fulfil four conditions: they must be applied in a non-*

[84] Case C-384/93 *Alpine Investments BV v Minister van Financien* [1995] ECR I-1141, para 38.
[85] C Barnard and S Peers, *European Union Law* (4th edn, OUP 2023) ch 14.

discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it"[86].

These "imperative requirements in the general interest" (or objective justifications) include, for instance, consumer protection, the safeguarding of public finances, environmental protection, and the maintenance of professional standards.[87]

Additionally, when a justification is invoked, the national measure must further comply with the principle of proportionality, which requires it to be suitable for achieving the stated objective and not go beyond what is necessary to attain it. In certain instances, the measure must also comply with fundamental rights as protected under EU law.[88]

The Court of Justice has repeatedly confirmed both the vertical[89] and horizontal[90] direct effect of Articles 49 and 56 TFEU, meaning that they apply to Member States and regulatory bodies and that they enable individuals and companies to invoke these rights before national courts. Nonetheless, the Court has more consistently upheld the vertical direct effect of these provisions, when considered in relation to the horizontal direct effect concerning private bodies. The discussion on the direct effect and applicability of these provisions to national legislation will be dealt with in greater depth in Chapter III.[91]

In the specific context of seaside concessions, the allocation of publicly owned coastal areas for private economic use constitutes a form of market access that falls within the scope of both freedoms. The absence of transparent and competitive selection procedures embodies a restriction on freedom of establishment, particularly when access to concessions is limited or automatically renewed in favour of the pre-existent concessionaires.

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[86] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 37.
[87] See, for instance, Case C-76/90 *Säger v Dennemeyer & Co Ltd* [1991] ECR I-4221.
[88] See, for instance, Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659.
[89] See, for instance, Case 2/74 *Reyners v Belgium* [1974] ECR 631 and Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfvereniging voor de Metaalnijverheid* [1974] ECR 1299.
[90] See, for instance, Case C-438/05 *International Transport Workers Federation v Viking Line ABP* [2007] ECR I-10779 and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.
[91] *See infra*, Chapter III.

2.2 Directive 2006/123/EC (Services Directive): scope, objectives, and key provisions

Directive 2006/123/EC on services in the internal market was adopted on 12 December 2006, with a transposition deadline set for 28 December 2009[92]. The Services Directive aims to facilitate market access for businesses providing services within the European Union, while simultaneously ensuring safe and high-quality services for consumers. Furthermore, it seeks to establish effective administrative cooperation among Member States, thereby overcoming the barriers and regulatory fragmentation that hinder the full development of a single market for services.

In particular, the Directive plays a crucial role in reinforcing the fundamental freedoms enshrined in the TFEU, especially the freedom of establishment and the freedom to provide services. While these freedoms are directly applicable provisions of primary EU law, in this paragraph it will be delineated how the Directive aims to make their exercise more effective and practical by eliminating legal and administrative obstacles. Rather than creating new rights, it builds upon and clarifies existing Treaty provisions, setting out a harmonised framework that ensures a level playing field within the internal market.[93]

In the early 2000s, the European Commission determined that the single market was not operating as effectively as intended, particularly due to the persistent barriers restricting the free movement of services. In response, the Services Directive was adopted in 2006 with the objective of establishing a fully functional single market for services by the end of the decade.

As a matter of fact, the underlying cause of the system's dysfunction could be ascribed to the jurisprudence of the Court of Justice, which exhibited a marked dualism. On the one hand, the Court significantly broadened the scope of the freedom to provide services, subjecting a wide range of national measures and areas of activity to judicial

[92] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.
[93] See, on this matter, V Hatzopoulos, *Assessing the Services Directive (2006/123/EC)* (2009) 46 Common Market Law Review 38 and T Rentrop, *The Services Directive: What Is Actually New? (*2007) 2007/2 EIPASCOPE.

scrutiny.[94] On the other hand, it concurrently developed an extensive set of exceptions, which allowed restrictive national rules to survive despite their potential incompatibility with internal market principles. In this way, the Court asserted its jurisdiction over all relevant national provisions while retaining discretion not to invalidate measures it deemed acceptable. In fact, it has held that non-discriminatory national rules may be permissible, provided they pursue legitimate public interest objectives and are proportionate in nature. This means that such rules must be suitable for achieving the intended objective and must not go beyond what is necessary to achieve it.[95]

The Treaty provisions were interpreted in a manner disregarding formal classifications and targeting the actual effect of national rules on cross-border services provision. The Court adopted a strict approach to overtly discriminatory measures, while permitting derogations only under exceptional circumstances, in accordance with Articles 52 and 62 TFEU.

Nevertheless, the CJEU was reluctant to strike down non-discriminatory national rules, provided they did not conceal protectionist objectives and met the requirements of proportionality. In this regard, the case law appeared to prioritise the preservation of Member States' regulatory autonomy over the absolute enforcement of free movement rights. This approach reflects the Court's commitment to balancing the fundamental freedoms of the internal market with the Member States' ability to regulate in the public interest. By allowing certain non-discriminatory and proportionate national measures, the CJEU ensures that the freedom to provide services is upheld without unduly compromising legitimate national interests.[96]

This deferential stance allowed even far-reaching restrictions (including total prohibitions) to be upheld, so long as they were facially neutral, non-protectionist in purpose, and proportionate in effect. This approach was justified by the diversity of legal and cultural traditions across Member States, but it also undermined legal certainty in

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[94] V Hatzopoulos and TU Do, *The case law of the ECJ concerning the free provision of services 2000-2005* (2006) 43 CMLRev 923.

[95] See also Case C-384/93 *Alpine Investments BV v Minister van Financien* [1995] ECR I-1141.

[96] See, on this matter, W Lewandowski, *Removing Barriers to Trade in Services in the Single Market with the Help of the Services Directive – Assessment of the Recent Case Law of the Court of Justice* (2021) 17 Utrecht Law Review 60.

the internal market for services.[97] The mere availability of such broad judge-made exceptions engendered ex ante uncertainty for service providers, who could have been deterred from engaging in cross-border operations due to the unpredictability of national legal frameworks.

In such a context, the extensive rights formally granted by Article 49 EC (now Article 56 TFEU) were found to be inadequate in order to liberalise the Community services market, as their enforceability in individual cases remained precarious.[98] This uncertainty operated as a deterrent in itself, discouraging investment, innovation, and market expansion across borders—thus hindering the full realisation of the internal market in services.

Thereby, the Bolkestein Directive was drafted in the first place as an attempt to achieve a true internal market by means of secondary legislation.[99]

The Directive establishes a general legal framework for any services provided in exchange for remuneration, except for the sectors explicitly excluded under Article 2. Its scope is significant, as it covers activities that collectively account for approximately 70% of the EU's GDP and employment[100]. According to Article 2(1), the Directive applies to "*services supplied by providers established in a Member State*"[101]. Services are defined in accordance with the General Agreement on Trade in Services (GATS)[102]: they are outlined as "*any self-employed economic activity, normally provided for remuneration, as referred to in Article [57 TFEU].*"[103]

Accordingly, the Directive covers a broad range of services, including:

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[97] J Snell, *Who's got the power? Free movement and allocation of competences in EC law* (2003) 22 YEL 323.

[98] European Commission, The State of the Internal Market in Services, COM (2002) 441 final.

[99] J Snell, *Freedom to Provide Services in the Case Law and in the Services Directive: Problems, Solutions and Institutions* in Ulla Neergaard, Ruth Nielsen and Lynn Roseberry (eds), *The Services Directive: Consequences for the Welfare State and the European Social Model* (DJØF Publishing 2008).

[100] Ministry of Justice (Italy), *Draft Legislative Decree – Implementation of Directive 2006/123/EC on Services in the Internal Market: Report* (Italian Government).

[101] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Article 2(1).

[102] General Agreement on Trade in Services (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183, annex 1B to the Marrakesh Agreement Establishing the World Trade Organization 1994.

[103] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Article 4(1).

- retail and wholesale trade of goods and services;
- activities pertaining to highly regulated professions, such as legal and tax advisers, architects, and engineers;
- real estate construction services;
- business-related services, including office maintenance, management consultancy, and event organisation;
- tourism and recreational services.

On the contrary, among the services that are explicitly excluded from the scope of the Directive are included financial services, certain electronic communications services, temporary work agency services, private security services, and gambling activities. Anyhow, all the excluded sectors and activities remain subject to specific legislation, where it exists, or the Treaty rules.

The aim is to facilitate access to and the exercise of service activities by reducing administrative burdens and streamlining the requirements for establishing new businesses, both within the provider's home country and in another EU Member State, whether as a primary establishment or through a secondary office.

To achieve this objective, the Directive introduces several specific mechanisms, including:
- the removal of legal and administrative barriers to the development of the services sector, particularly those arising from authorization regimes and national regulatory requirements governing market access and the exercise of service activities (Article 5[104]);
- the establishment of "Points of Single Contact", enabling service providers to complete all necessary formalities to start and operate their business (Articles 6 and 7[105]);
- the obligation to ensure that such procedures can be carried out electronically (Article 8[106]).

The Directive also requires Member States to review and, where necessary, simplify the procedures and requirements for engaging in services activities. This simplification applies both to:

[104] ibid, Article 5.
[105] ibid, Articles 6 and 7.
[106] ibid, Article 8.

- the establishment of a business on a stable basis in the provider's home country or in another EU Member State;
- the cross-border provision of services under the freedom to provide services regime.

In addition to that, to facilitate the freedom of establishment, the Directive imposes an obligation on Member States to assess the compatibility of their authorization regimes with the Directive (Article 9[107]). Specifically, Member States must ensure that:
- authorization requirements do not discriminate against service providers based on nationality or place of establishment;
- the necessity of such regimes is justified by an overriding reason of public interest;
- the measure is proportionate, meaning that the same objective cannot be achieved through a less restrictive measure.

Moreover, the Directive establishes additional obligations, including: compliance with specific principles regarding the conditions and procedures for issuing authorizations (Article 10[108]); the prohibition of certain legal requirements that cannot be justified, such as nationality requirements (Article 14[109]); the obligation to assess the compatibility of various legal requirements with the principles of non-discrimination, necessity, and proportionality and to amend national laws, regulations, and administrative provisions in case of non-compliance (Article 15[110]).

The regulation of services has proved to be among the most controversial elements of the Services Directive. In its original formulation, often referred to as the Bolkestein proposal, the Directive incorporated the "country of origin" principle, stipulating that "*Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field*." This formulation effectively meant that services providers would be regulated primarily by the rules of the Member State in which they were established, rather than by those of the host Member State where the service was actually delivered, except for limited derogations.

[107] ibid, Article 9.
[108] ibid, Article 10.
[109] ibid, Article 14.
[110] ibid, Article 15.

However, this explicit endorsement of the "country of origin" principle proved politically divisive and raised concerns among several Member States regarding the potential erosion of national regulatory autonomy.[111] As a result, the text of Article 16 was substantially revised during the legislative process. The final version no longer enshrines a strict "country of origin" rule. Instead, it provides that "*Member States shall respect the right of providers to provide services in a Member State other than that in which they are established*"[112], while allowing certain restrictions only if they are justified by overriding reasons of public interest, non-discriminatory, necessary, and proportionate. This modification reflects a more balanced approach aimed at harmonising the internal market while addressing national concerns regarding regulatory autonomy.[113]

At any rate, this Directive differs from others in significant ways: it does not merely require the transposition of specific provisions and principles of EU law into national legal systems but rather calls for the development of a national legal framework based on the principles set out in the Directive itself. It is "*not a harmonization directive, therefore, but a directive that aims at progressive harmonization*", through a constructed set of instruments specifically aimed at reducing fragmentation and increasing competitiveness within the services sector.[114]

The core objective of the Services Directive, consequently, is to promote the harmonisation of national regulatory frameworks governing the field of services activities, while removing the barriers that continue to hinder service providers from operating beyond national borders and fully participating in the internal market. Simultaneously, the goal is also to strengthen rights of recipients of services as users and to advocate for the enhancement of services quality.

To this end, the Directive also establishes a system of mutual assistance between Member States, intended to ensure oversight of both service providers and their activities. This mechanism is further reinforced by the creation of an electronic system

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[111] C Barnard and S Peers, *European Union Law* (4th edn, OUP 2023) ch 14.
[112] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Article 16.
[113] See, inter alia, Karsten Engsig Sørensen, *The Country-of-Origin Principle and Balancing Jurisdiction between Home Member States and Host Member States* [2019] 30(1) EBLR.

[114] Ministry of Justice (Italy), *Draft Legislative Decree – Implementation of Directive 2006/123/EC on Services in the Internal Market: Report* (Italian Government).

for the exchange of information among Member States, enhancing administrative cooperation and transparency.

In truth, the impact of the Services Directive on legal certainty has been subject to criticism[115], largely due to the intricate framework of exclusions and derogations that limit its scope, as well as the uneven judicial and administrative implementation across Member States. The fragmented and often inconsistent transposition of the Directive has created uncertainty regarding the applicable legal regime, thereby undermining the development of a coherent internal market for services.

This legal fragmentation has been exacerbated by the cautious and reluctant approach adopted by several Member States in implementing the Directive's provisions. Despite the European Commission's efforts to promote compliance - including the issuance of reasoned opinions in infringement proceedings and the use of soft law instruments to guide national implementation - these measures have yielded only limited results.

In fact, "*the attitude of Member States and lack of effects of Commission's enforcement efforts results in a significant disadvantage to the development of the internal market for services and economic growth in the EU*".[116][117]

In Italy, the Directive was implemented through Legislative Decree No. 59 of 26 March 2010[118], which seeks to guarantee freedom of access to and performance of service activities. This freedom is understood as an expression of the right to economic initiative, as protected under Article 41 of the Italian Constitution, a reference explicitly made in Article 10 of the Legislative Decree[119]. That same provision also lays down key principles of the new regulatory framework, most notably the prohibition of unjustified or discriminatory restrictions on access to the services market.

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[115] See, for instance, C Barnard, *Unravelling the Services Directive* [2008] 45 CMLR 323–394.

[116] W Lewandowski, Removing *Barriers to Trade in Services in the Single Market with the Help of the Services Directive – Assessment of the Recent Case Law of the Court of Justice* (2021) 17 *Utrecht Law Review* 60.

[117] See, inter alia, J Monteagudo, A Rutkowski, D Lorenzani, *The economic impact of the Services Directive: A first assessment following implementation,* Economic Papers of the European Commission 456, June 2012.

[118] Legislative Decree No 59 of 26 March 2010, Implementation of Directive 2006/123/EC on Services in the Internal Market.

[119] ibid, Article 10.

The Decree significantly simplified procedures for launching service activities by replacing traditional authorization systems with less restrictive mechanisms, such as tacit consent and the declaration of commencement of activity - now replaced by the Certified Notification of Commencement of Activity (*Segnalazione certificata di inizio attività*) - in cases where previous requirements were found to be either discriminatory or unjustifiably restrictive.

The structure of the Decree is divided into two main parts:

- Part One contains general or horizontal provisions, with immediate regulatory effect on all services falling within its scope, and serves as a binding reference for future national and regional legislation;
- Part Two, by contrast, introduces vertical or sector-specific provisions that amend the regulation of individual economic activities in a more detailed and targeted manner.

Among the other sections, Title III governs the freedom to provide services; title VII, entitled "Administrative Cooperation", emphasises the principle of loyal cooperation between Member States as a fundamental pillar of the Treaty and the need for Member States to work together to ensure that EU instruments have the fullest possible impact.

2.3 Application of the Services Directive to seaside concessions: competitive selection procedures, prohibition of automatic renewals, legal certainty

One of the main issues surrounding the application of the Services Directive concerns the uncertainty as to whether seaside concessions fall within its scope. Indeed, the aforementioned Article 4(1) of the Directive provides a broad definition of "services", encompassing *"any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty"*[120].

Furthermore, Article 12(1) of the Directive establishes that *"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*

[120] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Article 4(1).

and completion of the procedure"[121]. It also specifies that, in such cases, the authorisation must be granted for an appropriate limited duration and must not provide for automatic renewal or confer other advantages to the outgoing provider or to persons having particular connections with that operator.

More generally, the provision underlines the need for the allocation of authorisations to comply with the principles of impartiality, publicity, and transparency.

As a result of Article 12, the prevailing interpretation is that, upon expiry (or in the event of revocation) maritime state concessions must be awarded through competitive procedures and may not be subject to automatic renewal. Consequently, any preferential treatment for the outgoing concessionaire in the reallocation of the concession title is deemed unlawful.

In the Italian context, this issue acquires particular importance due to the extensive length of the national coastline and favourable climatic conditions, which have contributed to the presence of approximately 30,000 maritime concessions. In most cases, concession holders have established "*fully operational businesses, making substantial investments, both economic and personal, and generating considerable commercial goodwill*".[122]

In the *Promoimpresa* judgment[123], the Court of Justice held that, pursuant to Article 4(6) of the Services Directive, an "authorisation scheme" must be understood as any procedure which requires a private individual to apply for and obtain a formal decision, or an implied one, from a competent authority to access a specific activity or the exercise of thereof.

Accordingly, based on Recital 39 of the Directive[124], the notion of an authorisation scheme includes administrative procedures for the granting of concessions, as these constitute formal acts that service providers must obtain from national authorities in order to engage in economic activities, regardless of how such acts are classified under national law.

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[121] ibid, Article 12(1).
[122] M A Sandulli, *Introduzione al numero speciale sulle "Concessioni balneari" alla luce delle sentenze NN. 17 e 18 del 2021 dell'Adunanza Plenaria* (2021) *DeS* vol 3, Editoriale Scientifica SRL, p.332.
[123] Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558.

[124] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Recital 39.

The Court of Justice concluded that Article 12 of the Services Directive precludes a national legislative measure that provides for the automatic renewal of maritime state concessions for tourism and recreational activities, without any selection procedure among potential candidates.

Consistent with the reasoning of the CJEU, the Council of State upheld the view that the application of public procurement principles to maritime concessions is warranted by the fact that the allocation of state-owned coastal areas represents a commercial opportunity for economic operators.[125] Thus, such concessions must be awarded through a competitive procedure grounded in the principles of transparency and non-discrimination.

Likewise, the consistent majority of the doctrine has endorsed the application of the Bolkestein Directive to maritime concessions, supporting a substantive approach to the legal nature of public domain concessions (especially those granted for tourism and recreational purposes): such an interpretation aligns with the "*EU's indifference to the nomen iuris"* employed under national law.[126]

According to Article 49 TFEU and Article 12 of Directive 2006/123/EC, the obligation to carry out a public tender arises where at least one of the following conditions is met:

- the existence of a clear cross-border interest;
- the scarcity of the natural resource involved.

The first criterion was defined by the Court of Justice in the aforementioned *Promoimpresa* judgment in 2016. In that decision, the Court held that the existence of a clear cross-border interest must be assessed on a case-by-case basis, taking into account factors such as the scarcity of the resource (in the case of seaside concessions, the limited availability of beaches), the economic relevance of the activity, and the potential attractiveness of the market to operators from other EU Member States.

As asserted in the sentence:*" first of all, it should be noted that the existence of certain cross-border interest must be assessed on the basis of all the relevant factors,*

[125] See, to that effect*,* Council of State, Sixth Section, Judgment No 168 [2005], Council of State, Fifth Section, Judgment No 2828 [2007], Council of State, Sixth Section, Judgment No 889 [2016], Council of State, Sixth Section, Judgment No 7874 [2019].

[126] G Morbidelli, *Stesse spiagge, stessi concessionari?* (2021) *DeS* vol 3, Editoriale Scientifica SRL, p.387.

such as the financial value of the contract, the place where it is to be performed or its technical features, and having regard to the particular characteristics of the contract concerned"[127] [128].

The Court further specified that *"the findings of fact enabling the Court to ascertain whether there is certain cross-border interest should be made by the referring court before the questions are referred to the Court"*[129].

As for the second requirement, the CJEU clarified, again in the *Promoimpresa* ruling, that the assessment of whether the number of concessions is limited due to the scarcity of natural resources is exclusively within the competence of the national court. Given that, in Italy, such concessions are granted at the municipal level, rather than at a national level, the relevant geographical reference "*must, in particular, be taken into account in establishing whether such State land available for economic exploitation is scarce*"[130].

In fact, this context also gives rise to another topic, the so-called "*federalismo demaniale*" (State property federalism), introduced by Legislative Decree No. 85/2010[131], which laid down measures aimed at allocating public assets to municipalities, provinces, metropolitan cities, and regions as part of their own patrimony. The decree provided for the transfer of a range of state-owned public assets to local authorities, free of charge and upon request, based on their identification and inclusion in specific lists compiled by *Agenzia del Demanio* (State Property Agency).[132]

As part of this process, maritime public domain assets, along with the planning of their use, have been entrusted to the Regions, which are responsible for ensuring their optimal enhancement. In particular, the exercise of these functions is delegated to the municipalities.

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[127] See, to that effect, Case C-221/12 *Belgacom* [2013] EU:C:2013:736, paragraph 29 and the case-law cited.

[128] Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558, para 66.

[129] ibid, para 68.
[130] ibid, para 43.
[131] Legislative Decree No 85 of 28 May 2010, implementing Law No 42 of 5 May 2009.
[132] C. Benetazzo, S. Gobbato, *Italian state beach concessions and Directive 2006/123/EC in the European context*, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, p. 19.

In an attempt to avoid the application of the Services Directive, Italy tried to argue that beaches do not constitute a scarce resource of the country, as they are allegedly widely available across the national territory. In particular, the government recently appointed a Technical Advisory Committee to carry out an assessment of the current status of seaside concessions. According to the report produced at the end of this review, Italy's coastline would measure 11,172 kilometres, approximately 2,200 kilometres more than the figure provided by Istat, which estimates it at 8,970 kilometres.[133]

Based on this data, the technical committee concluded that only 33% of the coastal areas are currently occupied by beach establishments, and, therefore, since 67% of the coastline remains unoccupied, the Bolkestein Directive should not apply.

However, this conclusion was rejected by the European Commission, which decided to continue the infringement procedure against Italy. It noted that the 33% figure was calculated with reference to the entire coastline, excluding only military and classified areas, and that areas deemed "available" (which have been included in the remaining 67%) incorporated also zones that are, in practice, inaccessible.

Both national and European courts have repeatedly ruled on the Services Directive, addressing its scope of application, its self-executing nature, and its direct effect, which gives rise to a corresponding obligation on Italian courts to disapply national legislation that conflicts with the Directive's provisions.[134]

Most notably, the Court of Justice has played a crucial role in defining the applicable legal framework, especially through the *Promoimpresa* judgment[135], repeatedly cited throughout this thesis. In that ruling, the Court clarified that Article 12 of the Services Directive has direct effect and therefore requires national authorities to disapply any domestic legislation providing for the automatic renewal of maritime concessions.[136] This principle was later reaffirmed in the *AGCM v. Comune di Ginosa* judgment[137], where the Court confirmed (as will be discussed in more detail below) that

[133] See Italian Statistical Yearbook 2022, Istat, Table 1.5.
[134] *See infra*, Chapter II and Chapter III.
[135] Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558.

[136] *See infra*, Chapter II and Chapter III.
[137] Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312.

the prohibition on automatic renewal constitutes a binding obligation on Member States, and that any legislative extension granted *ex lege* is contrary to EU law.[138]

Despite these rulings, Italy, as previously covered, has repeatedly adopted legislative prorogation of existing concessions, thereby creating a climate of deep legal uncertainty. The lack of a clear regulatory framework has led to inconsistent decisions by local authorities and a surge in administrative and judicial litigation[139], exposing the country to the risk of further infringement proceedings by the European Commission as well.

Another problematic aspect, which will also be treated in the following paragraph, concerns the principle of legal certainty and the protection of legitimate expectations for existing concession holders. While market liberalisation requires competitive procedures to ensure fair access, businesses that have invested in seaside concessions for decades have invoked the need for a regulated transition period that safeguards their rights. Some Italian courts have attempted to balance these conflicting interests, yet the absence of a definitive reform continues to generate interpretive ambiguity and economic instability in the sector.

The application of the Services Directive to maritime concessions in Italy thus highlights the tension between the EU's market liberalisation objectives and the protection of historical operators' legitimate expectations. Overcoming this deadlock calls for a legislative intervention capable of reconciling EU obligations with the specific features of the Italian system.

2.4 EU competition law and its impact on seaside concessions

The application of EU competition law to seaside concessions represents a critical intersection between market opening goals and the management of public resources at the national level. Indeed, the allocation of maritime concessions is not only a matter of public and administrative law but is increasingly being scrutinised under the EU competition framework as well, particularly with regard to state aid rules, public procurement principles, and distortions of competition. This section explores how EU competition law imposes limits and obligations on Member States in the concession-

[138] *See infra*, Chapter II and Chapter III.
[139] ibid.

granting process, with the aim of ensuring non-discriminatory access, market openness, and efficient resources allocation.

The issue of incompatibility between Italian legislation on seaside concessions and European competition rules emerged prominently in the early 2000s, when the European Union began to place greater emphasis on ensuring fair access to public resources and preventing distortive market practices.

The Italian regime, by failing to guarantee transparency and equal treatment, was viewed as potentially facilitating market foreclosure and unduly preserving local monopolies. These concerns, as it has been delineated in the previous sections and will be further analysed in the next Chapter, were gradually formalized through infringement procedures and culminated in several landmark judgments of the CJEU, where the Court affirmed that such national practices violated EU competition principles and undermined the proper functioning of the internal market.[140]

Initially, the focus was on the lack of compliance with Article 12 of the Services Directive; however, as the Italian system continued to provide automatic and generalized extensions of existing concessions, the attention shifted toward the implications of this framework on the internal market and competition. In this context, concerns were raised under Articles 101 and 102 TFEU, which prohibit anti-competitive agreements and the abuse of dominant positions. By foreclosing market access for new operators and perpetuating exclusive rights for incumbent concessionaires, the Italian regime was seen as potentially distorting market dynamics, thus bringing the issue within the scope of core EU competition law principles.

The principle of free competition, as enshrined in Articles 101, 102, and 103 TFEU, has had a significant impact on the Italian legal framework governing maritime state concessions. As mentioned beforehand, it led, on the one hand, to the abolition of the so-called "preferential right" (*diritto di insistenza*), traditionally granted to outgoing concessionaires. On the other hand, it made it essential for Italian legislation to adapt to EU supranational principles. Nevertheless, as will be evidenced in this paragraph and the following chapters, the Italian regulatory regime on bathing concessions is, to date, still far from being able to be defined in line with European competition rules.

[140] *See infra*, Chapter II.

The "preferential right" refers to the provision originally set out in Article 37, paragraph 2 of the Italian Shipping Code[141], which stipulated that preference should be given to previous concession holders during the renewal process, thereby limiting the discretion of the public administration in the selection of new candidates.

Articles 101 and 102 TFEU constitute the cornerstone of EU competition law in the Treaty and operate as a complement to the free movement provisions, which primarily (though not exclusively) regulate the conduct of public authorities. In contrast, Articles 101 and 102 ensure the effective supervision of private conduct that may threaten the integrity of the internal market.

Specifically, Article 101 addresses bilateral or multilateral agreements and concerted practices, such as cartels and other restrictive arrangements, that are "*prohibited as incompatible with the internal market*.[142]" Article 102, by contrast, targets unilateral conduct, prohibiting the abuse of a dominant position by a single undertaking "*as incompatible with the internal market in so far as it may affect trade between Member States*.[143]" Both provisions are thus explicitly anchored in the objective of safeguarding the internal market against private forms of market distortion. Meanwhile, Article 114 TFEU affirms the competence of the EU's institutions to adopt harmonized rules to replace divergent national measures which restrict inter-State trade and therefore fragment the internal market along national lines.

The regime governing seaside concessions in Italy raises significant concerns under Articles 106 and 107 of the TFEU as well, which regulate the compatibility of public sector measures with the rules on state aid and competition.

Namely, Article 107(1) TFEU states the incompatibility with the internal market of "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition*"[144]. The repeated legislative extensions of existing maritime concessions, without enabling open, competitive procedures, may result in a selective economic advantage for incumbent concessionaires, especially when such renewals prevent new entrants (including

[141] Italian Shipping Code, Royal Decree No 327/1942 (Italy), Article 37(2).
[142] Treaty on the Functioning of the European Union [2007] OJ C306/1, Article 101(1).

[143]ibid, Article 102(1).

[144] ibid, Article 107(1).

operators from other EU countries) from accessing the market under equal conditions. Indeed, as the European Commission expressed[145], such a system may amount to unlawful state aid, particularly when no justification is provided for the absence of a competitive procedure, or when the measure is not appropriately notified under state aid rules.

Moreover, under Article 106(1) TFEU, "*in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties*"[146], unless justified by legitimate public service obligations. In the case of Italy, however, the practice of automatic renewals and the lack of transparent allocation mechanisms arguably fall short of the proportionality and necessity requirements enshrined in Article 106(2) TFEU.

In the *Promoimipresa* judgment[147], the CJEU implicitly acknowledges that the automatic extension of seaside concessions may be inconsistent not only with the Services Directive and internal market principles, but also with the broader framework of EU competition law. As such, Member States must ensure that their legislation on the matter do not confer undue advantages on current concessionaires and is aligned with both the market liberalisation goals and the state aid control mechanisms established under EU law.

In this regard, it is particularly noteworthy to recall the established case law of the Court of Justice which, since the well-known *Teleaustria* case[148], has consistently affirmed that the principles of public tendering, as general principles deriving directly and having self-executed effect under the Treaty, apply also to the public procurement contracts which are not specifically governed by EU rules. Indeed, contracting authorities are required to implement procedures that give concrete effect to those principles, using mechanisms chosen at national level. These procedures must be

[145] European Commission, Commission Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1.

[146]Treaty on the Functioning of the European Union [2007] OJ C306/1, Article 106(1).

[147] Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558.
[148] Case C-324/98 *Telaustria Verlags GmbH v Telekom Austria AG* [2000] ECR I-10745.

capable of ensuring equal access and avoiding both direct and indirect forms of discrimination in the selection.

This interpretation has also been consistently upheld by the European Commission, which, since the publication of its "Interpretative Communication on Concessions under Community Law" of 12 April 2000[149], has reaffirmed that the principles of transparency and public disclosure apply to the award of concessions over public assets, regardless of their formal classification under national law as either public or private. The Commission's text undertakes a detailed examination of the pertinent principles, including those of equal treatment, transparency, proportionality and mutual recognition, as derived from the rules of the Treaty or enshrined by the Court of Justice. The European authority asserts that, despite the fact that a significant proportion of the case law cited in the communication pertains to public contracts, the principles derived from it "*often go beyond the scope of public procurement. They are also applicable to other situations, including concessions*"[150].

The Commission emphasised that when public administrations intend to allocate assets through administrative concessions, they are required to publicly disclose not only their intention to award such concessions, but also all relevant information that would enable interested parties to assess their potential interest and effectively participate in the selection procedure. This includes, inter alia, a clear indication of the object of the concession, the criteria for selection and award, and the obligations expected of the concessionaire.

Consolidate doctrine declared that "*EU law, therefore, does not seem to introduce such a principle of competition, rather a "right to transparency" (which translates into a "duty" for domestic law)*".[151]

Given the scope and interpretation of the provisions that have been discussed, it has been observed that "*regulatory autonomy practised within the Member States is*

[149] European Commission, Interpretative Communication on Concessions under Community Law [2000] OJ C121/5.

[150] ibid.

[151] C Benetazzo and S Gobbato, *Italian State Beach Concessions and Directive 2006/123/EC in the European Context*, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, p. 23.

respected in principle, but not reliably in practice.[152]" Indeed, the provisions on free movement and competition are not constrained by the formal boundaries of the Union's legislative competence. Their application extends beyond areas of harmonised legislation, meaning that national regulatory autonomy is afforded no protection where it conflicts with the requirements of the internal market. In such instances, EU law prevails and domestic rules must yield when they undermine the objectives of market integration and undistorted competition.

In conclusion, the Italian system of seaside concessions reveals a complex and problematic relationship with EU competition law. The long-standing practices of automatic renewals, preferential treatment for incumbent concessionaires, and the absence of transparent and competitive selection procedures raised serious concerns regarding state aid and the distortion of competition in the internal market. Notwithstanding, to date, a real solution to the issue remains to be found.

[152] S Weatherill, *What is the EU's Internal Market?* in *Law and Values in the European Union* (Oxford University Press 2016, online edn, Oxford Academic, 18 August 2016), p. 313.

CHAPTER II

THE EVOLUTION OF THE SEASIDE CONCESSION SYSTEM IN ITALY: JUDICIAL DEVELOPMENTS

1. The European Commission's role

"*One of the weakest elements in the legal-political edifice of today's European Union is also the one which was almost entirely taken for granted by its founders: ensuring that the national governments are faithful to the basic principles of democracy, protection of fundamental rights, and the Rule of Law*".[153]

These principles form the core of the European integration project; anyhow, navigating the tension between the need for effective enforcement of these values and the limitations inherent in the EU's competences proves to be a complex task.

The supranational integration process was, in part, conceived to prevent conflict among Member States by transferring certain key political decisions, especially those concerning the internal market and the principle of non-discrimination on the basis of nationality, from the national to the EU level. This transfer was intended to establish a common legal and economic space in which adherence to shared fundamental values would be presumed, but such assumptions require continuous and robust enforcement mechanisms.[154]

The institutions of the European Union that are tasked with the preservation of the values enshrined in the Treaties are mainly the Court of Justice and the European Commission. The latter, specifically, has been assigned the legal authority to initiate infringement proceedings against Member States that fail to fulfil their obligations under EU law.

The role of the European Commission is mainly defined in Article 17(1) TEU, which states that "*The Commission […] shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application*

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[153] L Pech and KL Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU* (2017) 19 Cambridge Yearbook of European Legal Studies, 3.

[154] KL Scheppele, DV Kochenov, B Grabowska-Moroz, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, Yearbook of European Law, Volume 39, 2020.

of Union law under the control of the Court of Justice of the European Union."[155] In this capacity, the Commission is commonly regarded as the "guardian of the Treaties". This function is complemented by Article 19(1) TEU, which entrusts the Court of Justice with the responsibility to "*ensure that in the interpretation and application of the Treaties the law is observed*."[156] In fact, although the Commission plays a central role in interpreting and enforcing EU law, its legal assessments are not binding unless expressed in a formal decision, as the ultimate interpretive authority rests with the Court of Justice.

1.1 Infringement proceedings in the Treaties

Within this framework, infringement proceedings under Article 258 TFEU constitute the Commission's most significant enforcement tool. Given that the implementation and application of EU law are primarily the responsibility of Member States, pursuant to Article 291(1) TFEU, the infringement mechanism is essential to safeguard the uniform application of Union law throughout the internal legal orders of the Member States.[157]

Although complaints lodged by citizens, businesses, or other stakeholders serve as a crucial instrument for detecting potential breaches of EU law - widely recognised for their importance in bringing possible infringements to the attention of the institutions - the European Commission may also become aware of instances of non-compliance through alternative means. These include petitions submitted to the European Parliament or the Commission's own monitoring and investigative functions. In any case, infringement proceedings constitute the primary legal mechanism by which violations of EU law by Member States are addressed.

This process comprises two distinct stages: an administrative phase, aimed at securing voluntary compliance, and a judicial phase, which may culminate in proceedings before the Court of Justice.[158]

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[155] Treaty on European Union (Consolidated Version) [2016] OJ C202/1, art 17(1).
[156] ibid, art 19(1).
[157] Oliver, Peter, and Bernd Martenczuk, *'The Commission'*, in Professor Robert Schütze, and Professor Takis Tridimas (eds), Oxford *Principles Of European Union Law: The European Union Legal Order: Volume I* (United Kingdom, 2018; online edn, Oxford Academic).
[158] A Albors-Llorens, chap 10, *Judicial protection and EU remedies*, in European Union Law, 4th edn., S Peers and C Banard, Oxford University Press, (2023), pp. 248-235.

During the administrative phase - also referred to as the pre-litigation phase - the European Commission offers the Member State concerned the opportunity to clarify its position and rectify the alleged breach of EU law, prior to any legal action.

The initial step of this procedure entails a letter of formal notice, which outlines the subject matter of the dispute and provides the legal basis of the Commission's concerns. The Member State is granted a reasonable period to respond by providing the information that have been requested.[159]

If the Commission concludes that an infringement persists, it may issue a reasoned opinion, so a formal request to comply with EU law. This opinion describes the alleged infringement, sets out the Commission's legal arguments and explains why it considers the Member State to be in breach. Subsequently, the Member State will be given a further reasonable deadline (usually two months) to comply and report the corrective measures taken. It is notable that, while the reasoned opinion may elaborate on the content of the letter of formal notice, it cannot expand the scope or alter the subject matter of the original complaint.[160]

Should the Member State fail to take remedial action within the stipulated timeframe, the Commission may bring the matter before the CJEU, thereby initiating the judicial phase. The subject matter of the application must correspond to that outlined in the reasoned opinion or be more narrowly defined. The judgment delivered by the Court is declaratory, confirming whether a breach of EU law has occurred, and is binding upon the Member State concerned. In particularly urgent cases, the Court may also order interim measures.[161]

If the Member State fails to comply with the judgment, the Commission may return to the Court under Article 260(1) TFEU and propose the imposition of financial sanctions, which may take the form of a lump sum and/or a daily penalty. Although the final decision regarding the total to be paid lies with the Court, the Commission proposes an amount based on:

- the seriousness of the infringement and its impact on general and particular interests;

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[159] European Commission, *Infringement Procedure* (European Commission, 2024).
[160] See also KL Scheppele, DV Kochenov, B Grabowska-Moroz, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, Yearbook of European Law, Volume 39, 2020.
[161] See also S Robin-Olivier, *Infringement Procedure: European Court of Justice (ECJ)* (September 2021) Max Planck Encyclopedia of International Procedural Law (MPEiPro).

- its duration;
- the Member State's ability to pay, in order for the sanction to have a deterrent effect.

The calculation method and the principles related to the financial sanctions are set out in a Commission Communication, which is regularly updated.[162]

In accordance with Article 260(2) TFEU, the pre-litigation phase, in cases where a Member State does not comply with the judgment of the Court, has been streamlined. The Commission is no longer required to issue a second reasoned opinion; instead, it may simply send a letter of formal notice, which forms the basis upon which the Member State may submit its observations.

Furthermore, in situations involving a failure to notify transposing measures for a legislative directive on time, Article 260(3) TFEU introduces a specific procedural arrangement. In such cases, the Commission may, during the original infringement proceedings, propose the financial penalty to be imposed by the Court in its judgment: this removes the need for a separate enforcement procedure.

1.2 The Commission's discretion and strategic enforcement in infringement proceedings

It is well established in the case law of the Court of Justice that the European Commission enjoys broad discretion in determining whether to initiate or pursue infringement proceedings under Article 258 TFEU; as such, private parties do not possess any legal entitlement to compel the Commission to act.

On the other hand, given the public interest nature of its role, the Commission must balance legal obligations with political and administrative considerations: it ranks enforcement priorities accordingly and often declines to act on the numerous complaints it receives. While this has raised concerns about the transparency and accountability of its decision-making, the Commission has sought to address such issues in a series of communications. In 2017[163], it outlined a more strategic approach to enforcement, indicating that it would prioritise cases concerning the four fundamental freedoms, the incorrect implementation of directives, non-compliance with CJEU judgments, and

[162] European Commission, *Infringement Procedure* (European Commission, 2024).
[163] European Commission, Communication from the Commission – EU law: Better Results through Better Application [2017] OJ C18/10.

breaches that significantly affect the EU's financial interests (namely, all the topics that characterise the seaside concessions issue in Italy). This marked a shift to a more selective enforcement model based on institutional priorities.[164]

Yet, the substance of its discretion remains largely unchanged: the Commission retains wide latitude in determining both the initiation and pursuit of infringement actions. As the CJEU has held, "*the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations*"[165].

1.3 State responsibility and Treaty violations under Article 258 TFEU

As previously mentioned, the European Commission is empowered to initiate infringement proceedings where it considers that "*a Member State has failed to fulfil an obligation under the Treaties*"[166], according to Article 258 TFEU. This provision requires clarification of two key concepts: what constitutes a "Member State" for the purposes of such proceedings, and the scope of a "failure to fulfil an obligation." In the absence of detailed Treaty provisions, both concepts have been developed through the jurisprudence of the Court of Justice.

Reflecting the broad interpretation of "State" adopted in other areas of EU law, the Court has consistently held that a Member State may be held responsible under Article 258 TFEU "*whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution*"[167]. Notably, even independent institutions may give rise to State liability: this approach has been extended to cover regional and local authorities (like in the discussed case), federated entities, autonomous communities, and, in some instances, private bodies where the State exercises control.[168]

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[164] Oliver, Peter, and Bernd Martenczuk, *'The Commission'*, in Professor Robert Schütze, and Professor Takis Tridimas (eds), Oxford *Principles Of European Union Law: The European Union Legal Order: Volume I* (United Kingdom, 2018; online edn, Oxford Academic).
[165] Case C-431/92 *Commission v Germany* [1995] ECR I-2189, para 22.

[166] Treaty on the Functioning of the European Union [2007] OJ C306/1, Article 258(1).
[167] Case 77/69 *Commission v Belgium* [1970] ECR 237, para 15.
[168] See, for instance, Case C-87/02 *Commission v Italy* [2004] ECR I-5975; Case C-70/06 *Commission v Portugal* [2008] ECR I-1.

"*In this context, the decisive point is whether the activities or omissions leading to the potential infringement of EU law can be attributable to the State and thus a substantive rather than a formalistic approach has prevailed when assessing the quality of the defendant in infringement proceedings*"[169]. Yet, regardless of the internal constitutional attribution of responsibility, infringement proceedings are formally directed against the Member State itself, typically represented by its central government.

As for the meaning of a "failure to fulfil an obligation under the Treaties," the Court has interpreted this expression to encompass both acts and omissions, and to extend beyond the obligations imposed directly by the Treaties. It includes failures to comply with secondary legislation (such as directives), international agreements concluded by the EU and the general principles of EU law.[170]

The Italian question concerning seaside concessions is, hence, the perfect example of an infringement proceeding opened after the regional and local authorities of the State failed to comply not only with the provision of the Treaties (Article 49 TFEU) but with EU secondary legislation (the Services Directive) as well.[171]

2. Infringement proceedings against Italy: the challenge of seaside concessions

Since 2008, the European Commission have issued two infringement proceedings against Italy, over its management of seaside concessions. These cases focus on Italy's failure to comply with EU rules on freedom of establishment, transparency and competition, especially as set out in Articles 49 and 56 TFEU and Directive 2006/123/EC. In particular, the Commission has criticised the automatic renewal of concessions without open and fair procedures.

It is noteworthy that the CJEU has not ruled yet on the issue of Italian seaside concessions within the framework of infringement procedures, as the European Commission has so far chosen not to refer the matter formally to the Court under Article 258 TFEU. Instead, a dialogue with the Italian government has been prioritized, aimed to resolve the dispute through political and legislative adjustments. This cooperative

[169] A Albors-Llorens, chap 10, *Judicial protection and EU remedies,* in European Union Law, 4th edn, S Peers and C Banard, Oxford University Press, (2023), p. 291.
[170] See, for instance, Case C-239/03 *Commission v France* [2004] ECR I-9325; Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.
[171] See Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312.

approach is supported by the fact that the Court has already provided interpretative guidance in this field through preliminary rulings, such as in *Promoimpresa* and *Comune di Ginosa*, which clarify Member States' obligations under EU law in this area.

The section outlines the main legal issues, the steps taken by the Commission, and what these proceedings reveal about the challenges of enforcing EU law at national level.

2.1 Infringement proceeding No. 2008/4908

The first infringement proceeding against the Italian legislation in this field was No. 2008/4908, formally launched by the EU Commission in 2009, following the receipt of a complaint.

The procedure focused on the alleged incompatibility between EU law and some of the rules of the Italian Shipping Code, along with Article 9(4) of Regional Law No. 22/2006 of the Friuli Venezia Giulia Region. These national provisions were deemed contrary to Article 43 of the EC Treaty (now Article 49 TFEU) and Article 12 of the Services Directive.[172]

In fact, Article 37(2) of the Shipping Code provided the already mentioned "preferential right" for the outgoing concessionaire[173]; in addition, Article 9(4) of Regional Law 22/2006 envisaged, among the other criteria to be considered for the valuation of the competitors, to "*be in the priority situation referred to in Article 37(2), second sentence, of the Shipping Code*"[174].

In the letter of formal notice, dated 29 January 2009, the Commission declared that legal persons must be able to exercise their freedom of establishment "*without being subject to the application of national rules that do not respect the principle of equal treatment*" [175]. It further noted that discriminatory measures may only be justified under one of the exceptions expressly provided in Articles 45 and 46 of the EC Treaty (now

[172] E Poli and C Galetto, *The Bolkestein Directive and Beach Concessions' Holders: An Endless Italian Summer Saga* (Centres for European Policy Network, No 15, 2024).
[173] Italian Shipping Code, Royal Decree No 327/1942, Article 37(2).
[174] Regional Law No 22 of 2006 (Friuli Venezia Giulia), Plan for Use of State-Owned Maritime Property, implemented by Regional Decree No 320 of 9 October 2007, Article 9(4), letter (g).
[175] European Commission, *Letter of Formal Notice to the Italian Republic concerning the regulation of seaside concessions*, Infringement Procedure No 2008/4908, 29 January 2009.

Articles 51 and 52 TFEU), and such justification must comply with the principle of proportionality.

Although formally applicable to all companies, whether Italian or foreign, the referred provisions effectively favoured companies already holding concessions, and thus already established (either in Italy or in the relevant region). Thereby, as stated in the letter, "*the rules in question, which confer a preference for the outgoing concessionaire (the so-called preferential right), constitute restrictions on the freedom of establishment and imply discrimination as to their place of establishment, contrary to Article 43 of the Treaty* [now Article 49 TFEU]"[176].

Moreover, explicit reference was made to the well-established case law of the Court of Justice: drawing upon the reasoning in *CaixaBank France*, the Commission asserted that the provisions under scrutiny "*distort the selection procedure, breaching the principle of equal treatment of the different economic operators and, in practice, making it extremely difficult, if not impossible, for any other competitor to gain access to the concessions.*[177]*"* It underlined also how that they could represent a real threat to competition as well, due to the fact that *"such provisions […] dissuade other companies from competing and offering more efficient services for the new concessions, or even impede this*."[178]

For the next step, the Commission turned to consider whether such restrictions could be justified under the derogations laid down in Articles 51 and 52 TFEU: in relation to the first Article, it reaffirmed the settled case law that such exceptions "*should be restricted to activities that constitute a direct and specific participation in the exercise of official authority*"[179], a condition that clearly was not met by the private economic exploitation of State-owned maritime property. As for the second one, the Commission concluded that "*there is no element […] that justifies recourse to the grounds provided for in Article [52 TFEU]*"[180], especially since the Italian government had failed to demonstrate that the contested measures addressed an actual and significant threat to

[176] ibid, paras 8-9.
[177] ibid, para 11, with reference to Case C-442/02 *CaixaBank France* [2004] ECR I-8961.
[178] ibid.
[179] European Commission, Letter of Formal Notice to the Italian Republic concerning the regulation of seaside concessions, Infringement Procedure No 2008/4908, 29 January 2009, para 14.
[180] ibid, para 16.

one of the essential interests of society, in accordance with the principle of proportionality.[181]

Accordingly, the Commission found that Italy, by maintaining Article 37(2) of the Shipping Code and Article 9(4) of Regional Law No 22/2006, had failed to fulfil its obligations under Article 49 TFEU, and invited the Italian Government to submit its observations within two months.

Yet, it was only after a second letter of formal notice, dated 5 May 2010[182], that the "preferential right" was finally removed. In this letter, the Commission pointed out the persistent inconsistency with EU law of the legislative reforms that occurred in the meantime in the Italian legal framework. Indeed, despite an earlier removal of the preferential right from the legislation through Legislative Decree no. 194 of 30 December 2009, during its subsequent conversion in Law the legislator inserted a previous provision, allowing the renewal of the concessions every six years. The latter was considered by the Commission incompatible with Article 49 TFEU and with Article 12 of the Services Directive, too. The letter stated that such automatic renewal "*confer in this way a privileged position on outgoing providers […]. The provisions in question dissuade other undertakings from competing and offering more efficient services for new concessions, or even prevent this*."[183] Moreover, even the new system did not fall within the derogations provided by the Treaties or by the case-law of the Court of Justice.

Following this, Italy proceeded to amend its national legislation to abolish the preferential right, which ultimately resulted in the closure of the infringement procedure in February 2012.

2.2 Infringement proceeding No. 2020/4118 and the current situation

Notwithstanding the previous infringement proceeding issued on the matter, the Italian government persisted in disregarding its obligations towards the EU, reinserting the automatic renewal of the existing seaside concessions.

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[181] C Benetazzo and S Gobbato, *Italian State Beach Concessions and Directive 2006/123/EC in the European Context*, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017.
[182] European Commission, *Letter of Formal Notice to the Italian Republic concerning the regime of maritime state concessions* C(2010) 2734 final, 5 May 2010.
[183] ibid, p.3.

The EU Commission, therefore, launched a second procedure with a letter of formal notice on 3 December 2020; however, it refused to publish even a summary of the main related legal aspects, raising several criticisms in relation to the lack of transparency of the action.[184]

Once again, Italy did not comply with the necessity to align its national legislation with the EU standard: on the contrary, it rather repeatedly extended the expiration of existing concessions.

In response, the Commission sent a reasoned opinion to the Italian government on 16 November 2023[185], wherein it enumerated the reasons substantiating the national legislation's continued contravention of the EU legal framework. The institution continued monitoring the matter closely, while expressing strong encouragement to the Italian government to implement the necessary amendments to rectify the breach.

In early 2024, an informal agreement was reached between the Italian government and the European Commission concerning the long-standing issue of seaside concessions. Under this understanding, the Italian government has committed to align the national legislation with EU requirements (particularly by committing to organize competitive procedures for concession awards by 2027). Moreover, municipalities retain the right to launch competitive procedures and award new concessions immediately, without having to wait until the final deadline.[186]

While it hasn't implied a formal closure of the current infringement procedure yet, the Italian government reported, in a press release of the Council of Ministers, that "*the collaboration between Rome and Brussels has made it possible to strike a balance between the need to open up the concession market and the opportunity to protect the legitimate expectations of the present concessionaires, allowing to conclude a long-standing and complex issue of particular importance for our nation*" [187].

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[184] Question for written answer E-003416/23 to the Commission, Piernicola Pedicini (Verts/ALE), 20 November 2023, subject: *Lack of transparency as regards the handling of the infringement procedure against Italy over beach concessions*.

[185] European Commission, Reasoned Opinion Addressed to Italy Concerning the Incompatibility of the Automatic Extension of Seaside Concessions with EU Law, 16 November 2023, Infringement Procedure No 2020/4118.

[186] Il Sole 24 Ore, 'Concessioni balneari, il decreto "salva-infrazioni" all'esame della Ue' (8 March 2025) https://www.quotidiano.ilsole24ore.com/art.php?artid=2005839&e=SOLE&i=20250308&t=S24 .

[187] Presidenza del Consiglio dei Ministri, *Comunicato stampa del Consiglio dei Ministri n. 93* (Italian Government, 4 March 2024).

Nonetheless, to this date, there is still an ongoing infringement procedure against Italy concerning its management of state-owned seaside concessions: the Commission has made it clear that the procedure will remain open until Italy fully implements the agreed measures and ensures compliance with the principles of fair competition and market access enshrined in EU law.[188] Should this condition not be met, there is the risk that Italy will once again be subject to infringement procedures in the future.

3. The judicial shaping of Italian seaside concession law: between national inertia and supranational enforcement

The issue of Italian legislation pertaining to seaside concessions, and its compatibility (or lack thereof) with the European legal framework, has had ramifications across various sectors of the EU. The protracted period of inaction on the part of the Italian legislator has resulted in the matter being the subject of extensive case law, both at European and national levels.

Indeed, a significant proportion of the amendments and reforms that the Italian legislation has undergone have been triggered by rulings of the CJEU, of the Italian Council of State and of the Constitutional Court (other than by infringement proceedings of the EU Commission).[189]

The upcoming sections present a comprehensive portrayal of the tensions and convergences between national and supranational legal orders, illustrated throughout the examination of the most important judicial decisions that have delineated this subject.

3.1 The CJEU rulings and their implications (e.g. Promoimpresa and others)

As previously stated, the Court of Justice has repeatedly pronounced itself on the incompatibility of the Italian legislation on maritime concessions with EU law.

The ruling which is most likely to be considered the cornerstone of its jurisprudence on this issue, as it is also the Court's first actual statement on the matter, is the landmark *Promoimpresa* judgment. In truth, it is important to note that several

[188] Eunews, *Balneari, Italia e Ue trovano l'intesa per chiudere la procedura d'infrazione. Le gare partiranno entro il 2027* (5 March 2024) https://www.eunews.it/2024/09/05/balneari-italia-ue-chiudere-procedura/ .
[189] *See supra*, Chapter I.

other rulings before this one had already developed a number of general principles relevant to the matter, particularly in the field of public procurement and service concessions[190]. They established the foundation for the legal reasoning that would later be applied to maritime concessions, although that specific issue had not yet been addressed. Nonetheless, the Court of Justice had not ruled directly on the issue of seaside concessions in Italy prior to the *Promoimpresa* judgment of 14 July 2016: therein, it explicitly addressed the compatibility of Italian rules on maritime concessions for tourism and recreational purposes with EU law, notably with Article 12 of the Services Directive.

The ruling of the Court in the case at hand was issued in two joined cases C-458/14 and C-67/15[191]. The first one was referred by the Regional Administrative Court (TAR) of Lombardia, which submitted a request for a preliminary ruling to the Court of Justice in order to assess the compatibility of national legislation - specifically, Article 1(18) of Decree-Law No. 194/2009 (converted into Law No. 25/2010, as subsequently amended)[192] – with EU law. This provision stipulated the automatic extension of existing State-owned maritime property concessions that were in force at the time the law was enacted.

The domestic proceeding concerned the rejection of a request to renew a maritime concession. The applicant company claimed that the denial was in breach of the above-mentioned national provision, while the public authority justified its decision by stating that the award of a new concession required the initiation of a competitive selection procedure, excluding any possibility of automatic renewal.

The referring judge considered that the legal relationship in question met the criteria of a "concession" as defined under EU law and, consequently, that the national provision might constitute an unjustified restriction on competition and on the principles

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[190] See, on this matter, Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745; Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-8585 (the Court reiterated the need for transparency and impartiality in the award of concessions, even when no formal procedure is prescribed); Case C-324/07 *Coditel Brabant SA v Commune d'Uccle and Région de Bruxelles-Capitale* [2008] ECR I-8457 (the judgment clarified that the direct award of concessions must be duly justified and cannot occur automatically without a competitive selection process).

[191] Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558.

[192] Decree-Law of 30 December 2009, No 194, Article 1(18), converted with amendments by Law of 26 February 2010, No 25.

of freedom of establishment and non-discrimination; accordingly, the national court decided to stay the proceedings and refer the matter to the CJEU.

The second case originated from the Regional Administrative Court (TAR) of Sardegna, which submitted an identical preliminary question. In this instance, the applicants challenged the legitimacy of a public tender issued by the Public Administration for the award of a State-owned maritime property concession. Specifically, they argued that their request for an extension of the same concession - submitted pursuant to the aforementioned national legislation - had been tacitly accepted (through the mechanism of silent consent), thereby conflicting with the subsequent publication of the tender.

In summary, the preliminary questions referred to the Court were as follows:

1. whether Article 12 of Directive 2006/123/EC precludes a national provision - such as Article 1, paragraph 18, of Decree-Law No. 194/2009 - that allows for the automatic renewal of existing State-owned maritime property concessions (granted for tourism and recreational purposes);
2. whether the principles of freedom of establishment, non-discrimination, and the protection of competition, as enshrined in Articles 49, 56, and 106 TFEU, preclude national legislation which, through successive legislative interventions, repeatedly extends the expiration dates of concessions involving economically valuable maritime public property.

"*The Court of Justice has distinguished between two areas of operation of the applicable Community framework in the case of the extension ex lege of public maritime concessions issued for recreational tourism purposes*"[193].

The first area focuses on the Services Directive, whose scope is limited to "authorisation schemes" as defined in Recital 39 of the Directive itself[194]. In particular, the Court examined the compatibility of the automatic renewal mechanism provided by the Italian legislation with Article 12 of the Directive.

As noted by the Advocate General in his Opinion, "*according to settled case-law, where an area has been the subject of comprehensive harmonisation at EU level,*

[193] E Vermiglio, *Concessions of State-Owned Maritime Property and Service Concessions in the Case Law of the CJEU: A Distinction with Increasingly Blurred Boundaries?* (2017) 119(3) Dir mar, p. 727.
[194] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Recital 39.

any national measure relating to that area must be assessed in the light of the provisions of that harmonising measure and not of those of primary law"[195]. Therefore, in the present case, since the sector in question has been fully harmonised (through the Bolkestein Directive) the applicable standard of review is Article 12 of the Directive.

Given that, the second legal framework refers exclusively to Article 49 TFEU anyway, as the proceedings concern "*a right of establishment on State-owned land with a view to conducting tourist and leisure-oriented business activities*"[196]. As a result, they naturally fall within the scope of application of that provision.[197]

3.1.1 The Court's judgement in Promoimpresa

In its 2016 judgment, the Court held, in relation to the first preliminary question raised by the referring court, that Article 12 of the Services Directive "*must be interpreted as precluding a national measure, such as that at issue in the main proceedings, 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*."[198]

First and foremost, the Court established the applicability of Article 12 to the concessions at issue, as these fall within the definition of "authorisations" provided by the Directive. Furthermore, the Court clarified the distinction between concessions of public domain goods and concessions of public services, thus delineating the respective scopes of Directive 2006/123/EC and Directive 2014/23/EU[199].

The key difference between these two types of concessions lies in the economic autonomy granted to the concessionaire: in the case of service concessions, the concessionaire enjoys "*a certain economic freedom to determine the conditions under which that right is exercised and, in addition, is, to a large extent, exposed to the risks*

[195] Opinion of AG Szpunar in Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others and Others* ECLI:EU:C:2015:916, delivered on 17 December 2015, para 40.
[196] Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558, para 63.
[197] R Righi, E Nesi, Camera Amministrativa Romana, *Memorandum on the Judgment of the Court of Justice of the European Union in Joined Cases C-458/14 and C-67/15 – Promoimpresa and Others* (2016), p. 15.
[198] Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558.
[199] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1.

of operating the service"[200]. In such cases, the applicable framework is Directive 2014/23/EU. Conversely, where the State predetermines the terms of use of the public asset or natural resource, the legal relationship qualifies as an authorisation and thus falls under the scope of Article 12 of Directive 2006/123/EC.

On the other hand, "*the task of verifying the additional requirement laid down by Article 12, i.e. the need to authorise a limited number of concessions on account of the scarcity of natural resources, was left to the national court*"[201].

Once the applicability of the Services Directive had been established, the Court affirmed that, pursuant to Article 12, the granting of authorisations must be subject to a selection procedure among potential candidates, in compliance with the principles of transparency, impartiality, and adequate publicity. Any derogation from this requirement may be justified only on grounds of overriding reasons relating to the public interest: those can't legitimate the complete avoidance of the selection procedure but may be taken into account as criteria within the selection process itself.[202]

As the AG Szpunar noted as well, the legitimate expectations of concession holders can't be invoked to warrant the automatic renewal of concessions applied indiscriminately to all authorisations. This principle "*calls for assessment on a case-by-case basis, in order to show […] that the holder of the authorisation could reasonably expect its authorisation to be renewed and that he made the corresponding investments. Such justification therefore cannot reasonably be cited in support of an automatic extension*"[203].

Consequently, the *ex lege* extension of the expiration date of concessions, as provided for under Italian national legislation, constitutes a breach of Article 12 of the Services Directive.

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[200] Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558, para 46 (see, to that effect, Case C-300/07 *Hans & Christophorus Oymanns GbR v Hauptzollamt Duisburg* [2009] ECR I-04773, paragraph 71).
[201] M E Bartoloni, *Concessions Relating to State-Owned Maritime Property within the Context of Free Movement: Reflections on the Promoimpresa Judgment* (2022) 1 Italian Journal of Public Law 103, vol 14, p. 296.
[202] E Vermiglio, *Concessions of State-Owned Maritime Property and Service Concessions in the Case Law of the CJEU: A Distinction with Increasingly Blurred Boundaries?* (2017) 119(3) Dir mar, p. 731.
[203] Opinion of AG Szpunar in Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others and Others* ECLI:EU:C:2015:916, delivered on 17 December 2015, paras 92-93.

With regard to the second preliminary question, the Court ruled that "*Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits the automatic extension of existing concessions of State-owned property for tourist and leisure-oriented business activities, in so far as those concessions are of certain cross-border interest."*

As pointed out above, since the case concerns the granting of a right of establishment for economic exploitation purposes, it must comply with the fundamental rules of the Treaty, regardless of the fact that the relevant sector may also fall within the scope of harmonisation under secondary EU law.

Accordingly, national authorities are obliged to respect the Treaty principles, and in this specific case, the principle of non-discrimination: the absence of a selection procedure penalises undertakings established in other Member States of the Union, creating an unjustified barrier to market access.

In particular, this situation arises where the concession under consideration presents a clear cross-border interest, the existence of which must be assessed by the referring national court.[204]

Likewise, in relation to Article 49 TFEU, a potential derogation may be permitted on the basis of overriding reasons of public interest. Those include the principle of protection of legal certainty, which could be safeguarded through the introduction of a transitional national regime only for "*the authorisations granted when it had not yet been declared that the contracts having a certain cross-border interest could be subject to transparency obligations*"[205]. Such a regime might recognise the right of the ongoing concessionaires to terminate the relationship under economically acceptable conditions, thereby allowing them to recoup their investments.

However, the cases at issue in the main proceedings concerned concessions that had been granted at a time when national authorities were already bound by the EU transparency requirements. Consequently, in the Court's view, the infringement of Article 49 TFEU cannot be justified, and the national legislation must be disapplied in favour of the direct application of EU law.

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[204] *See supra*, Chapter I.

[205] V Squaratti, *Access to the Market for Concessions of State-Owned Areas of the Maritime and Lake Coasts between Investment Protection and Certain Cross-Border Interest* (2017) 2 European Papers – European Forum, Insight, pp. 767-777.

3.1.2 Consequences of the judgement on domestic law

The judgment analysed above, and the principles established therein, have had a significant impact on national legal institutes, particularly the ones concerning the distinction between "concessions of public assets" and "public service concessions".

Originally, the management of maritime public property was under the exclusive responsibility of public authorities, intended to ensure general use by the public, and its allocation to private individuals occurred only on an exceptional basis through concessions. However, the liberalisation of the European market and the broader context of economic and technological development have given rise to new collective interests, notably those related to industrial development and seaside tourism, alongside public access and national defence.[206]

As a result, the object of the concession is no longer merely the public asset itself, but the economic activity associated with it: the public asset is thus seen as a tool for providing a service, namely the pursuit of a business activity[207]. Accordingly, legal scholarship has increasingly focused on the moment in which the asset is entrusted to the private operator by the public administration: this has had significant implications for the legal and administrative treatment of beach concessions. By emphasising the act of entrustment rather than the subsequent management of the asset, the doctrine highlights the critical importance of procedural safeguards - such as transparency, impartiality, and competition - in the selection of concessionaires. This focus reflects the view that the legitimacy of the entire concession relationship hinges on the fairness and openness of the initial award process. It also aligns with the broader objectives of EU law, which prioritise equal access to economic opportunities and non-discriminatory treatment of market participants, particularly when public assets are used to enable profit-generating activities.

[206] See, on this matter, M D'Orsogna, *Le concessioni demaniali marittime nel prisma della concorrenza: un nodo ancora irrisolto* (2011) 5 *Urbanistica e Appalti* 599.
[207] See, on this matter, F Benvenuti, *Demanio marittimo tra passato e futuro*, in Riv. dir. nav., 1965, pag. 154.

In this framework, the exercise of discretionary power by the public authority must be guided by the promotion of the public interest, ensuring the most efficient and beneficial use of the asset.[208]

The substantive approach of EU law aligns with the evolution beyond the classical notion of public property[209]: according to the European legal order, where economic activities that may impact the functioning of the internal market are involved, Member States are required to adopt public and transparent selection procedures.

Consequently, the emphasis shifts from the utilisation of the public asset to the selection phase of the concessionaire. This phase is no longer regarded as a mere form of administrative control over the utilisation of the asset, but rather as an exercise of administrative power aimed at identifying the most suitable candidate, which serves as a mean for conducting an economic activity. [210] Accordingly, legislative focus is shifting towards the criteria for selecting the concessionaire, as opposed to the regulation of activities undertaken during the concession.[211]

As will be further discussed in subsequent sections[212], the dicta expressed in the judgments of the Court of Justice are capable of immediate application by national courts, in accordance with the principle of the primacy of EU law over national law. A direct consequence of this principle is that any domestic provisions incompatible with

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[208] E Vermiglio, *Concessions of State-Owned Maritime Property and Service Concessions in the Case Law of the CJEU: A Distinction with Increasingly Blurred Boundaries?* (2017) 119(3) Dir mar, pp. 733-734.

[209] Author's note: in Italian administrative law, the notion of 'public property' traditionally referred to the State's ownership of assets designated for public use or assigned to a public function, characterized by inalienability, imprescriptibility, and immunity from seizure. Historically, this concept emphasized the protection of public goods from market forces. However, in recent decades, the notion has evolved to accommodate principles of economic efficiency and competition. Public property is now increasingly seen not merely as an asset to preserve, but also as a resource to be managed strategically, often through market-based mechanisms such as concessions and public-private partnerships, aligning better with EU internal market objectives. See, on this matter, F Caringella, *Manuale ragionato di diritto amministrativo* (Dike Giuridica 2020) and M Clarich, *Manuale di diritto amministrativo* (5th edn, Il Mulino 2023).

[210] That is to say, rather than being a simple authorisation to use a resource, the selection of the concessionaire is now viewed as a substantive act of public governance. It involves evaluating competing proposals to ensure that the asset is used in a way that maximises public benefit and economic efficiency, transforming the concession process into a strategic tool for pursuing public interest objectives within a competitive framework. See, on this matter, S Cassese, I *beni pubblici. Circolazione e tutela* (Giuffrè 1969) and G Di Gaspare, *Origine, costituzione e struttura della nozione di servizio pubblico* (2018).

[211] See, on this matter, F Di Lascio, *Concessioni di demanio marittimo e tutela della concorrenza* (2009) 3 Foro amm TAR 787, recalling AGCM, *Bollettino 42*, Opinion of 28 October (1998).

[212] *See infra*, Chapter III.

EU law must be disapplied, not only by national courts but also by administrative authorities.[213]

3.1.3 AGCM v. Comune di Ginosa

The sentence of the Court of Justice C-348/22 of April 2023 constitutes another pivotal element in the heated debate concerning concessions for the occupation of State-owned maritime property and has unequivocally delineated the European principles laid down in this matter since the Bolkestein Directive.

Notwithstanding the fact that the answers given by the Luxembourg Court to the Italian judge have retrieved concepts that had already been expressed in its previous case-law[214], this ruling played a fundamental role by pointing out precisely the minimum level of protection provided for the European citizens.

The case concerned a request for a preliminary ruling from the Regional Administrative Court (TAR) of Puglia, in the proceedings AGCM (Autorità Garante della Concorrenza e del Mercato)[215] v. Comune di Ginosa, regarding the decision of the latter to extend concessions for the occupation of State-owned maritime property in its territory until 31 December 2033.

The municipality of Ginosa decided to apply the law of 2018 and communicated the delay of the concessions until 31 December 2033. The referring Court (requested to decide on the litigation opened by the AGCM, asking the annulment of such extension) has referred some questions to the Court of Justice for a preliminary ruling. The questions concerned: the validity of the Directive, the existence of a certain cross-border interest as a prerequisite for the application of Article 12 of the same Directive, the direct effect of Article 12 and the eventual obligation upon local administrative authorities to apply said Directive.

The first relevant factor to envisage in order to analyse the Court's approach to the problem is the choice, after hearing the Advocate General, to deliver the judgement

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[213] R Righi, E Nesi, Camera Amministrativa Romana, *Memorandum on the Judgment of the Court of Justice of the European Union in Joined Cases C-458/14 and C-67/15 – Promoimpresa and Others (2016),* pp. 16-18.
[214] See Joined Cases C-458/14 and C-67/15 Promoimpresa Srl and Others [2016] ECLI:EU:C:2016:558 and Case C-103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 1839, ECLI:EU:C:1989:256.
[215] Editor's note: the Italian Competition Authority.

without an Opinion, because it didn't considered the case to raise new points of law.[216] Despite this premise, the Court has replied clearly to the issues brought up by the national judge, in order to set out an organic and coherent legal framework, comprehensive of the principles and the specific provisions that are for the Member States to respect in the field of the award of concessions for the occupation of State-owned maritime property.

As far as the validity of the Directive is concerned, the Court upheld that the Council has correctly acted by qualified majority rather than unanimity: "*the evaluation did not identify any component that could compromise the validity of the secondary legislation in question"*[217]. Indeed, the choice of the legal basis for a measure must depend on objective factors, such as the aim and the content; in this specific case, the measure could be founded on two different legal bases, which are, however, impossible to combine. Thereby, it must be founded on the most specific provision (*lex specialis derogat lex generalis)*. Given that the goal of the Directive is to facilitate the exercise of freedom of establishment by service providers and the free movement of services, its validity was confirmed: "*the Council was fully entitled […] to act by qualified majority*"[218].

With regard to the applicability of said Directive only to concessions which are of certain cross-border interest, the Court dispelled any alleged ambiguity found by national courts in previous judgments on the subject. It was preliminary observed that, according to settled case-law (like *Promoimpresa*), where an area has been the subject of full harmonization at EU level, any national measure adopted in that sphere must be assessed in the light of the provisions of that harmonizing measure, and not of those of primary law.[219] Therefore, Article 12 must be taken into consideration, as meaning that it does apply also when all the relevant elements are confined to a single Member State, and solely requires the assessment of the scarcity of natural resources and available

[216] Statute of the Court of Justice of the European Union, Article 20, para 5.
[217] A Nato, *Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa* (2023) Eurojus.it no 4, p. 32.
[218] Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312, para 57.
[219] Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558, para 59.

concessions.[220] "It *follows that Article 12(1) and (2) of that directive must be interpreted as meaning that it does not apply only to concessions for the occupation of State-owned maritime property which are of certain cross-border interest*"[221].

The most relevant answer that has been offered by the Court of Justice concerns the direct applicability of Article 12 and the institutional subjects that are obliged to implement it.[222] The Luxembourg Court have explicitly asserted the direct effect of Article 12: the provision appears to be sufficiently clear and precise, neither conditioned or subjected, in its implementation or effects, "*to the taking of any measure either by the institutions of the European Union or by the Member States*"[223].[224] Even if Member States are provided with a margin of discretion in deciding how to transpose the EU law in the national legislation, this is not incompatible with the recognition of the direct applicability of Article 12: the latter is due to the presence of an exact and explicit obligation as to the result to be achieved and allows to determine the minimum rights and level of protection that are guaranteed to the European citizens in any event.

According to this Article, Member States are requested, when a shortage of natural resources is ascertained, to set up an impartial, transparent, and non-discriminatory selection procedure to gather potential candidates. Article 12 allows them for a certain degree of latitude as to the choice of criteria for assessing the scarcity of natural resources.[225] Thereby, this evaluation can be made by combining an abstract and general approach at national level with a case-by-case approach, based on the analysis of the costal territory entrusted to the municipality concerned: the combination of these two approaches, in the Court's opinion, seems to be balanced and capable of ensuring those objectives. Nor does the fact that such verification must be carried out by the competent national authorities call into question the direct effect of Article 12. Moreover, it precludes the automatic and general renewal of the concessions: they must be granted for an appropriate limited period.

Making a further clarification, the Court also pronounced upon the responsibility of the Italian State for the failure to transpose the directive. It has been established that

[220] *See supra*, section 3.1.
[221] Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312, para 41.
[222] *See infra*, Chapter III.
[223] ibid, para 63.
[224] R Adam and A Tizzano, *Manuale di diritto dell'Unione Europea* (3rd edn, Giappichelli 2020).
[225] Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312, para 46.

the direct effect can't be used to justify the failure to adopt national implementing measures. The Italian authorities are still required to ensure the transposal of those provisions: the *Promoimpresa* judgement already explicited the meaning and the scope of Article 12 of the Directive, which was ought to be applied from 28/12/2009, that is to say, when it entered into force.[226] Given the direct effect of the rule, it can be relied on by individuals before national courts against their own Member States, when they didn't correctly implement the Directive in domestic law.[227]

Hence, the Court's response is peremptory: "*Article 12(1) and (2) of Directive 2006/123 must be interpreted as meaning that the obligation for Member States to apply an impartial and transparent selection procedure to potential candidates and the prohibition on automatic renewal of an authorisation granted for a given activity are laid down unconditionally and sufficiently precisely to be regarded as having direct effect*".[228]

This conclusion leads to the answer to the other important question asked by the national court, namely whether the obligation to apply those rules, and eventually disapply conflicting national provisions, lies upon national courts alone or on local administrative authorities as well. The Court referred to its settled case-law, according to which municipal authorities are also required to apply the unconditional and sufficiently precise provisions of a Directive, even by disapplying incompatible rules of national law.[229]

The indication provided in the *Promoimpresa* precedent, stating that it is for the referring court to determine the scarcity of natural resources and, apparently, leaving room for doubts about the extension of this requirement also upon other authorities[230], did not imply, as the Court clarified in this last judgement, that they were the only recipients of this obligation. Each administration is required to apply a selection procedure among potential candidates and to ensure that all the conditions laid down in

[226] ibid, paras 72-73.
[227] See, on this matter, Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* ECLI:EU:C:1982:7.
[228] Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312, para 74.
[229] Case C-103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 1839, ECLI:EU:C:1989:256., paras 29-33.
[230] In other words, if the direct application of EU law is required also from national administrative authorities, such as municipalities, as well as national courts.

the Directive are complied with, disregarding where necessary the differing national rules.

3.1.4 Consequences of the judgement on domestic law

The referenced judgement marks a focal evolvement in the ongoing dialogue between the Italian legal system and the European Union's internal market rules. The Court of Justice formally acknowledged the failure of the Italian legislator to comply, thus exerted pressure to ensure that the domestic legal framework would be brought into alignment with the requirements set out by the European Union. This led to national and local authorities being compelled to reconsider their regulatory practices in light of EU law and the principle of transparency.

The ruling reinforced the primacy of EU law, particularly the Services Directive, and reiterated the prohibition on the automatic renewal of authorisations concerning the use of scarce public resources, such as state-owned maritime property.

As highlighted by authoritative doctrine, the affirmation of the primacy of European principles over national law is fundamental "*at a time when the authority of the judgments of the Court of Justice and the very primacy of EU law are doubted by the highest jurisdictions of some European states*".[231]

The main merit of this judgment is that it did not just abstractly affirm the primacy of European law, but it accurately shaped the behaviour required of local administrative authorities in giving concrete application to European standards. Notwithstanding the answers given in the judgment were foreseeable, they offered a specific contribution, in full consistency with the purpose of the reference for a preliminary ruling[232], to the identification of a minimum level of protection of the rights that European citizens can invoke before their national courts.[233]

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[231] B Nascimbene and I Anrò, *Primato del diritto dell'Unione europea e disapplicazione. Un confronto fra Corte costituzionale, Corte di Cassazione e Corte di giustizia in materia di sicurezza sociale* (31 March 2022), Giustizia Insieme, Diritto UE.

[232] See, on this matter, L Daniele, *Diritto dell'Unione Europea* (7th edn, Giuffrè Francis Lefebvre 2020).

[233] D Diverio, *Nulla di nuovo… sotto il sole? Qualche considerazione a prima lettura sulla sentenza della Corte di giustizia nella causa AGCM c. Comune di Ginosa,* BlogDUE (28 April 2023).

Another significant effort made by the Court in the judgment we are discussing is to define more accurately who, and with what degree of discretion, should carry out the analysis on the scarcity of natural resources.

Furthermore, although the direct effect of Article 12 of the Services Directive had already been explicitly highlighted by AG Szpunar in his Opinion in the *Promoimpresa* case[234], the Court had never clearly ruled on this point prior to the judgment under analysis. It is also noteworthy that this case constitutes a unique instance with regard to the doctrine of direct effect. Specifically, the legal dispute involved two public entities: a local authority (the Municipality of Ginosa) and a national authority (the AGCM). As both parties are organs of the State, and none of them is a private individual, the case cannot be classified under the traditional categories of direct effect. Instead, it constitutes a hybrid form, the analysis of which will be further developed in Chapter III.[235]

Finally, despite the significant pronouncements made by the Court in this ruling, it is important to emphasise that it leaves unresolved the issue of immovable structures and the potential right of outgoing concessionaires to compensation. As previously mentioned[236], the establishment of a mechanism for redress and the definition of criteria for quantifying possible compensation constitute a crucial aspect of the dispute, as they relate to the protection of the outgoing concessionaire's property rights.[237]

In conclusion, "*the significance of the ruling should therefore be seen in the clarification of the issues around the interpretation of Article 12(2) and the strong affirmation of the importance of the principle of fair competition in the context of the duration of concessions*"[238].

[234] Opinion of AG Szpunar in Joined Cases C 458/14 and C 67/15 *Promoimpresa Srl and Others* ECLI:EU:C:2015:916, delivered on 17 December 2015, para 110.
[235] *See infra*, Chapter III.
[236] *See supra*, Chapter I.
[237] *See infra*, Chapter IV.
[238] P Bogdanowicz, *Case C-348/22, Autorità Garante della Concorrenza e del Mercato (Commune de Ginosa). The Court clarifies the prohibition on automatic renewal of an authorisation granted for a given activity* (Review of European Administrative Law Blog, 19 January 2024).

3.1.5 Società Italiana Imprese Balneari Srl v Comune di Rosignano Marittimo and Others

The judgment in Case C-598/22[239], delivered on 11 July 2024, concerned a request for a preliminary ruling on the interpretation of Articles 49 and 56 of TFEU.

The dispute arose between the *Società Italiana Imprese Balneari Srl* (hereinafter "SIIB") and the Municipality of Rosignano Marittimo (hereinafter "the Municipality"). The SIIB held a concession for the occupation of a State-owned maritime area, on which it had constructed permanent structures. Upon the expiry of the concession, the Municipality decided that the said structures were to become State property *ipso iure*, without compensation, and imposed increased public domain charges on the company. The SIIB challenged these measures, bringing the matter before the Regional Administrative Court (TAR) of Tuscany, and subsequently on appeal before the Council of State. The latter referred a request for a preliminary ruling to the Court of Justice.

The core legal question concerned the compatibility of Article 49 of the Italian Shipping Code[240] with Articles 49 and 56 TFEU, in light of the principles established in the *Laezza* judgment (C-375/14)[241]. Specifically, the referring court asked whether those EU provisions preclude a national rule which requires the concessionaire, upon the expiration of the concession - and even in the event of a new concession being granted - to transfer, without compensation, the immovable structures built on the public maritime domain and used for the management of beach activities. Such an obligation might constitute a restriction on the freedom of establishment and the freedom to provide services and may be disproportionate to the legitimate public interest objectives pursued by the national legislator.

The Court, after determining that the reopening of the oral phase of the proceedings was not necessary in the present case, ruled on the admissibility of the request for a preliminary ruling. Although the dispute concerned a purely internal situation, the reference was nevertheless deemed admissible due to its cross-border relevance. Both the referring court and the European Commission recognised that the Italian Shipping Code applies indiscriminately to Italian economic operators and those

[239] Case C-598/22 *Società Italiana Imprese Balneari Srl v Comune di Rosignano Marittimo and Others* [2024] ECLI:EU:C:2024:567.
[240] Italian Shipping Code, Royal Decree No 327/1942, Article 49(1).
[241] Case C-375/14 *Criminal proceedings against Rosanna Laezza* [2016] ECLI:EU:C:2016:60.

established in other Member States at the same time. Consequently, it could not be excluded that operators from other Member States might be interested in exercising the freedom of establishment or the freedom to provide services within the Italian territory. Therefore, the national provisions at issue were considered capable of producing effects beyond the domestic context, and the preliminary reference was held to be admissible insofar as it concerned Article 49 TFEU.[242]

As previously explained, Articles 49 and 56 TFEU establish, respectively, the freedom of establishment and the freedom to provide services. The case law of the Court has consistently clarified that the granting of a concession to occupy State-owned maritime property entails the concessionaire's access to the host Member State's territory with a view to participating in the economic life of that State on a stable and continuous basis, for a relatively long duration.[243] For this reason, such concessions fall within the scope of the freedom of establishment under Article 49 TFEU.

Moreover, since under Article 57(1) TFEU the rules on the freedom to provide services apply only in the absence of rules on the freedom of establishment, the Court excluded the application of Article 56 TFEU. Consequently, concessions concerning State-owned maritime property fall solely within the scope of Article 49 TFEU.

As delineated beforehand, this provision expressly prohibits any restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. According to settled case law of the Court of Justice, it covers all national measures which, even if not formally discriminatory on grounds of nationality, hinder, obstruct, or render less attractive the exercise of the right of establishment.[244]

However, the Court has also clarified that a national provision applicable without distinction to all economic operators does not infringe this prohibition where it does not seek to regulate the conditions for establishment, and where its potential restrictive effects on the freedom of establishment are too uncertain or indirect to be considered real obstacles to that freedom.[245]

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[242] Council of State, News No 70 of 29 July 2024 (Italian Council of State, 29 July 2024).
[243] See Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 25; Case C-384/08 *Attanasio Group Srl v Comune di Lecce* [2010] ECR I-2083, para 39; Case C-201/15 *AGET Iraklis AE v Elliniko Dimosio* EU:C:2016:972, para 50.
[244] See, for instance, Case C-442/02 *CaixaBank France* [2004] ECR I-8961, para 11.
[245] See Case C-433/21 and C-434/21 *Contship Italia SpA and Others v Autorità di Sistema Portuale del Mar Ligure Occidentale and Others* EU:C:2022:757, para 45.

In the present case, it is undisputed that Article 49(1) of the Italian Shipping Code applies equally to all operators active in the Italian territory. This implies that any economic operator wishing to apply for a concession must assess whether doing so is economically viable.[246] Thus, the provision in question does not explicitly regulate the conditions of establishment for operators authorised to carry out tourist-recreational activities on maritime public property. Rather, it merely provides that, upon the expiry of a concession, and in the absence of a different stipulation in the concession deed, non-removable structures erected by the concessionaire are to be automatically acquired by the State without compensation.

Although this provision does not pursue objectives directly linked to the right of establishment, it remains necessary to assess whether it produces indirect or disproportionate restrictive effects in relation to the exercise of that freedom.

The Court observed that Article 49 of the Italian Shipping Code reflects the fundamental principles governing public property, particularly the principle of inalienability. According to the latter, public property must remain under public ownership, and concessions for its occupation are inherently temporary and revocable. The free and uncompensated acquisition by the administration of non-removable structures built on public land is, therefore, a direct consequence of this legal framework.

In the specific case, the economic operator (SIIB) was fully aware at the time the concession was granted that it was subject to a fixed term and possible revocation. Furthermore, it was highlighted that "*any restrictive effects of Article 49(1) on freedom of establishment are too uncertain and indirect […] for that provision to be able to be regarded as liable to hinder that freedom*"[247].

Lastly, the Court held that such free acquisition does not amount to forced expropriation, as the rule in question expressly allows for a contractual derogation from this rule. This reinforces the contractual and consensual nature of the concession relationship.[248]

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[246] As the AG observed in her Opinion: "*All economic operators are therefore faced with the same concern, that is whether it is economically viable to compete for a concession knowing that, upon its expiry, the irremovable structures constructed will be transferred to State ownership*", Opinion of AG Ćapeta, Case C-598/22 *Società Italiana Imprese Balneari (SIIB) v Comune di Rosignano Marittimo* EU:C:2024:134, delivered on 8 February 2024, para 51.

[247] Case C-598/22 *Società Italiana Imprese Balneari Srl v Comune di Rosignano Marittimo and Others* [2024] ECLI:EU:C:2024:567, para 56.

[248] Council of State, News No 70 of 29 July 2024 (Italian Council of State, 29 July 2024).

The Court further emphasised that the distinction between the renewal and the initial granting of a concession does not affect the interpretation of Article 49(1) of the Shipping Code. In fact, the renewal of a concession constitutes the succession of two distinct authorisations, not the automatic extension of the original one. This interpretation "*is such as to ensure that a concession can be awarded only following a competitive tendering procedure placing all the candidates and tenderers on an equal footing*"[249].

In conclusion, the interpretation of Article 49 TFEU does not contradict the principles set out in the *Laezza* judgment[250]. In that case, which concerned the gambling sector, the concessionaires were the actual owners of the assets required for their economic activity, and the obligation to transfer the use of these assets free of charge was equivalent to a sanction imposed without negotiation.

In contrast, in the present case, SIIB merely held a temporary surface right over the structures it had built on the maritime public domain. Moreover, the issue of the free acquisition of non-removable structures "*is a contractual negotiation between the concession-granting public entity and its concessionaire*"[251]: it applies only on a supplementary basis, where no alternative agreement is specified in the concession deed.[252]

On the basis of these considerations, the Court reaffirmed the legal principles previously established: Article 49 TFEU "*must be interpreted as not precluding a national rule which provides that, upon the expiry of a concession to occupy State-owned land and unless otherwise stipulated in the concession agreement, the concessionaire is required to transfer immediately, for no consideration and without compensation, the fixed structures which it has erected on the land that is subject to the concession, even in the event that the concession is renewed"*.[253]

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[249] ibid, para 58.
[250] Case C-375/14 *Criminal proceedings against Rosanna Laezza* [2016] ECLI:EU:C:2016:60, paras. 41-44.
[251] Case C-598/22 *Società Italiana Imprese Balneari Srl v Comune di Rosignano Marittimo and Others* [2024] ECLI:EU:C:2024:567, para 61.
[252] See G Ioannides (2024) *The free devolution of non-removable works carried out by the concessionaire and the issue of compensations*, DPCE Online, 65(3).
[253] ibid, para 62.

3.1.6 Consequences of the judgement on domestic law

The judgment analysed in the previous paragraph represents an evolutionary step in the case law established by the *Promoimpresa* and *Comune di Ginosa* rulings, while remaining consistent with the same jurisprudential line. The earlier decisions had primarily addressed the unlawfulness of automatic legislative extensions (*ex lege*) and the prohibition on the automatic renewal of concessions in violation of Article 12 of the Services Directive and Article 49 TFEU: the former requires Member States to ensure impartial and transparent selection procedures when authorisations are limited due to scarce natural resources, and prohibits automatic or unlimited renewals; the latter guarantees the freedom of establishment for EU nationals, prohibiting restrictions on their right to set up and manage businesses in any Member State. The more recent C-598/22 ruling introduced a new and distinct legal issue: the fate of non-removable structures built by concessionaires on public maritime property.

The core of the issue lies in the automatic and free acquisition of such constructions by the State upon the expiry of the concession, without any form of compensation for the outgoing operator. In its assessment of Article 49 of the Italian Shipping Code, the Court emphasised that a national measure imposing such an acquisition could, under certain conditions, amount to a restriction on the freedom of establishment, particularly if it proves disproportionate to the legitimate public interest pursued by the legislator.[254]

Although the Court did not consider the specific case to breach EU law, it called for a proportionality assessment, opening the possibility that, in future scenarios, compensation may be required where the automatic and uncompensated transfer of immovable assets would impose an excessive burden on the concessionaire.

In summary:

- the *Promoimpresa* judgment initially established the obligation to carry out a public tender procedure for the assignment of concessions[255];

[254] See G Ioannides (2024) *The free devolution of non-removable works carried out by the concessionaire and the issue of compensations,* DPCE Online, 65(3).
[255] See Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others [*2016] ECLI:EU:C:2016:558, paras 49 ff.

- subsequently, the *Comune di Ginosa* ruling explicitly recognised the direct effect of Article 12 of the Services Directive, including in relationships between public bodies[256];
- finally, the July 2024 ruling (Case C-598/22) introduced a new compatibility issue with EU law: the illegitimacy of the automatic, uncompensated acquisition of immovable structures built by the concessionaire, when such acquisition is disproportionate in light of the public interest pursued. This development paves the way for the discussion of safeguarding private investment and property rights within the context of concession regimes: these topics will be furtherly discussed in the next chapter.[257]

Following this latest judgment, a further step has been taken towards defining a concession system consistent with EU law. The economic freedom of the operator and the protection of legitimate expectations of the outgoing concessionaires have become central elements in assessing the lawfulness of national concession rules, adding to the theme of protection of the internal market and potential incoming concessionaires, which had already been largely addressed in the Court's judgments discussed in the previous sections.

3.2 Italian Courts' decisions and their impact

In the context delineated thus far, the Italian courts have played a major role in shaping the legal development of maritime concessions, particularly in the context of their alignment with European Union law. It is important to acknowledge that, faced with persistent legislative inaction, the judiciary - most notably the Council of State and the Constitutional Court - has intervened on multiple occasions to clarify the applicable legal standards and ensure the primacy of EU law.

Through a series of key decisions, Italian courts have affirmed the direct applicability of EU provisions, upheld the necessity of public tender procedures, and contributed to dismantling national practices deemed incompatible with internal market principles. Their jurisprudence has not only tried to fill legislative gaps but also served as a critical instrument of legal harmonisation between domestic and supranational norms.

[256] See Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312, para 74.
[257] *See infra*, Chapter IV.

This section examines the evolving stance of the Italian judiciary on the issue of seaside concessions, particularly in light of EU law developments. It will first analyse the role of the Council of State, focusing on its interpretation and application of the Services Directive and the principle of competition in recent landmark rulings. It will then turn to the Constitutional Court, exploring how it has addressed the tension between national legislation and EU obligations, especially regarding the primacy of EU law and the constitutional implications of legislative inertia. The aim is to assess how these judicial decisions have influenced the national regulatory framework and contributed to shaping Italy's compliance with European law.

3.2.1 Council of State rulings on the application of the Services Directive

The Italian Council of State has repeatedly addressed the issue of seaside concessions, often with the intent of urging the national legislator to comply with the guidance provided by the European Union and, at times, even stepping in to fill the legislative void itself.

Within the extensive litigation that has surrounded this matter, one of the most important interventions by the Council's Plenary Assembly is undoubtedly represented by the twin rulings No. 17 and No. 18 of 9 November 2021. In these landmark judgments, while the Council did not fully resolve the longstanding legal uncertainty surrounding the concession system, it nonetheless "*took a stance on a number of highly significant issues*"[258], thereby exerting considerable influence on the evolution of both administrative and legislative responses in this area.

Positioned at the intersection between national and supranational legal frameworks, these decisions have not only interpreted the domestic legal provisions in light of EU law but have also actively contributed to the attempt of aligning the Italian legal system with the Services Directive.

In particular, the Council affirmed on various occasions the primacy of EU law, recognised the direct effect of Article 12 of the Services Directive, and declared the incompatibility of automatic extensions of concessions with EU principles such as competition, transparency, and equal treatment. These decisions have inserted

[258] R Mastroianni, *L'Adunanza Plenaria del Consiglio di Stato e le concessioni balneari: due passi avanti e uno indietro?* (2022) 1 Eurojus, p. 105.

themselves into a broader process of legal transformation, urging the national legislator and administrative authorities to abandon long-standing practices of concession renewal and to move towards procedures that ensure openness and fairness, in accordance with the European legal order.

3.2.2 Twin judgements No 17 and No 18 2021

The judgments in question concern the adjudication of two appeals brought against the decisions of the Regional Administrative Court (TAR) of Puglia and the Regional Administrative Court (TAR) of Sicily, which were referred to the Plenary Assembly (*Adunanza Plenaria*) of the Council of State. The referral was made by the President of the Council of State, pursuant to Article 99 (2) of the Italian Code of Administrative Procedure, which provides that "*before the decision, the President of the Council of State, at the request of the parties or ex officio, may refer any appeal to the Plenary Assembly to resolve issues of significant legal importance or to settle jurisprudential divergences*"[259].[260]

With Decree No. 160 of 2021[261], the President made use of this provision for the first time, highlighting the "*particular socio-economic relevance*" of the matter under appeal and the need for a judgment that would ensure "*legal certainty and uniform application of the law by the competent administrations, as well as consistency in judicial interpretations*".[262]

The Plenary Assembly of the Council of State was therefore called upon to rule on a series of issues relating to concessions of State-owned maritime property:
a) whether the Italian Republic is under an obligation to disapply national or regional laws that provide for automatic and general extensions of maritime concessions granted for tourist and recreational purposes, and whether such an obligation applies to all branches of the Member State, as well as whether the task of interpreting and ensuring

[259] Legislative Decree No 104 of 2 July 2010, Article 99(2) (Italian Code of Administrative Procedure).
[260] The reasoning included in the Presidential Decree, justifying the referral under the two criteria laid down by Article 99, has been subject to various criticisms. See, on this matter, R Mastroianni, *L'Adunanza Plenaria del Consiglio di Stato e le concessioni balneari: due passi avanti e uno indietro?* (2022) 1 Eurojus, pp. 108-109.
[261] Presidential Decree No 160/2021 of the President of the Council of State.
[262] Lucia Casale, *ll principio di legalità alla prova delle concessioni demaniali marittime* (2025) XVII(4) DirittoAmministrativo.it.

such disapplication is reserved exclusively to judicial bodies or may also be carried out by administrative authorities;

b) if the answer to the above is affirmative, whether the administration is required to annul *ex officio* a measure that conflicts with EU law or to reconsider it in light of that law, and whether, and under what circumstances, a final judgment favourable to that measure may preclude its annulment;

c) whether, with reference to the moratorium introduced by Article 182(2) of Decree-Law No 34 of 19 May 2020, as amended by Law No 77 of 17 July 2020[263], if this provision is not deemed inapplicable due to its incompatibility with EU law, the expression "*areas subject to concession as of the date of entry into force of the law converting this decree*" should be understood as also encompassing those areas whose concessions had already expired by the time the moratorium entered into force, but whose terms fell within the scope of Article 1, paragraphs 682 et seq., of Law No 145 of 30 December 2018[264].

With this ruling, the Plenary Assembly "*sacrificed its role as a judicial interpreter in favour of that [...] of assisting the legislator, [...] to the point of assuming, in its stead, choices of opportunity and balance in reconciling various interests*".[265]

Indeed, the persistent inaction of the national legislature in adopting a comprehensive regulatory framework for the matter - one that complies with EU constraints - has had a considerable socio-economic impact. In an effort to fill this legislative void, the Council went "*further than expected when it outlined the parameters for the implementation of competitive procedures for the allocation of maritime state-owned concessions and proposed to the relevant administrations a general technical extension until 31 December 2023*".[266]

After addressing preliminary procedural issues - specifically determining that the contested measure affects only the individual interest of the claimant and,

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[263] Decree-Law No 34 of 19 May 2020, coordinated with the Conversion Law No 77 of 17 July 2020, on "Urgent measures on health, employment and economic support, as well as social policies related to the COVID-19 epidemiological emergency", Article 182(2).

[264]Law No 145 of 30 December 2018, Budget of the State for the Financial Year 2019 and Multiannual Budget for the Three-Year Period 2019–2021, Article 1, paras 682 et seq.

[265] M A Sandulli, *Introduzione al numero speciale sulle "Concessioni balneari" alla luce delle sentenze NN. 17 e 18 del 2021 dell'Adunanza Plenaria* (2021) DeS vol 3, Editoriale Scientifica SRL, p. 16.

[266] Lucia Casale, *ll principio di legalità alla prova delle concessioni demaniali maritime* (2025) XVII(4) DirittoAmministrativo.it.

consequently, that the conditions for allowing intervention by trade associations were not met (thus declaring their intervention inadmissible)[267] - the Plenary Assembly moved on to assess the legal framework governing seaside concessions.

In evaluating "*the possible conflict between national law and directly applicable EU rules*"[268] - in particular, Article 1, paragraphs 682 and 683 of Law No 145 of 2018, which establishes the automatic and general extension of existing concessions until 31 December 2033 - the Plenary Assembly recalled that the matter had already been addressed by the CJEU in the *Promoimpresa* judgment[269] and aligned itself with that Court's conclusions.

The Council reaffirmed that EU law precludes a national provision allowing the automatic renewal of seaside concessions without a prior competitive selection process, thus finding the Italian legislation (specifically the automatic extension until December 2033) to be incompatible with Article 49 TFEU and Article 12 of the Services Directive.

Particularly, the Plenary Assembly, drawing on the principles established by the CJEU as early as the *Telaustria* judgment of 2000[270], affirmed that any contract, provided it demonstrates a certain cross-border interest, must be awarded in compliance with the transparency obligation, even if it falls outside the scope of the directives.

The notion of certain cross-border interest is interpreted as the "*capacity of a public contract, or more generally of an economic opportunity offered by a public administration, even through measures that do not lead to the conclusion of a procurement or concession contract, to attract economic operators from other Member States*".[271]

With specific reference to the "market" for seaside concessions, the authority emphasised that the public administration offers private concessionaires access to state-

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[267] This aspect of the decision has also been criticised, considering the broad legal and economic impact of the ruling and the decisional significance of the answers provided. See, on this matter, M A Sandulli, *Introduzione al numero speciale sulle "Concessioni balneari" alla luce delle sentenze NN. 17 e 18 del 2021 dell'Adunanza Plenaria* (2021) DeS vol 3, Editoriale Scientifica SRL, p.14.
[268] Council of State – Plenary Assembly, Judgment No 17 [2021], para 11.
[269] Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558.
[270] "*Any act of the State which sets the conditions under which an economic activity may be carried out must respect the fundamental principles of the Treaty, in particular the principles of non-discrimination on the basis of nationality and equal treatment, as well as the resulting obligation of transparency*", Council of State – Plenary Assembly, Judgment No 17 [2021], para 15. See also Case C-324/98 *Telaustria Verlags GmbH v Telekom Austria AG* [2000] ECR I-10745, para 60.
[271]Council of State, Plenary Assembly, Judgment No 17 [2021], para 15.

owned assets forming "*one of the most renowned and attractive natural heritages in the world*"[272].This further enhances the clear and significant economic appeal of such opportunities to foreign operators from other EU Member States.[273]

Given that this sector is deemed "*crucial for the national economy*"[274], the Council considers it "*untenable to remove such resources from free market competition, both under national law and, above all, under European Union law*".[275] Furthermore, although it asserts that Italian beaches "*as a whole, and individually, possess a clear cross-border interest*"[276], thereby rendering national legislation incompatible with Articles 49 and 56 TFEU, the obligation of public tendering actually arises from the application of Article 12 of the Services Directive, which does not require the presence of a cross-border interest.

After examining and rejecting the main counter-arguments advanced against the applicability of the Directive, the Council further dismisses the thesis according to which the provision in question cannot be considered self-executing.[277] Indeed, given the Directive's aim - to introduce a regime of transparency in the concession market - its content is sufficiently precise and unconditional to require the disapplication of conflicting domestic rules. Consequently, the incompatibility of the national regime with Article 12 of the Services Directive is also established.[278]

Once this premise is settled, the Plenary Assembly holds that the aforementioned obligation of disapplication lies with the administrative apparatus itself.[279] As the judgment explains, "*to argue otherwise would mean authorising the public administration to adopt administrative acts which are unlawful due to a violation of EU*

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[272] ibid, para 16.
[273] This point is even more clear if combined with the widespread practice of sub-concessions (which allows concessionaires to obtain a higher return than the original concession fee). See, on this matter, A L Rum, *'Note to Council of State, Plenary Assembly, Judgments Nos 17/2021 and 18/2021'* (2025) XVII(4) Diritto Amministrativo ISSN 2039-6937, p. 58.
[274]Council of State, Plenary Assembly, Judgment No 17 [2021], para 16.
[275] M Gola, *Il Consiglio di Stato, l'Europa e le "concessioni balneari": si chiude una – annosa – vicenda o resta ancora aperta?* (2021) 3 Diritto e Società, Saggi, p. 403.
[276] Council of State, Plenary Assembly, Judgment No 17 [2021], para 16.
[277] ibid, para 26.
[278] ibid, para 28.
[279] Since, under well-established European and national case law, this duty is incumbent on all entities within the legal system, without distinction. See, on this matter, A L Rum, *Note to Council of State, Plenary Assembly, Judgments Nos 17/2021 and 18/2021* (2025) XVII(4) Diritto Amministrativo ISSN 2039-6937, p. 60.

law, and which would ultimately be annulled in court, thereby severely undermining the principle of legality, as well as basic requirements of legal certainty".[280]

Furthermore, the Court asserts that, in the present case, no question of administrative self-review (*autotutela*) arises. In fact, it qualifies the act of renewal of the concession as "*a merely declaratory act recognising an effect automatically produced by statute*".[281] Therefore, if the legal provision giving rise to that effect is found to be incompatible with EU law and thus inapplicable, the automatic extension of the concession must be considered *tamquam non esset* - as if it never existed.

The same reasoning applies even where a final judicial decision has been issued in favour of the concession holder: in such cases, the effects of the concession must nevertheless be regarded as nullified, owing to the overriding requirement to disapply the conflicting domestic rule.[282]

In conclusion, the Council of State, acknowledging the prevailing legal uncertainty - generated by successive legislative extensions and the persistent lack of systematic reform - considered it necessary to defer the temporal effects of its ruling. Fully aware of the potential economic and social repercussions of an immediate enforcement, the Plenary Assembly ruled that the effects of the judgment should be postponed until a suitable period had elapsed, particularly "*in view of the functional need to organise public tender procedures*"[283]. The Court further stated that "*the derogation from retroactivity is grounded in the principle of legal certainty*"[284].

Accordingly, the operative date for the full implementation of the ruling was set as 31 December 2023. From that date onwards, all existing concessions would be deemed ineffective, and any subsequent legislative attempts to further extend their duration would also be considered inapplicable.[285]

It is necessary, regarding this point of the decision, to insert a brief reflection. The Plenary Assembly acknowledges that organising public and transparent tendering procedures requires an adequate technical timeframe, and that, in the meantime,

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[280]Council of State, Plenary Assembly, Judgment No 17 [2021], para 32.
[281] ibid, para 42.
[282] ibid, paras 44-45.
[283] ibid, para 47.
[284] ibid.
[285] R Mastroianni, *L'Adunanza Plenaria del Consiglio di Stato e le concessioni balneari: due passi avanti e uno indietro?* (2022) 1 Eurojus, p. 114.

concession relationships may continue. However, it is also aware that such a need, by itself, cannot justify the failure of national administrations to immediately apply European rules endowed with direct effect. Nevertheless, the case law of the Court of Justice permits, in exceptional circumstances, to put a temporal limitation on the effects of preliminary rulings.[286]

Indeed, it is possible to limit the retroactive effect of the Court's judgments where there is a risk of serious economic or social consequences, especially if numerous legal relationships have been lawfully established based on a different interpretation of the law, within a context of objective and significant uncertainty[287] - as in the present case.[288] Therefore, although as a general rule the Court's judgments clarify the meaning of a provision from the moment of its entry into force and must thus be applied also to pre-existing legal relationships, it is exceptionally permissible to restrict their effects in order to safeguard legal situations that have been consolidated in good faith.[289]

The Plenary Assembly, however, failed to take into account that the derogation from the retroactive effect of preliminary rulings may only be granted by the Court of Justice itself within the same interpretative judgment, given its exceptional nature.[290] The Council of State, by contrast, unilaterally decided to defer the effects of its own rulings on seaside concessions, despite the fact that the *Promoimpresa* judgment had already ruled on Article 49 TFEU and the Services Directive without introducing any temporal limitation on their applicability.[291]

As for the criteria to guide future tender procedures - while ultimately left to the discretion of the legislator - the Council emphasised that they must be "*proportionate, non-discriminatory and fair."*; it also underlined the importance of ensuring that the

[286] See Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italian Republic* [1991] ECR I-5357.
[287] See Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 53.
[288] F Ferraro, *Diritto dell'Unione Europea e concessioni demaniali: più luci o più ombre nelle sentenze gemelle dell'Adunanza Plenaria?* (2021) III(3) Diritto e Società (Special Issue), p. 378.
[289] See Case C-76/14 *Manea v Consiglio dell'Ordine degli Avvocati di Bari* EU:C:2015:216, para 54.
[290] See, on this matter, Case 309/85 *Barra v Belgian State* EU:C:1988:42, para 14; Case 24/86 *Blaizot v University of Liège* EU:C:1988:43, para 29; Case C-163/90 *Legros and Others* EU:C:1992:326, para 30; Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Bosman and Others* EU:C:1995:463, para 142.
[291] F Ferraro, *Diritto dell'Unione Europea e concessioni demaniali: più luci o più ombre nelle sentenze gemelle dell'Adunanza Plenaria?* (2021) III(3) Diritto e Società (Special Issue), p. 379.

duration of each concession is limited in time.[292] It will be the responsibility of the administration "*to balance the competing interests at stake, always acting in accordance with the principles governing public action*".[293]

By deferring the effects of its ruling, the Council sought to provide the national legislator with the necessary time to enact comprehensive legislation capable of reconciling competition and market protection requirements with the legitimate expectations of outgoing concessionaires.[294] As the following sections will illustrate, this hope has not been fulfilled.

3.2.3 Other rulings of the Council of State

After the fundamental twin rulings of 2021, the Council of State has continued to influence the national legal landscape on seaside concessions. In a significant development, the *Corte di Cassazione* (thereinafter Supreme Court of Cassation), with judgment No. 32559 of 23 November 2023[295], annulled one of the twin rulings - No. 18/2021 - on the grounds that it constituted a denial of justice. This annulment followed an appeal brought by trade associations that had been excluded from the original proceedings and alleged multiple procedural and substantive violations.

Nevertheless, the Council of State reaffirmed its interpretative stance in various subsequent rulings, in particular the ones of 20 May 2024 (No. 4479 and Nos. 4480 and 4481, Seventh Section)[296]. These decisions upheld the position of the Municipality of Lecce, which had opted to disapply the automatic extension of concessions under Article 1, paras. 682 and 683 of Law No. 145/2018 (since repealed by Law No. 118/2022), and annulled the opposing decisions adopted by the Municipality of Ginosa - some of which had been at the centre of the CJEU judgment in Case C-348/22.

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[292] It has to be justified on the basis of technical, economic, and financial evaluations, and determined concretely by the awarding authority; see Council of State, Plenary Assembly, Judgment No 17 [2021], para 49.
[293] M Gola, *Il Consiglio di Stato, l'Europa e le "concessioni balneari": si chiude una – annosa – vicenda o resta ancora aperta?* (2021) 3 Diritto e Società, Saggi, p. 418.
[294] A L Rum, *Note to Council of State, Plenary Assembly, Judgments Nos 17/2021 and 18/2021* (2025) XVII(4) Diritto Amministrativo ISSN 2039-6937, p. 63.
[295] Supreme Court of Cassation, Judgment No 32559 of 23 November 2023.
[296] Council of State, Seventh Section, Judgment No 4479 [2024] and Council of State, Seventh Section, Judgments Nos 4480 and 4481 [2024]

The rulings reaffirmed the interpretative principles that have been well established in this field and, therefore, confirmed the obligation of national authorities to disapply any domestic provision that grants automatic and generalised extensions of concessions, in accordance with both CJEU case law and domestic jurisprudence. Even setting aside the enduring binding force of judgment No. 17/2021, there is a constant administrative jurisprudence that has repeatedly deemed it imperative to disapply the generalised extensions of concessions.[297] In fact, after the twin rulings and in line with the approach of the Court of Justice, the subsequent national legislation in this regard has been systematically found by administrative judges to be incompatible with Article 12 of the Services Directive and Article 49 TFEU.

Notably, the Council has maintained a firm stance in urging administrative authorities to proceed with competitive tendering procedures, reiterating that the absence of legislative reform does not justify further delays or derogations. These rulings have further clarified the scope of administrative discretion, the procedural duties of public authorities, and the consequences of failing to comply with EU law, thereby reinforcing the primacy of EU legal principles in the management of maritime public property.

With regard to the new legislative framework, the Council of State emphasised that the provisions introduced by Law No. 14/2023 result in a further extension of existing concessions, whose duration becomes indefinite and potentially unlimited due to the prohibition on issuing new calls for tenders until the adoption of the legislative decrees provided for in Law No. 118/2022. Since the previous concessions remain in force until the issuance of the new ones, this system is manifestly in conflict with EU law.

As for the issue of the scarcity of available resources, the Seventh Section not only reaffirmed that such scarcity is not sufficient to call into question the direct effect of Article 12 of the Bolkestein Directive but also added a further observation. Specifically, it noted that allowing the occupation of the few remaining stretches of free and publicly accessible beach - particularly important for economically disadvantaged

[297] See, on this matter, Council of State, Sixth Section, Judgement No 2192 [2023]; Council of State, Sixth Section, Judgment No 7992 [2023]; Council of State, Seventh Section, Judgment No 9493 [2023]; Council of State, Seventh Section, Judgment No 119 [2024].

groups - would contradict the constitutional principles of economic solidarity and the protection of the environment and landscape.[298]

Finally, the Council reiterated the criteria to be used for the organisation of competitive selection procedures, as well as the conditions and limitations under which a technical extension of concessions may be permitted until 2024. In fact, with reference to the 2024 bathing season, only a "technical" extension – so strictly functional to the execution of the selection procedure - is considered compatible with EU law. This extension must establish the expiry date of the existing concessions as 31 December 2023 and may allow the competent administrative authorities to prolong their duration, through a duly motivated act, only for the time strictly necessary to complete the competitive procedure, and in any event no later than 31 December 2024. Such an extension is admissible only "*in the presence of objective reasons that prevent the conclusion of the selection procedure by 31 December 2023, such as, by way of example, the pendency of legal proceedings or objective difficulties in carrying out the procedure itself*"[299].[300]

In order to legitimately benefit from this technical extension without violating or circumventing Union law, the administrative authorities - especially municipal ones - must have already launched the selection procedure or, at least, adopted a resolution to initiate it within a very short timeframe, issuing policy directives and promptly beginning the preparation of tender documentation.[301]

These principles have been further reiterated by the administrative judiciary in the most recent rulings No. 1688 of February 2025 and No. 2907 of April 2025.[302]

3.2.4 Brief references to other national Courts and conclusions

In addition to the crucial contributions that came from the Court of Justice and the Council of State to the matter, both the Constitutional Court and the Court of

[298] Giustizia Amministrativa, '*After the judgments of the Joint Sections of the Court of Cassation and the Court of Justice, the Council of State confirms the incompatibility with EU law of the extensions of State-owned maritime concessions and the need to initiate tender procedures for the allocation of expired concessions'* (Consiglio di Stato, 2025).
[299] Law No 118/2022, Article 3(1) and (3).
[300] Council of State, Seventh Section, Judgment No 4479 [2024], paras 25 ff.
[301] ibid.
[302] Council of State, Seventh Section, Judgment No 1688 [2025] and Council of State, Seventh Section, Judgment No 2907 [2025].

Cassation have intervened in the complex legal framework governing seaside concessions, reiterating the conclusions that have been reached according to the jurisprudential landscape outlined in the previous sections of this Chapter.

Among the most noteworthy rulings that need to be mentioned there is certainly No 109/2024 of the Italian Constitutional Court[303]. Therein, the Court places itself within the framework traced by the internal administrative judiciary and the CJEU, holding up concepts and legal qualifications that have, in recent years, characterized the reconstruction of the legal nature of seaside concessions.[304] Moreover, shortly after the publication of the judgment in question, the interpretation provided received further consolidation through a new ruling of the Court of Justice[305].

Subsequently, the Constitutional Court unequivocally declared the constitutional illegitimacy of statutory extensions of seaside concessions for violation of EU law - conceived as an "interposed parameter" - and not, as had often occurred in the past, for infringement of the State's exclusive legislative competence in matters of competition protection[306].

In its reasoning, the Constitutional Court reiterates, by adopting them as its own, both the legal principles affirmed in the preliminary rulings of the CJEU[307] and the elaboration of the Plenary Assembly of the Council of State in order to define the content of the interposed parameter - namely, Article 12 of the Services Directive - with the aim of applying it, pursuant to Article 117(1) of the Italian Constitution[308], to assess the legitimacy of the contested regional provision. "*It is precisely on the obligation of both national and regional legislators to comply with the constraints arising from the legal order of the European Union that the Constitutional Court proceeds to examine the compatibility between the Sicilian legislation and the Services Directive*".[309]

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[303] Italian Constitutional Court, Judgment No 109/2024, 3 May 2024.
[304] *See supra*, Chapter II.
[305] See Case C-598/22 *Società Italiana Imprese Balneari Srl v Comune di Rosignano Marittimo and Others* [2024] ECLI:EU:C:2024:567.
[306] See, on this matter, Italian Constitutional Court, Judgment No 180/2010, 15 June 2010.
[307] See Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558 and Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312.
[308] Constitution of the Italian Republic [1947], Article 117(1).
[309] M Timo, *L'incostituzionalità delle proroghe legali delle concessioni balneari per violazione della "Direttiva Servizi" (nota a Corte cost. n. 109/2024)* (2024) Giustizia Insieme.

In this ruling - which thus marks a shift in the constitutional jurisprudence - the Constitutional Court, for the first time, addressed the substantive merits of the constitutional legitimacy of statutory extensions (*proroghe ex lege*), adopting the more substantial benchmark of compliance with EU obligations, as enshrined in Article 117(1) of the Italian Constitution. By contrast, in the past, it had always taken a merely formal position, focusing on the correct allocation of legislative powers.[310]

The Court of Cassation has also addressed the issue, most notably with Judgment No. 32559 of 2023 by the Joined Chambers (*Sezioni Unite*)[311] and with Judgment No. 698 of 2022 issued by the Third Criminal Section[312], which dealt with the matter of maritime State concessions in a criminal law context.

As demonstrated by the case law examined in the previous sections, the Italian administrative courts[313] - most notably the Council of State - have consistently aligned themselves with the positions expressed by the European Union. Through their judgments, these courts have repeatedly called for the national legislator to conform to EU law, particularly the principles enshrined in the Services Directive and Article 49 TFEU. This proactive stance has often led to interpretation in light of EU obligations of national provisions and, where necessary, to their disapplication. Despite these efforts, however, the response from the legislative branch has been largely insufficient, as evidenced by the persistent legal uncertainty and the continued adoption of national measures in conflict with EU requirements.

The systematic delays of the Italian government stem from a complex interplay of conflicting interests. On one side, there is the European Union's legal imperative to align the national legislation to the EU provisions. On the other side, strong domestic political and economic pressures push in the opposite direction. Thousands of long-standing concessionaires, many of whom operate family-run businesses, have invested significant resources under the expectation of stability, and they represent a powerful

[310] Indeed, there are only two precedents that the judges of the Constitutional Court could invoke to uphold the constitutionality issue: Italian Constitutional Court, Judgment No 180 [2010] and the more recent Italian Constitutional Court, Judgement No 233 [2020].
[311]Supreme Court of Cassation, Joined Chambers, Judgment No 32559 [2023], which annulled Council of State, Plenary Assembly, Judgment No 18 [2021].
[312] Supreme Court of Cassation, Third Criminal Section, Judgment No 698 [2022].
[313] See, for example, TAR Liguria (Regional Administrative Court), First Section, Judgment No 183/2025 [2025] and TAR Campania (Regional Administrative Court), Seventh Section, Judgement No 699/2025 [2025].

lobbying group with considerable local and parliamentary support. These operators invoke the protection of legitimate expectations and the safeguarding of past investments. The government finds itself caught between the need to uphold EU law and avoid infringement procedures, and the desire to mitigate social and economic backlash at the national level (especially in coastal regions where tourism is central). This tension has resulted in legislative inertia and repeated extensions of existing concessions.

In such a context, the judicial activism, though praiseworthy in its commitment to upholding the primacy of EU law, has not succeeded yet in eliciting the national legislator to formulate a comprehensive reform aligned with the Union's legal framework.

The evident fracture in the relationship between the two branches of the Italian state – namely, the judiciary and the legislature – is generating considerable disorder in the local administrative management of seaside concessions. Notably, within the Italian system of power allocation, the municipal administration is the authority responsible for the granting of such concessions. Nevertheless, a considerable number of coastal municipalities are not equipped with the requisite legal expertise to successfully navigate the conflicting pressures emanating from the national legislative authority and the judiciary.

This inherent uncertainty has led to significant variations in the decisions adopted by different local authorities, with some entities frequently revising their decisions within a short timeframe. In the ensuing chapters, an in-depth examination will be conducted to ascertain the repercussions of this phenomenon on Italy's socio-economic panorama. Moreover, a constructive approach will be adopted to identify efficacious solutions that ensure the harmonisation of local administrative practices with EU law, as opposed to a mere adherence to formal requirements.

CHAPTER III

DIRECT EFFECT, LIBERALISATION OF SERVICES AND PROPERTY REGIMES: LEGAL FOUNDATIONS AND CHALLENGES IN THE CONTEXT OF SEASIDE CONCESSIONS

1. Direct effect and primacy of EU law

In the context of the ongoing dispute between the EU institutions and the Italian national government with regard to the management of bathing concessions, the principle of direct effect holds particular significance.

This section delves into this principle, as initially articulated by the Court of Justice in *Van Gend en Loos*[314], outlining its core criteria. Emphasis will be placed on the application of this principle to the Services Directive, particularly Article 12, within the framework of seaside concessions. Building upon the case law previously analysed, the discussion will critically assess the direct effect of the Directive's provisions and its implications for the obligation of national authorities to disapply conflicting domestic legislation.

The doctrine of direct effect is an illustration of the CJEU developing principles that aim to strengthen the impact of European law within national legal systems: it enables EU law to be enforced not only by the Commission, according to the Treaty rules, but also by individuals in their national courts, thereby creating a system of 'dual vigilance'.[315]

1.1 The principle of direct effect in Van Gend & Loos

The roots of the doctrine of direct effect can be traced back to cases preceding *Van Gend en Loos*. Notably, in *Groupement des Industries Sidérurgiques Luxembourgeoises*[316] and *Fédération Charbonnière de Belgique*[317], the Court of Justice emphasized that the ECSC Treaty should be interpreted in light of its objectives, going

[314] Case 26/62 *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

[315] See, on this matter, Jean Monnet Program, *Dual Vigilance Revisited* (Jean Monnet Working Paper No 6/99, 1999).

[316] Joined cases 7/54 and 9/54, *Groupement des Industries Sidérurgiques Luxembourgeoises*, EU:C:1956:2.

[317] Case 8/55 *Fédération Charbonnière de Belgique,* EU:C:1956:11.

beyond a strictly literal reading. With these early rulings, the Court aimed to reinforce "*the effectiveness and uniformity of Community law*"[318]. Similarly, AG Lagrange, in his Opinion, advocated for a broad and dynamic interpretative approach, distinguishing the ECSC Treaty from conventional international agreements that rely on the "*common intention of the parties*"[319]. He contended that the ECSC Treaty, as the constitutional charter of a community more akin to a federal system, necessitated an evolutionary interpretation, positioning the Court of Justice as a supranational judicial body within an integrated legal order.[320]

In this context, the *Van Gend & Loos* judgment laid down foundational principles that have since shaped the jurisprudence of the CJEU, while simultaneously reinforcing and advancing other core tenets of EU law.

The referred question was "*whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights which the courts must protect*"[321]. This query, however, encapsulated a broader constitutional issue: whether the EEC Treaty conferred enforceable rights upon individuals, and whether national courts were required to safeguard such rights even if this necessitated disapplying conflicting national legislation.

Thus, the preliminary reference compelled the CJEU to address the legal nature of the European Community and to assess whether its law was confined to the realm of international law or constituted a new legal order capable of producing direct effects within the domestic legal systems of Member States. This analysis required to determine whether provisions like Article 12 could create subjective legal rights for individuals and impose obligations upon national authorities to uphold them. In this regard, the Court was asked to ascertain "*if and to what extent Article 12 of the EEC Treaty was equipped with 'direct internal effect,' requiring the CJ to evaluate if Community law belonged to international law and, therefore, whether the EEC Treaty was a 'standard international treaty'*".[322]

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[318]D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025), pp. 9-10.
[319] Opinion of AG Lagrange of 12 June 1956, *Fédération Charbonnière de Belgique,* ECLI:EU:C:1956:7, 277.
[320] ibid.
[321] ibid, p. 3.
[322] D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025), p. 13.

Written observations were submitted to the Court by the governments of Belgium, Germany, and the Netherlands, as well as by the European Commission and the applicant company, with the Advocate General also providing a reasoned opinion.

In contrast, the European Commission maintained that the effect of Treaty provisions on national law should be determined uniformly across the Community, based solely on the Treaty itself, regardless of domestic constitutional frameworks. The Commission warned that dismissing the query would lead to the paradoxical situation in which "*the rights of individuals would be protected in all cases of infringement of Community law except in the case of an infringement by a Member State*".[323]

Regarding the substantive question, VG&L held that Article 12 EEC had direct effect in Member States without the need for further implementing measures. Namely, they contended that, since the nature of the provision only imposed a *non facere* (negative obligation), it rendered any need for transposition into national law unnecessary. Furthermore, although the obligation was formally addressed to Member States, VG&L asserted that both individuals and the Community had to be safeguarded against possible infringements, including "*the illegitimate behaviour of domestic authorities*."[324]

The Commission's stance notably diverged from the arguments advanced by the intervening governments, as well. It argued that Article 12 was sufficiently clear, precise, and unconditional to produce direct effect, asserting that no national implementing measure was necessary. The Commission emphasized that "*Community law must be effectively and uniformly applied throughout the whole of the Community*"[325]. Consequently, its effect on national legal systems depended solely on the Community provisions, which were to prevail over conflicting domestic laws and be directly applied by national courts. Additionally, it maintained that the fact that a Community rule was addressed to Member States did not preclude individuals from invoking it before national courts.

On the other side, the Dutch, Belgian, and German governments firmly rejected this approach. The Netherlands argued that Article 12 merely imposed obligations on

[323] ibid.
[324] D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025), p. 15.
[325] Case 26/62 *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, p. 7.

Member States without conferring any individual rights, thereby lacking the capacity to produce direct internal effect.

Similarly, the Belgian government contended that provisions capable of producing direct internal effect in the Treaty were exceptional, and Article 12 did not fall within this category. Aligning with this position, Germany agreed that the provision imposed international obligations upon States but did not confer enforceable rights upon individuals.[326]

1.1.1 The AG Opinion

In this context, Advocate General Roemer's position diverged significantly from the one of the Commission, closely aligned with the arguments advanced by the intervening governments, albeit through a distinct line of reasoning. In his Opinion, Roemer firmly opposed the direct applicability of Article 12 EEC, asserting that a provision could only be considered directly applicable if it expressly conferred rights upon individuals. He contended that "*large parts of the Treaty clearly contain only obligations of Member States, and do not contain rules having a direct internal effect*"[327]: since Article 12 did not explicitly grant rights to individuals, it could not be invoked before national courts.

He argued that recognizing the direct effect of Article 12 would imply acknowledging the primacy of Community law over national law. In his view, if the Treaty drafters had intended to establish such a far-reaching principle, they would have explicitly provided for it: "*if, for the purpose of Community law, it had been intended to make the direct application of the provisions of the Treaty, in the sense that they are to prevail over national law, a fundamental principle, the procedure for enforcing obedience could have been confined to a declaration of the nullity of measures taken contrary to the provisions of the Treaty*"[328].[329]

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[326] ibid.
[327] Opinion of AG Roemer, Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, ECLI:EU:C:1963:1, delivered on 12 December 1962, p. 21.
[328] ibid.
[329] Elif Sıla Taşlıçay and Deren Bayar, '*Case Examination of Van Gend en Loos judgment of the European Court of Justice'*, Law 413 - European Union Law (Jean Monnet Module, Bilkent University, January 2022), p. 7.

In his analysis, AG Roemer noted that not all Member States had constitutional frameworks aligned in this regard, raising concerns of potential inequalities across the Community. According to him, allowing Article 12 to produce direct effect could lead to uneven application of Community law, a consequence that he doubted was intended by the Treaty drafters, particularly in the sensitive field of customs law. According to him, it was unlikely that "*the authors, when dealing with a provision of such importance to customs law, intended to produce the consequences of an uneven development of the law involved in the principle of direct application, consequences which do not accord with an essential aim of the Community*"[330].

Turning to the substantive content of Article 12, Roemer scrutinized its wording, emphasizing its inherent complexity. He argued that the provision was framed in such a manner that made uniform and automatic application problematic, particularly given the intricacies of customs law.[331]

In conclusion, the AG recommended that the Court respond to the national court's question in the negative.

1.1.2 The Court's reasoning and decision

Two conflicting conceptual approaches emerged before the Court. The so called "international" perspective asserted that the legal rights of individuals could only be derived from domestic legal measures and not directly from the Treaties or acts of Community institutions. According to this view, a strict literal interpretation of Article 12 would have precluded the recognition of its direct effect. Conversely, the "constitutional" perspective argued that European law was capable of directly creating individual rights, regardless of national implementing measures.[332]

The Court decisively endorsed the latter approach, marking a significant departure from conventional international law principles. It proclaimed the establishment of a 'new legal order' founded by the European Treaties, within which both Member States

[330] Opinion of AG Roemer, Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, ECLI:EU:C:1963:1, delivered on 12 December 1962, p. 24.
[331] He noted that it would be "*scarcely possible for its provisions to be applied in every case without creating problems*", ibid, p. 22.
[332] R Schütze, *Direct Effects and Indirect Effects of Union Law* in Robert Schütze and Takis Tridimas (eds), Oxford Principles of European Union Law: The European Union Legal Order: Volume I (OUP 2018), p. 267.

and their nationals were regarded as subjects. Adopting a teleological method of interpretation, it held that in determining the effect of an international treaty provision, "*it is necessary to consider the spirit, the general scheme and the wording of this provision*"[333].

The Court emphasized that the objectives of the Treaties (especially the creation of a common market) could only be fully achieved if individuals and businesses were allowed to invoke Treaty provisions directly before national courts. Accordingly, national courts were under a duty to protect these rights irrespective of conflicting national legislation.[334] As Professor Nick Grief aptly observed, "*European Union law can create rights for individuals that national courts must protect*"[335].

On these bases, the Court articulated that the Treaty constituted "*more than an agreement which merely creates mutual obligations between the contracting states*"[336]. Despite the fact that Article 12 (now Article 30 TFEU) did not explicitly confer rights upon individuals and appeared to impose obligations solely upon Member States, the Court reasoned that the imposition of an obligation inherently implied the recognition of a corresponding individual right. This interpretation was further substantiated by the preamble to the Treaty, which "*refers not only to governments but to people*"[337]. Thus, the Court established that individuals could invoke provisions of European law to challenge national measures that contravened Community obligations.

As a consequence, the European Economic Community was characterized as a "new legal order of international law", comprised of Member States that have relinquished a portion of their sovereignty (within designated domains) and that recognise its legal subjects not solely as States but also as their citizens. As the Court stated, "*independently of the legislation of Member States, Community law therefore not*

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[333] Case 26/62 *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, p. 12.

[334] Elif Sıla Taşlıçay and Deren Bayar, '*Case Examination of Van Gend en Loos judgment of the European Court of Justice'*, Law 413 - European Union Law (Jean Monnet Module, Bilkent University, January 2022), p. 8.

[335] University of Kent (2016, December 8). *Reflections on the European Court of Justice's judgment in Van Gend en Loos* | Professor Nick Grief. YouTube. Retrieved December 11, 2021.

[336] Case 26/62 *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, p. 12.

[337] ibid.

only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage"[338].

The Court opted for an objective interpretation of the Treaties, rather than adhering to a literal approach: it focused on their overarching aims and structure rather than on the subjective intent of the drafters. This methodology, as J Winter noted, reflects the idea that "*the spirit of the Treaty amounts to the imputed objective will of the Contracting Parties: i.e. not what the drafters […] had in mind but what they ought to have had in mind*"[339]. By adopting this teleological and dynamic interpretation, the Court effectively curtailed the discretion of national authorities in determining the scope of EU obligations and solidified the doctrine of direct effect[340].[341]

Turning to Article 12, the Court underscored that it embodied a "*clear and unconditional prohibition*", whose nature "*makes it ideally adapted to produce direct effects […] between Member States and their subjects*"[342]. The CJEU affirmed that the provision required no further implementing measures, thereby enabling individuals to directly rely on it before national courts.

The ruling underscored that permitting individuals to invoke Treaty provisions directly before national courts would reinforce legal protection, whereas limiting enforcement solely to institutional mechanisms would undermine effectiveness, particularly in cases where national measures contravening the Treaty had already been implemented.

This judgment has been characterized as "*a unique judicial contribution to the making of Europe*"[343], as it was the first instance in which the Court explicitly articulated the foundations of the principle of direct effect. Subsequent case law has consistently reaffirmed and built upon this landmark ruling. Its revolutionary significance lies in the recognition of the EEC Treaty as a "*unique type of international agreement*"[344], thereby

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[338] ibid.
[339] J. A. Winter, *Direct Applicability and Direct Effect. Two Distinct and Different Concepts in Community Law* (1972) 9 Common Market Law Review 425, 433.
[340] D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025), p. 19.
[341] See also, on this matter, S Sankari, *European Court of Justice Legal Reasoning in Context*, Europa Law Publishing, 2013, p. 153.
[342] Case 26/62 *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, p. 13.

[343] F Mancini and D Keeling, *Democracy and the European Court of Justice* (1994) 57 *Modern Law Review* 175, 183.
[344] D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025), p. 7.

establishing the autonomy of Community law from traditional international law. The "*peculiarity and originality of the European legal order […] revolves around the strengthening of individual rights*"[345], which are enshrined in the Treaty provisions independently of the domestic legal orders of the Member States.

The capacity of the EU legislation (at the time, Community law) to have an immediate impact, regardless of the willingness of the single Member State, on the legal status of individual European citizens constitutes the foundation of all subsequent interventions of the Court of Justice on the subject of maritime concessions, as shall be evidenced in the following paragraphs.

1.2 From historical criteria to contemporary applications: the evolution of the direct effect test

In the *Van Gend en Loos* ruling, the Court established that a Treaty provision must be "*clear, precise and unconditional*" in order to produce direct effect; these criteria recur persistently in the case law of the CJEU.[346] For a provision to meet these conditions, it must be sufficiently determinate, enabling individuals to delineate its content and identify their rights and obligations, thereby allowing them to invoke it before national courts. Consequently, domestic courts are compelled to set aside any conflicting national legislation and apply the EU provision in the specific case.[347]

The criteria of clarity and precision require the obligation enshrined in the provision to be described unequivocally. This concept was thoroughly articulated in the *Francovich* judgement of 1991, wherein the Court stated that a provision is clear and precise if it identifies three essential elements: "*the identity of the persons entitled to the guarantee provided, the content of that guarantee, and the identity of the person liable to provide the guarantee*"[348].

As far as the criterion of unconditionality is concerned, the requirement is met if the provision's implementation or legal effects are not contingent upon further measures to be adopted by Member States or EU institutions and if it imposes an obligation free

[345] ibid, p. 28.
[346] See, for instance, Case 148/78 *Criminal proceedings against Tullio Ratti* ECLI:EU:C:1979:110.
[347] See, on this matter, D Gallo, *Rethinking Direct Effect and Its Evolution: A Proposal* (2022) Cambridge University Press.
[348] Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italian Republic* [1991] ECR I-5357, para 12.

from conditions. In this respect, the concept of unconditionality substantially overlaps with that of direct applicability, as will be further examined in the subsequent sections. Nevertheless, it is crucial to note that unconditionality is not an absolute concept; the mere existence of a margin of discretion left to Member States "*does not necessarily imply that the provision is per se deprived of direct effect*"[349].

The following paragraphs will delve furtherly into the application of this test and the implications of the principle of direct effect in the context of EU law sources that possess distinctive features, such as directives.

Over time, the conventional test established by the CJEU in *Van Gend & Loos* to determine the direct effect of EU law provisions has been increasingly scrutinized and criticized by scholars.

The test's structure and application have evolved significantly, prompting some commentators to describe direct effect as a "*chameleon concept"*[350] and a "*multifaceted juridical category"*[351] which is not "*carved in stone*"[352]. The doctrine of direct effect, as developed in EU case law, has progressively undergone a process of "*diversification et gradation*"[353] regarding its practical effects.

One of the main criticisms concerns the requirement of clarity, which has become nearly obsolete in recent case law despite its frequent invocation in earlier rulings. Scholars argue that the distinction between clarity and precision is largely illusory, as the CJEU often uses the two terms interchangeably, given their substantial overlap in meaning.[354] Consequently, the once three-pronged test has effectively collapsed into a twofold inquiry, with unconditionality emerging as the decisive criterion. It has been pointed out that "*if a norm is clear/precise, it is not necessarily unconditional, while if a norm is unconditional, it is inevitably clear/precise*"[355]. Therefore, unconditionality

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[349] D Gallo, *Rethinking Direct Effect and Its Evolution: A Proposal* (2022) Cambridge University Press, p. 596.
[350] J Steiner, *Direct applicability in EEC Law – A chameleon concept* 98 (1982) Law Quarterly Review 229.
[351] D Gallo, *Rethinking Direct Effect and Its Evolution: A Proposal* (2022) Cambridge University Press, p. 579.
[352] M Bobek, *Van Gend en Loos 50* (n 14) 181.
[353] R Kovar, *La contribution de la Cour de justice à l'édification de l'ordre juridique communautaire. Cours général de droit communautaire*' in Recueil des Cours de l'Académie de Droit Européen (Kluwer Law International 1995) 15, 68.
[354] D Gallo, *Rethinking Direct Effect and Its Evolution: A Proposal* (2022) Cambridge University Press.
[355] ibid, p. 599.

has become "*the only true condition for which a provision is considered to be directly effective*"[356].

Furthermore, the CJEU has progressively broadened its interpretation of what constitutes a sufficiently clear, precise, and unconditional provision. Through a "fl*exible and teleological interpretation*"[357], the Court has extended the scope of direct effect to provisions that may not initially appear to meet these criteria. This expansive approach, initially evident in *Van Gend & Loos*, became even more pronounced in subsequent cases such as *Reyners*[358] and *Defrenne*[359], where the Court further "*relaxed and broadened*" the test.[360]

Professor Daniele Gallo underscores, on this matter, another significant critique: the inconsistency in the application of the test across different EU legal sources. While all binding legal instruments (excluding soft law) theoretically possess the potential for direct effect, the CJEU's case law demonstrates that the Court sometimes applies the test in a cursory manner or even omits it entirely.[361] This tendency is particularly evident when the provision in question contains a prohibition (i.e., negative obligations): in those cases, the Court often asserts that such provisions are "*by their nature*"[362] sufficiently precise and unconditional, thereby inherently possessing direct effect, without deeming it necessary to undertake a detailed analysis.[363]

However, in cases involving positive obligations (where the provision grants individuals a right to a benefit from the State or other private parties) the CJEU applies the direct effect test more rigorously. This selective application of the test suggests a

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[356] D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025), p. 96.
[357] D Gallo, *Rethinking Direct Effect and Its Evolution: A Proposal* (2022) Cambridge University Press, p. 597.
[358] Case 2/74 *Jean Reyners v Belgian State* ECLI:EU:C:1974:68.
[359] Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* ECLI:EU:C:1976:56.
[360] D Gallo, *Rethinking Direct Effect and Its Evolution: A Proposal* (2022) Cambridge University Press, p. 597.
[361] See, for instance, Case 51/76 *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* ECLI:EU:C:1977:12; Case 38/77 *Enka BV v Inspecteur der Invoerrechten en Accijnzen Arnhem* ECLI:EU:C:1977:190; Case 21/78 *Knud Oluf Delkvist v Anklagemyndigheden* ECLI:EU:C:1978:213.
[362] Case 28/67 *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn* ECLI:EU:C:1968:17.
[363] See D Gallo, *Rethinking Direct Effect and Its Evolution: A Proposal* (2022) Cambridge University Press, p. 597.

pragmatic approach by the CJEU, prioritizing effective enforcement of EU law over strict adherence to doctrinal criteria.

In light of the observations that have been made thus far, many scholars have come to the conclusion that the test for assessing the direct effect is to be perceived as "outdated", given that the historical criteria provided in the VG&L judgement are no longer the primary means of determining the direct effect of EU provisions. Instead, the contemporary academic debate identifies two cumulative requirements as decisive in establishing the direct effect of a rule: the unconditional nature of the norm and the creation of a tangible advantage for the individual[364].[365]

Regarding the first condition, academic opinions diverge on the precise meaning and relationship between unconditionality, direct effect, and direct applicability. The prevailing view in the literature asserts that direct effect and direct applicability are distinct concepts. Direct effect refers to "*the ability of a norm to enforce itself*", whereas direct applicability indicates that a provision can "*have effects within the domestic legal orders*" without requiring further implementing measures. Thus, while all EU law provisions are directly applicable, not all possess direct effect, which remains more restrictive in scope.[366]

Nevertheless, an alternative perspective within the doctrine suggests considering the problem "*from a more practical point of view*"[367]: as posited by this theoretical framework, the two concepts often merge[368], for the only relevant matter is to establish whether the provision is applicable to the case at stake.

Furthermore, supporters of this view, including Professor Daniele Gallo, argue that if unconditionality is synonymous with direct applicability, and if unconditionality is the sole definitive criterion for establishing direct effect as well, then direct effect and direct applicability not only correlate but effectively embody the same legal concept.[369]

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[364] ibid, p. 600.

[365] This second condition is typically disregarded in academic literature. *See infra* (n. 370).

[366] R Schütze, *Direct Effects and Indirect Effects of Union Law* in Robert Schütze and Takis Tridimas (eds), Oxford Principles of European Union Law: Volume I (OUP 2018), p. 268.

[367] D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025), p. 101.
[368] See, for instance, Case 2/74 *Jean Reyners v Belgian State* ECLI:EU:C:1974:68.
[369] *See contra*, amongst others, R Schütze, *Direct and indirect effects of Union law* in R Schütze and T Tridimas (eds), Oxford Principles of EU Law (Oxford University Press 2018) 265, 266–8.

Turning to the second condition, it posits that the EU provision must not solely impose a detriment on the individual but must also confer a discernible advantage or benefit. Thus, for direct effect to arise, the provision must generate a specific interest or right for the individual, resulting from the application of EU law and the disapplication of conflicting national law. Consequently, if the application of an EU provision is entirely *in malam partem*, without conferring any tangible benefit to the individual, direct effect will not arise, and disapplication of national law cannot be enforced.[370]

In conclusion, the evolution of the direct effect doctrine from the *Van Gend & Loos* judgment to date has led to considerable academic debate and divergence. As aptly noted, "*direct effect is an imprecise notion, difficult to frame in a legal sense, particularly in its scope, boundaries and objectives*"[371], highlighting the complexity in delineating the precise contours of this fundamental principle of EU law.

1.3 Differences in the application of the direct effect

As a general rule, the operation of direct effect varies depending on two key factors[372]:

- the nature of the EU law source that is intended to produce direct effect;
- the legal relationship between the parties for which the EU provision is invoked as directly effective.

Regarding the first differentiation, direct effect applies differently to primary and secondary acts of EU law.[373] Primary law (consisting in the Treaties) is generally capable of producing both vertical and horizontal direct effects, if the provisions at stake respects the requirements of being clear, precise and unconditional.[374] Secondary law, on the other hand, requires a further distinction: regulations[375] (for they are directly applicable)

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[370] *See contra*, M. Bobek, *The effects of EU law in the national legal systems* in Catherine Barnard and Steve Peers (eds), European Union Law, 2nd edn (OUP 2017), p. 146, affirming that "*granting individual rights is not a condition for direct effect*".
[371] D Gallo, *Rethinking Direct Effect and Its Evolution: A Proposal* (2022) Cambridge University Press, p. 580.

[372] M. Bobek, *The effects of EU law in the national legal systems* in Catherine Barnard and Steve Peers (eds), European Union Law, 2nd edn (OUP 2017), p. 147.
[373] European Commission, *Direct effect of EU law* (EUR-Lex, 2023).
[374] See Case 26/62 *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, ECLI:EU:C:1963:1.
[375] See Case 43/71, *Politi s.a.s. v Ministry for Finance of the Italian Republic* [1971] ECR 1039, EU:C:1971:122.

and international agreements[376] are usually able to have direct effect (both vertical and horizontal) at the same condition provided for primary law; opinions and recommendations are not binding, so they don't' have direct effect. As far as decisions[377] are concerned, the Court have recognised that they can also have direct effect when they are addressed to specific entities and contain unconditional and sufficiently precise obligation. Finally, the directives represent the most controversial source when it comes to assessing direct effect, as it will be delineated in the following paragraphs.[378] This differentiation underscores the complex interplay between the nature of the EU act and the extent of its enforceability within national legal systems.[379]

Moving on to the second differentiation, "*it makes the national application of EU law somewhat 'directional'*"[380]. Vertical direct effect allows individuals to invoke provisions of EU law against a Member State or public authority, thereby enforcing obligations upon the State.[381] Conversely, horizontal direct effect enables individuals to rely on EU law against other private parties; however, not all types of acts within the EU legal framework can engender this particular direct effect (i.e. the case of directives, which will be addressed subsequently). Lastly, inverse vertical direct effect refers to situations where the State seeks to enforce EU law against an individual, invoking obligations derived from directives that have not been properly implemented. This approach has been categorically rejected by the Court of Justice, as allowing the State to rely on its own failure to implement EU law would contravene the principle of legal certainty.[382]

1.4 The interplay between direct effect and the principle of primacy

[376] See Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987], ECR 3719, ECLI:EU:C:1987:400.
[377] See Case C-156/91, *Hansa Fleisch Ernst Mundt GmbH & Co. KG v Landrat des Kreises Schleswig-Flensburg* [1992], ECR I-5567, ECLI:EU:C:1992:423.
[378] *See infra*, section 2.
[379] Professor Schütze, Robert, and Professor Takis Tridimas (eds), Oxford Principles Of European Union Law: The European Union Legal Order: Volume I (United Kingdom, 2018; online edn, Oxford Academic).
[380] M. Bobek, *The effects of EU law in the national legal systems* in Catherine Barnard and Steve Peers (eds), European Union Law, 2nd edn (OUP 2017), p. 147.
[381] See Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723, ECLI:EU:C:1986:84.
[382] See Joined Cases C-387/02, C-391/02 and C-403/02 *Criminal Proceedings against Silvio Berlusconi, Sergio Adelchi and Marcello Dell'Utri and Others* [2005] ECR I-3565, ECLI:EU:C:2005:270.

Another reason why *Van Gend & Loos* is regarded as a landmark ruling in the EU legal framework is due to its implicit connection with the principle of primacy. The Court of Justice's establishment of the principle of direct enforceability of EU law rights by individuals before national courts constituted the foundational basis for the subsequent articulation of this essential principle of the European Union. Although the VG&L judgement did not explicitly address the concept, it presupposed the supremacy of EU law over conflicting national provisions.[383] This doctrine was explicitly delineated in the subsequent *Costa v ENEL* ruling in 1964.[384]

The principle of primacy, also referred to as "precedence" or "supremacy," dictates that EU law prevails over national law in the event of a conflict, irrespective of whether the national provisions are of a constitutional, legislative, or administrative nature. This means that, in areas where Member States have ceded sovereign competences to the European Union, national legislation, irrespective of its primary or secondary status, cannot supersede EU law.[385] This principle, while not expressly codified in the EU Treaties, was firmly established through the jurisprudence of the Court of Justice, as it will be following indicated.

The foundation of the doctrine was laid in *Costa v ENEL*: therein, the Court emphasized that the efficacy and uniform application of EU law would be undermined if Member States could subordinate it to domestic legislation. It reasoned that, by transferring certain sovereign powers to the EU, Member States had voluntarily limited their legislative autonomy, thus necessitating for EU law to take precedence over any conflicting national norm.[386]

Subsequent case law has reaffirmed and refined the doctrine of primacy. Notable cases include *Internationale Handelsgesellschaft,* where the Court emphasized that EU law prevails even over national constitutional norms[387]; *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, which clarified that national courts must disapply

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[383] See D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025).
[384] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.
[385] European Union, *Primacy of EU Law/Precedence/Supremacy* (EUR-Lex).
[386] ibid.
[387] "*the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure*", Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970], ECR 1125, ECLI:EU:C:1970:114, para 3.

conflicting national legislation irrespective of whether it was enacted before or after the relevant EU rule[388]; and *Marleasing*, where the Court extended the principle to indirect effect, requiring national courts to interpret national law in conformity with EU directives[389].

The principle of primacy does not require the formal annulment of conflicting national provisions but obliges national courts and authorities to disapply them for as long as the relevant EU law is in force. This ensures the uniform application and effective enforcement of EU law across all Member States, thereby safeguarding the rights conferred upon individuals by the Union legal order.[390]

The principle of direct effect is acknowledged to be inherently linked to the primacy of EU law: the reasoning behind the concept of direct effect is based on the premise that national law can't override EU provisions to which it is not aligned. However, "*the reverse is not true*"[391]: the mere fact that a provision of EU law prevails over national legislation does not automatically confer direct effect upon it.[392] The applicability of direct effect must be assessed on a case-by-case basis, taking into account specific criteria.

Moreover, an individual may invoke a provision of EU law directly not only when a conflict with domestic law arises, but also in contexts unrelated to any of those conflicts or when seeking to challenge subsequent national legislation. Similarly, the principle of primacy "*exerts its force beyond the temporal criterion governing the relationship between sources of law and, in that sense, constitutes, together with direct effect, the core of the originality and autonomy of European law*"[393].

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[388] "*a national court which is called upon […] to apply provisions of Community law is under a duty to give full effect to those provisions […] even if adopted subsequently*", Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, ECLI:EU:C:1978:49, para 24.
[389] "*a national court […] is required to interpret its national law in the light of the wording and the purpose of that directive*", Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135, ECLI:EU:C:1990:395, para 13.
[390] See European Parliament, *The Primacy of European Union law*, Study requested by the JURI Committee, July 2022.

[391] D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025), p. 25.
[392] See, on this matter, L Daniele, *Diritto dell'Unione Europea* (7th edn, Giuffrè Francis Lefebvre 2020).
[393] D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025), p. 25.

The principles of primacy and direct effect are also correlated with other two key principles of EU law: effectiveness and uniformity; the Court of Justice asserted their importance in numerous rulings.[394]

As Professor Daniele Gallo affirmed, "*if direct effect presupposes primacy, primacy implies that EU law shall be effectively, as well as uniformly, enforced."* Consequently, primacy and direct effect can be reputed "*two ramifications of the principle of effectiveness of EU law*"[395].

Therefore, the interrelation between direct effect and primacy underscores the distinct nature of the EU legal order: the EEC Treaty established a *sui generis* legal system (distinct from conventional international agreements) that, from its inception, "*became an integral part of the legal systems of the Member States and which their courts are bound to apply*"[396], thus reaffirming the EU's autonomous and supranational character.

2. The role of direct effect in addressing conflicting national rules: the case of seaside concessions

Among the various sources of European Union law, directives present a particularly nuanced challenge regarding the doctrine of direct effect, for they are addressed to Member States and require national implementation. This structural characteristic raises complex questions concerning the circumstances under which individuals may directly invoke the provisions of directives before national courts.

This section will first outline the reasoning adopted by the Court of Justice in its evolving jurisprudence on the potential recognition of direct effect for directives, as well as the specific limitations imposed. Building upon these theoretical considerations, the discussion will then shift to the specific context of seaside concessions in Italy, examining the contentious issue of the direct applicability of Article 12 of the Services Directive by national authorities.

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[394] See, for instance, Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, ECLI:EU:C:1978:49, para 14: "*rules of Community law must be fully and uniformly applied in all the Member States*".

[395] See N Póltorak, *European Union Rights in National Courts*, Alphen aan den Rijn, Kluwer Law International, 2015, 7.

[396] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585, p. 593.

2.1 The complex case of directives

The direct effect of directives within the legal orders of Member States has consistently been one of the most controversial areas in EU law, owing to the inherent nature of this legal instrument, which has given rise to various interpretative challenges. The landmark ruling that marked a turning point in this field, ensuring the effectiveness of EU law and the possibility for individuals to invoke its provisions before national courts, was the *Van Duyn* judgment in 1974[397].

Despite the significance of this ruling, the topic of the direct effect of directives remains an issue of contemporary relevance (in particular, within the scope of this discussion, the interpretation of the principle of direct effect in relation to directives plays a pivotal role). A plethora of questions have yet to be resolved, and the jurisprudence of the CJEU has been characterized by a series of rulings that are "*apparently not attributable to a homogeneous ratio*"[398].

As a matter of principle, directives are "*mediated*" and "*indirect*"[399] sources of EU law, inherently incapable of producing direct effects. In fact, unlike regulations, they are not entirely directly applicable and instead impose obligations of result that necessitate the adoption of national implementing measures.[400] Consequently, their effectiveness within the domestic legal order is contingent upon their transposition. This conceptualization aligns with the notion of "*decentralization of the decision-making process*"[401], as directives were originally conceived as subsidiary instruments, reflecting the principle of proportionality. While Member States are obliged to fulfil the obligations imposed by directives and ensure their effectiveness, such effect remains mediated; their direct effect, by contrast, constitutes an "exceptional" and "pathological" occurrence.[402]

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[397] Case C-41/74 *Van Duyn v Home Office* [1974] ECR 1337, EU:C:1974:133.
[398] C Gambino, *Direttiva Bolkestein, concessioni balneari ed effetti diretti in "situazioni triangolari": qualche spunto di riflessione* (2024) 2 Quaderni AISDUE, p. 7.
[399] See R Schütze, *European Union Law* (3rd edn, OUP 2021).
[400] L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 779.
[401] S Prechal, *Directives in EC Law*, Oxford, 2006, p. 5.
[402] L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 780; see also U Villani, *Istituzioni di diritto dell'Unione Europea*, Bari, 2020.

This occurs as, at the beginning, the objective of directives was to serve as an alternative to the unification of legal systems, particularly when full harmonization was not feasible.[403] Over time, however, directives have been employed as "*liberalization tools*"[404] as well, with the aim to simplify and regulate the functioning of the internal market.[405]

Nevertheless, as the Court pointed out in *Van Duyn*, excluding the direct effect of directives *in toto* would not be consistent with the principles of EU law for several reasons.[406] Firstly, the Court emphasized that "*it would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned*"[407]. Furthermore, it noted that "*the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law*"[408].

This reasoning was further supported by AG Slynn in the *Marshall* case: in his Opinion he observed that the directive "*comes into play only to enable rights to be claimed by individuals against the State*". The latter "*cannot rely on its own failure to confer those rights. The citizen may assert them against the State either as a sword or as a shield*"[409].[410]

Therefore, denying the direct effect of unimplemented directives would effectively grant Member States "*the power to undermine their effectiveness de*

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[403] See C Amalfitano and M Condinanzi, *Unione europea: fonti, adattamento e rapporti tra ordinamenti*, Torino, 2015, pp. 57-58.
[404] L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 780.
[405] S Prechal, *Directives in EC Law*, Oxford, 2006, pp. 3-5.
[406] See also C Gambino, *Direttiva Bolkestein, concessioni balneari ed effetti diretti in "situazioni triangolari": qualche spunto di riflessione* (2024) 2 Quaderni AISDUE.
[407] Case C-41/74 *Van Duyn v Home Office* [1974] ECR 1337, EU:C:1974:133, para 12.
[408] ibid.
[409] Opinion of AG Slynn, Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723, ECLI:EU:C:1986:84, delivered on 18 September 1985, p. 734.
[410] D Gallo, *La vexata quaestio dell'efficacia interna delle direttive: l'insostenibile leggerezza del divieto di effetti diretti orizzontali*, in E. MOAVERO MILANESI, G. PICCIRILLI (a cura di), Attuare il diritto dell'Unione europea in Italia. Un bilancio a 5 anni dall'entrata in vigore della legge n. 234 del 2012, Bari, 2018, p. 18.

facto"[411], preventing individuals from exercising the rights conferred upon them under EU law.[412]

For these reasons, the Court of Justice has progressively recognised the capacity of directives to produce direct effect, provided that certain conditions are met. Directives that meet the criteria required to have such capacity are commonly referred to as **"**self-executing".

As previously discussed in this Chapter, for a provision of EU law to be considered directly effective, it must fulfil the threefold test of clarity, precision, and unconditionality. However, when applied to directives, this test undergoes inevitable adjustments. As noted in the literature, "*one could say that the test varies not only 'over time' but also 'across space', depending on the legal act involved*"[413]. The temporal evolution of the test has already been examined[414], with the Court's case law demonstrating a progressive "*relaxation*"[415] and "*expansion*"[416] of the original requirements.

Regarding its variation relating to the different legal instruments at stake, directives embody a pertinent example. Indeed. in relation to this source of secondary law, the loosening of the test has been even more pronounced than in other contexts.[417] In point of fact, for a provision within a directive to be considered directly effective, it is sufficient that they are regarded as "*sufficiently precise*"[418] from a substantive point of view, going beyond the mere wording of the rule.[419]

The requirement of unconditionality is likewise interpreted differently when it comes to directives. In this case, the provision does not operate automatically *strictu sensu*. However, the Court of Justice has clarified in several rulings that the mere

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[411] E. Cannizzaro, *Il diritto dell'integrazione europea*, 2° ed., Torino, 2017, p. 118.
[412] D Gallo, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa*, Milano, 2018, p. 110.
[413] L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 783.
[414] *See supra*, section 1.2.
[415] D Chalmers, G Davies and G Monti, *European Union Law*, Cambridge, 2019, p. 293 ff.
[416] See R Schütze, *European Union Law* (3rd edn, OUP 2021); P Craig and G De Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press 2015).
[417] See, for instance, Case C-387/19 *RTS infra BVBA e Aannemingsbedrijf Norré-Behaegel contro Vlaams Gewest* [2021] ECLI:EU:C:2021:13 and Case C-205/20 *NE II* [2020] ECLI:EU:C:2022:168.
[418] Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* ECLI:EU:C:1982:7, para 25.
[419] L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 784.

existence of a margin of discretion for Member States does not necessarily preclude a directive's provisions from being deemed sufficiently precise and unconditional.[420] Notably, in rulings as *Procacci*[421] and *Link Logistic*[422], the Court held that only when Member States are granted a "*wide margin of discretion*"[423] in fulfilling their obligation the direct effect of a directive can be excluded.[424]

With regard to the second condition, the Court has clarified that the recognition of the direct effect of directives is subject to a temporal limitation, which stems from the specific nature of this legal act. A directive may only produce direct effect if the deadline for its transposition has expired and the Member State has failed to fully and correctly implement its provisions into the national legal order.[425] It is also imperative to emphasise that directives engender legal consequences within Member States even prior to the termination of the transposition period. In fact, national authorities are bound by a stringent obligation to refrain from implementing measures that would jeopardise the realisation of the objectives enshrined within the directive.[426]

In addition to these criteria, legal scholarship has stressed that the assessment of a directive's direct effect must also take into account its function, evaluated on a case-by-case basis.[427] By way of example, while some directives serve to supplement the provisions of the Treaties, others merely aim to approximate national legal frameworks.[428]

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[420] See Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* ECLI:EU:C:1982:7, paras 28-29.
[421] Joined cases C-100/89 and C-101/89, *Peter Kaefer and Andréa Procacci v French State* [1990] ECLI:EU:C:1990:456.
[422] Case C-384/17 *Link Logistik N&N* [2018] ECLI:EU:C:2018:810.
[423] ibid, para 51.
[424] This principle was again addressed by the Court in later judgemnets, which have refined and, in some respects, overruled those earlier conclusions. See, on this matter, Case C-205/20 *NE II* [2020] ECLI:EU:C:2022:168; L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, pp. 784-786.
[425] See, on this matter, D Gallo, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa*, Milano, 2018, p. 108.
[426] '*Standstill obligation'*, strictly linked to the principle of loyal cooperation (Article 4, para 3 TEU). L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 787.
[427] L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 780-781.
[428] In this regard, Capelli has proposed a systematic calssification of directives into six categories, using a teleological criterion. See F Capelli, *Le direttive comunitarie*, Giuffrè editore, 1983, pp. 70-97. See also, on this matter, F Capelli, *Evoluzione, splendori, e decadenza delle direttive comunitarie. Impatto della direttiva Ce n. 2006/123 in materia di servizi: il caso delle concessioni balneari*, Napoli, 2021.

Finally, the content of the directive also plays a crucial role in determining its direct effect. A key distinction has been made between 'private law directives', which govern legal relationships between private individuals, and 'public law directives', which concern the exercise of public authority by Member States.[429] The issue of horizontal direct effect is particularly relevant to the former, whereas the latter are more closely associated with the phenomenon of incidental direct effect.[430]

2.2 Vertical, horizontal, and inverse vertical direct effect in the application of directives

It is noteworthy to evidence that, even when directives are acknowledged to have direct effect, their enforceability operates exclusively in a "*unidirectional manner*"[431]: in other words, directives may only be invoked by individuals against the State, and not the other way around.

The Court, building on the rationale established in *Van Duyn*, subsequently introduced an additional foundation for the direct effect of directives through the 'doctrine of estoppel'.[432] According to this principle, a Member State cannot invoke its own failure to implement a directive correctly or within the prescribed timeframe in order to avoid the obligations stemming from it.

This reasoning was clearly articulated by the Court in *Ratti*: "*a Member State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails*"[433]. In such instances, where the failure to properly transpose a directive is attributable to the Member State (either due to total omission or incorrect implementation) an individual may rely on the directive to assert the rights they would have enjoyed had the measure been correctly implemented.

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[429] See A Dashwood, *From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?*, in Cambridge Yearbook of European Legal Studies, 2006-2007, pp. 81-109.
[430] L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 782-783.
[431] ibid, p. 788.
[432] See R Schütze, *Direct Effects and Indirect Effects of Union Law* in Robert Schütze and Takis Tridimas (eds), Oxford Principles of European Union Law: Volume I (OUP 2018), p. 280.
[433] Case 148/78 *Criminal proceedings against Tullio Ratti* ECLI:EU:C:1979:110, para 22.

The logic underpinning this conclusion is grounded in the nature of directives as legal acts binding solely upon the Member States, and not upon private individuals. As clarified by the Court in *Faccini Dori*[434], directives cannot impose obligations on private parties who are not the addressees of implementation duties. Consequently, they cannot be subjected to sanctions for non-compliance with provisions that were never transposed into domestic law.[435] This view is reinforced in *Popławski II*, where the Court held that a directive "*cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual before a national court*"[436].

Consequently, directives are capable of producing only a vertical direct effect, while horizontal direct effect is excluded. In particular, individuals cannot invoke a directive in a legal dispute against another individual[437], nor can Member States or their public administrations rely on unimplemented or incorrectly transposed directives to the detriment of individuals (inverse vertical direct effect or direct effect *in malam partem*).[438] The Court of Justice has consistently rejected this possibility, reiterating such prohibition especially in the area of criminal law[439], but also in different areas[440].[441] As emphasised by Professor Nato, "*permitting this would result in a paradox*"[442]: it would allow a Member State to enforce against individuals rules derived from a directive it failed to properly transpose.

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[434] Case C-91/92 *Faccini Dori v Recreb* [1994] ECLI:EU:C:1994:292, para 20: "*as the Court has consistently held since its judgment in Case 152/84 Marshall[…], paragraph 48, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual*".

[435] C Gambino, *Direttiva Bolkestein, concessioni balneari ed effetti diretti in "situazioni triangolari": qualche spunto di riflessione* (2024) 2 Quaderni AISDUE, p.9.

[436] Case C-573/17 *Poplawski II* [2019] ECLI:EU:C:2019:530, para 65.

[437] See Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723, ECLI:EU:C:1986:84.

[438] D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025), pp. 130-131.

[439] See, for instance, Case 14/86 *Pretore di Salò v. X* [1987] ECLI:EU:C:1987:275; Joined case C-309/94, C-330/94, C-342/94 and C-224/95 *Tombesi, Roberto Santella, Giovanni Muzi and others and Anselmo Savini* [1997] ECLI:EU:C:1997:314; Joined Cases C-387/02, C-391/02 and C-403/02 *Criminal Proceedings against Silvio Berlusconi, Sergio Adelchi and Marcello Dell'Utri and Others* [2005] ECR I-3565, ECLI:EU:C:2005:270.

[440] See, for instance, Case C-102/02 *Beuttenmüller* [2004] ECLI:EU:C:2004:264; Case C-321/05 *Kofoed* [2007] ECLI:EU:C:2007:408; Case C-227/09 *Accardo and Others* [2010] ECLI:EU:C:2010:624.

[441] D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025), pp. 130-133.

[442] A Nato, *Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa* (2023) Eurojus.it no 4, p. 51.

At the core of the Court's reasoning lies the need to ensure the respect of the principle of legitimate expectations of individuals: physical and legal persons cannot be held accountable for a conduct that, although contrary to the directive, complies with existing national law (as it will be furtherly explained discussing the issue of seaside concessions).[443]

This rigid distinction between vertical and horizontal application has nonetheless been subject to criticism. It creates potential inequalities, as an individual's ability to invoke the rights conferred by a directive depends on whether he is invoking them against a public authority or a private party.[444] Hence, the Court's jurisprudence has gradually evolved to safeguard the effectiveness ('*effet utile'*[445]) of the rights granted to the individuals by EU law. In light of the numerous exceptions and limitations developed over time, part of the doctrine now contends that "*the prohibition of horizontal direct effect of directives today appears more as the exception than the rule*"[446].[447]

Since it is neither possible nor desirable - as it would contravene the horizontal allocation of competences among EU institutions[448] - to overturn the prohibition of horizontal direct effect of directives, the Court of Justice has progressively relied on "*some alternative tools*"[449]. Through these mechanisms, it "*has admitted that some directives are capable of producing prejudicial effects for individuals*"[450], even if they can never impose direct obligations upon them.

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[443] D Gallo, *La vexata quaestio dell'efficacia interna delle direttive: l'insostenibile leggerezza del divieto di effetti diretti orizzontali,* in E. MOAVERO MILANESI, G. PICCIRILLI (a cura di), Attuare il diritto dell'Unione europea in Italia. Un bilancio a 5 anni dall'entrata in vigore della legge n. 234 del 2012, Bari, 2018, p. 19.

[444] See L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 790; D Gallo, *La vexata quaestio dell'efficacia interna delle direttive: l'insostenibile leggerezza del divieto di effetti diretti orizzontali,* in E. MOAVERO MILANESI, G. PICCIRILLI (a cura di), Attuare il diritto dell'Unione europea in Italia. Un bilancio a 5 anni dall'entrata in vigore della legge n. 234 del 2012, Bari, 2018, p. 19.

[445] D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025), p. 65.

[446] M Bobek, *Why Is It Better to Treat Every Provision of EU Directives as Having Horizontal Direct Effect?,* in International Journal of Comparative Labour Law and Industrial Relations, 2023, pp. 211-220.

[447] L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 790.

[448] ibid, p. 792.

[449] D Gallo, *La vexata quaestio dell'efficacia interna delle direttive: l'insostenibile leggerezza del divieto di effetti diretti orizzontali,* in E. MOAVERO MILANESI, G. PICCIRILLI (a cura di), Attuare il diritto dell'Unione europea in Italia. Un bilancio a 5 anni dall'entrata in vigore della legge n. 234 del 2012, Bari, 2018, p. 19.

[450] ibid, p. 20.

The first of such exceptions lies in the distinction between horizontal direct effect and incidental direct effect. In so-called "*triangular relationships*"[451], an individual may invoke a directive against a Member State (public entity), and the resolution of the dispute generates collateral effects for third private parties (either natural or legal persons).[452] In these circumstances, the individual who complied with national law, and may have "*knowingly or unknowingly*"[453] benefitted from the State's failure to transpose the directive, will experience adverse consequences. Those are nevertheless regarded as admissible, as long as they remain within the boundaries of what the Court has defined as "*mere adverse repercussions*"[454], and do not impose additional obligations on the third party. For instance, in certain cases, such repercussions have also been observed among third parties (the current concessionaires) who have derived benefit from the State's failure to transpose the Services Directive by complying with existing domestic legislation.

As affirmed in *Wells* and *Fratelli Costanzo*[455], such indirect consequences for third party rights "*do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned*"[456].

Another scenario in this respect concerns disputes between private parties in which one party invokes a procedural obligation, such as the notification requirement set out in a directive, preventing, by doing so, the application of domestic legislation to the detriment of the other private party, who would have otherwise benefited from it.[457] In such a circumstance, the triangular nature of the relationship lies in the fact that the contested conduct is attributable to the State, despite its exclusion from direct

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[451] See also, on this matter, D Colgan, *Triangular Situations: The Coup de Grâce for the Denial of Horizontal Direct Effect of Community Directives, in European Public Law*, 2002, pp. 545-568.
[452] See L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 794; C Gambino, *'Direttiva Bolkestein, concessioni balneari ed effetti diretti in "situazioni triangolari": qualche spunto di riflessione'* (2024) 2 Quaderni AISDUE, p. 12.
[453] D Gallo, *La vexata quaestio dell'efficacia interna delle direttive: l'insostenibile leggerezza del divieto di effetti diretti orizzontali,* in E. MOAVERO MILANESI, G. PICCIRILLI (a cura di), Attuare il diritto dell'Unione europea in Italia. Un bilancio a 5 anni dall'entrata in vigore della legge n. 234 del 2012, Bari, 2018, p. 20.
[454] Case C-201/02 *Wells* [2004] ECLI:EU:C:2004:12, para 57.
[455] Case C-103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 1839, ECLI:EU:C:1989:256.
[456] Case C-201/02 *Wells* [2004] ECLI:EU:C:2004:12, para 57.
[457] L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 794.

participation in the dispute. Those have been categorised as "*incidental direct effects*"[458] of the directives[459].[460]

Another notable exception arises from the Court's broad interpretation of the notion of "Member State" – as opposed to the concept of "individual".[461] According to the Court's jurisprudence[462], this concept encompasses "*organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals*"[463].

Finally, the last judicial tool developed by the Court to circumvent the prohibition of direct effect of directives is the principle of consistent interpretation (so called "indirect effect")[464]. This doctrine[465] stipulates that national courts are obliged to interpret domestic legislation consistently with EU directives, "*even where direct effect seems to be prevented*"[466].

These mechanisms represent alternative solutions that the Court of Justice has gradually crafted through its case law in order to overcome (or mitigate, at least) the limitations resulting from the lack of horizontal direct effect of directives. Nevertheless, the challenges associated with this issue remain "*difficult to overcome*"[467]. A strand of legal scholarship posits that the sole viable and coherent solution may be found in an "*explicit and reasoned judicial revirement*"[468], which would endow directives with the capacity to produce horizontal direct effect, albeit only to a certain degree.

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[458] See P Craig and G De Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press 2015).
[459] See D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025).
[460] The Court of Justice developed this hypothesis in rulings such as Case C-194/94 *CIA Security International* [1996] ECLI:EU:C:1996:172 and Case C-443/98 *Unilever* [2000] ECLI:EU:C:2000:496.
[461] L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 795.
[462] See Case C-413/15 *Farrell* [2017] ECLI:EU:C:2017:745, paras 33-35.
[463] Case C-188/89 *Foster* [1990] ECLI:EU:C:1990:313, para 18.
[464] See also D Gallo, *Direct Effect in EU Law* (Oxford EU Law Library, Oxford University Press 2025) and R Schütze, *Direct Effects and Indirect Effects of Union Law* in Robert Schütze and Takis Tridimas (eds), Oxford Principles of European Union Law: The European Union Legal Order: Volume I (OUP 2018).
[465] See Case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECLI:EU:C:1984:153 and Case C-106/89 *Marleasing* [1990] ECLI:EU:C:1990:395.
[466] L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34, p. 796.
[467] D Gallo, *La vexata quaestio dell'efficacia interna delle direttive: l'insostenibile leggerezza del divieto di effetti diretti orizzontali,* in E. MOAVERO MILANESI, G. PICCIRILLI (a cura di), Attuare il diritto dell'Unione europea in Italia. Un bilancio a 5 anni dall'entrata in vigore della legge n. 234 del 2012, Bari, 2018, p. 25.
[468] ibid.

2.3 The application of the Services Directive in the case law on seaside concessions

As previously illustrated through the main judgments of the Court of Justice in Chapter II, the doctrine of direct effect - especially with regard to directives - holds specific relevance within the debate on the Italian seaside concession regime. In fact, the potential for the provisions of the Services Directive to produce direct effect within the legal orders of the Member States, thereby requiring national authorities to disapply incompatible domestic legislation, lies at the heart of this legal and institutional controversy.

Italian municipalities have found themselves "between a rock and a hard place": on the one hand, they are subject to national laws mandating automatic extensions of existing concessions; at the same time, they are bound by EU obligations (as interpreted by the CJEU), which move in the opposite direction and are irreconcilable with the domestic framework. This situation has inevitably resulted in a considerable degree of uncertainty regarding the proper course of action required from local administrations.[469]

After ruling out the possibility of resolving the issue in the case at stake by exclusively relying on Article 49 TFEU[470], the Court of Justice eventually addressed the applicability of the Services Directive itself. Although the AG Szpunar had already acknowledged the direct effect of Article 12 of the Directive in his Opinion in *Promoimpresa*, the Court expressed itself for the first time in this sense in the *AGCM v Comune di Ginosa* judgment.[471]

In this ruling[472], the Court was asked to assess whether the provisions enshrined in said Article - imposing an obligation to conduct impartial and transparent selection procedures for concession awards and prohibiting the automatic renewal of such authorisations - were sufficiently clear, precise, and unconditional to produce direct effect, thereby triggering the disapplication of any conflicting national law.[473]

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[469] C Gambino, *Direttiva Bolkestein, concessioni balneari ed effetti diretti in "situazioni triangolari": qualche spunto di riflessione* (2024) 2 Quaderni AISDUE, p. 5.
[470] As a provision of primary law, it is not subject to the prohibition of inverse vertical direct effect.
[471] A Nato, *Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa* (2023) Eurojus.it no 4, p. 40.
[472] *See supra*, Chapter II, section 3.1.3.
[473] The Court specified that Article 12 applies "*only in cases where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources, which*

The European judges[474] affirmed that, notwithstanding the degree of discretion left to Member States, the result-oriented obligation set forth in Article 12 is, in their view, sufficiently clear, precise, and unconditional.[475] It is therefore demonstrated that the directive is suitable for producing direct effects and for triggering the non-application of incompatible internal rules.[476] This position reinforces the applicability of the Services Directive in the context of the Italian seaside concession system and underscores the binding nature of EU law in ensuring compliance with fundamental internal market principles.

According to the Court, "*administrative authorities, including municipal authorities, are under the same obligation as a national court*"[477]:

- to reject applications for automatic extensions of concessions based on national legislation;
- to refrain from renewing existing authorisations;
- to declare previously extended concessions unlawful.

The ultimate objective is to achieve the liberation coastal areas and establish novel allocation procedures by means of transparent and impartial public tenders.[478]

Some scholars have argued that the case of Italian seaside concessions may be framed within the category of "triangular relationships"[479], wherein an individual invokes a directive provision against the State, producing incidental effects on third

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must be determined by reference to a factual situation that is assessed by the competent authority, subject to review by a national court" (Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312, para 71).

474 "*They reached these conclusions on the basis of the well-established case law on the direct effect of directives."* A Nato, '*Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa'* (2023) Eurojus.it no 4, p. 41. *See supra*, Chapter III.

475 *"[…] the Court has held that, even though a directive leaves the Member States a degree of latitude when they adopt rules in order to implement it, a provision of that directive may be regarded as unconditional and precise where it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved"* (Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312, para 64).

476 A Nato, *Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa* (2023) Eurojus.it no 4, p. 32 ff.

477 Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312, para 77. See also Case C-103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 1839, ECLI:EU:C:1989:256, paras 29-33.

478 C Gambino, *Direttiva Bolkestein, concessioni balneari ed effetti diretti in "situazioni triangolari": qualche spunto di riflessione* (2024) 2 Quaderni AISDUE, p. 5.

479 *See supra*, Chapter III.

parties. According to their perspective, in this case, Article 12 of the Services Directive may serve as the legal basis for denying the incumbent concessionaire's right to continue managing the coastal site, leading to the arise of adverse consequences for him[480], as it will result in the loss of the area he had been previously assigned.[481] Following this reasoning, such repercussions would fall within the scope of incidental effects that the Court of Justice has accepted (provided they do not entail the imposition of new obligations on the affected individual), especially since another private party derives a corresponding benefit from the same provision.[482]

However, the nature of the dispute in *AGCM v Comune di Ginosa* is peculiar[483]: the case does not involve a private individual vis-à-vis the State, but rather a conflict between two public entities - namely, a local authority (the Municipality of Ginosa) and an independent national authority (AGCM). As a result, the case does not neatly fit within the categories of either triangular relationships or inverse vertical direct effect, both consistently rejected by the CJEU.[484]

In principle, as it has been pointed out before, national authorities cannot invoke directives against individuals, particularly when the directive in question has not been correctly transposed.[485] Hence, in the case at hand, municipal authorities are not allowed to invoke the Services Directive against the concessionaire. Despite the rationale underlying this prohibition, legal scholars have voiced concern that such an interpretative framework may generate disparities: namely, that substantially identical situations could be treated differently depending solely on whether the directive is

[480] See also R Mastroianni, *L'Adunanza Plenaria del Consiglio di Stato e le concessioni balneari: due passi avanti e uno indietro?* (2022) Rivista di diritto della regolazione, pp. 105 ff.
[481] C Gambino, *Direttiva Bolkestein, concessioni balneari ed effetti diretti in "situazioni triangolari": qualche spunto di riflessione* (2024) 2 Quaderni AISDUE, pp. 14-15.
[482] See, on this matter, D Gallo, *La vexata quaestio dell'efficacia interna delle direttive: l'insostenibile leggerezza del divieto di effetti diretti orizzontali,* in E. MOAVERO MILANESI, G. PICCIRILLI (a cura di), Attuare il diritto dell'Unione europea in Italia. Un bilancio a 5 anni dall'entrata in vigore della legge n. 234 del 2012, Bari, 2018; L Cecchetti, *Verso i cinquant'anni dell'effetto diretto delle direttive: questioni ancora aperte* (2023) IV I Post di AISDUE, Sezione "Atti convegni AISDUE", n. 34.
[483] A Nato, *Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa* (2023) Eurojus.it no 4, p. 49.
[484] ibid.
[485] *See supra*, Chapter III.

invoked by a private party or by a public authority.[486] For this reason, the case has been described in the literature as a "*hybrid category*"[487].

In this context, the beneficiaries of the direct effect of Article 12 are the prospective competitors seeking to participate in the new concession award procedures, whereas the adverse effects fall on the current concession holders. Nonetheless, according to the Court's well-established case law, as long as the direct effect of the directive merely entails "negative repercussions", national administrations and courts are required to disapply the domestic provisions in conflict with EU law. Indeed, "*the right of the potential concessionaire to participate in a competitive procedure should take precedence over the unlawful assertion of the outgoing concessionaire*"[488]. Moreover, this interpretation does not violate the principle of legitimate expectations: the Court highlighted that "*if a prudent and alert economic operator could have foreseen the adoption of a measure likely to affect his interests, he cannot plead that principle if the measure is adopted*"[489].

Anyhow, as it was underlined beforehand, the novelty of this ruling lies in the fact that the claimant (the AGCM) itself is a public authority acting against a local public body (the Municipality of Ginosa). Thereby the dispute could be situated within the boundaries of vertical effect as well, but with an atypical dynamic: it involves a State agency invoking EU law against another emanation of the State in order to obtain disapplication of national legislation.

Hence, while formally falling within the vertical direct effect framework, the case evokes the logic of what the EU scholarship refers to as triangular situations (explained *supra* in this paragraph). In *AGCM v Comune di Ginosa*, the former didn't act as a private individual but in the interest of preserving market access for third-party economic operators. The case therefore adds complexity to the classical division between vertical and horizontal direct effect, suggesting that State-to-State litigation

[486] A Circolo, *L'effetto diretto delle direttive e la parabola delle concessioni balneari* (2021) 3 Studi sull'integrazione europea, p. 580.
[487] A Nato, *Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa* (2023) Eurojus.it no 4, p. 49.
[488] F Liguori, *Direct Effect and EU Primacy in the State-Owned Maritime Concessions Area* (REALaw, 8 December 2023).
[489] Case C-67/09 P *Nuova Agricast and Cofra v Commission* [2010] ECLI:EU:C:2010:607, para 71.

may operate as a proxy for the enforcement of individual rights in situations where horizontal direct effect is not available.

For these reasons, this case departs from the traditional topic of the lack of horizontal direct effect confirmed in rulings such as *Faccini Dori*[490], where directives could not be relied upon between private parties. In the ruling under discussion, the AGCM channels the directive's enforcement by invoking it against another public authority, effectively filling the enforcement gap that individuals would otherwise face in triangular disputes.

At any rate, the delineated scenario remains inherently problematic.[491] As Professor Gallo has observed, the "*cul de sac"* created in such circumstances lies in the fact that there will always be a private party whose interests are adversely affected: either the individual whose prerogatives are protected by the application of the directive, or the one whose prerogatives are safeguarded by the national rule in conflict with the directive.[492]

By recognising the direct effect of Article 12 of the Services Directive, the Court of Justice thus confirms that the provision may be invoked by individuals in order to compel the competent authorities to allocate concessions through transparent and non-discriminatory procedures. "*This advantage, conferred on the individual, stems from the reflection of obligations and prohibitions imposed on Member States by the provisions of the directive, which are recognised as having direct effect"*.[493]

3. EU regulation of public property in Member States: the relevance of Article 345 TFEU

The relationship between European Union law and national rules governing the management of public goods has long been a subject of legal and academic debate.

[490] Case C-91/92 Faccini Dori v Recreb [1994] ECLI:EU:C:1994:292.
[491] F Liguori, *Direct Effect and EU Primacy in the State-Owned Maritime Concessions Area* (REALaw, 8 December 2023).
[492] D Gallo, *L'efficacia diretta del diritto dell'Unione europea negli ordinamenti nazionali. Evoluzione di una dottrina ancora controversa,* Milano, 2018, p. 306.
[493] A Nato, *Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa* (2023) Eurojus.it no 4, p. 48. See also D Gallo, *L'evoluzione dell'effetto diretto e dei suoi rapporti con il primato e l'immediata applicazione del diritto UE negli ordinamenti nazionali* in G Palmisano (ed), Il diritto internazionale ed europeo nei giudizi interni (Napoli, 2020) 131–168.

While Member States retain the competence to define their systems of property ownership, this autonomy must be exercised in accordance with the obligations imposed by EU law, particularly those concerning the internal market and principle of free competition. The core of this debate lies in the interpretation of Article 345 TFEU, which safeguards national property regimes but does not exempt them from having to comply with the overarching principles of EU law. This section explores the extent to which the EU can impose regulatory constraints on the management of public assets (such as state-owned maritime concessions) through the lens of Article 345, as interpreted by the authoritative and prevailing doctrine.

Article 345 TFEU (formerly Article 295 EC) states that: "*the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*"[494]. It has been considered "*an expression of 'the principle of the neutrality' of the Treaties in relation to the rules in Member States governing the system of property ownership*"[495].

Although the wording of this Article might suggest that the European Union lacks the competence to regulate in the field of property ownership, thereby leaving full discretion to the Member States, "*practice, in other words, is very different from the presumption of Article 345 TFEU one might have at first sight*"[496]. In fact, both provisions of EU law[497] and the jurisprudence of the Court of Justice[498] engage with issues pertaining to property regimes. Scholars such as Bram Akkermans and Eveline Ramaekers have thoroughly examined the scope of Article 345, considering its various possible interpretations: their analysis reveals that, while the Article does acknowledge the autonomy of Member States in defining their property ownership systems, it does not place such systems beyond the reach of EU law. In particular, the provision does not preclude the application of EU competition law or the four fundamental freedoms,

[494] Treaty on the Functioning of the European Union [2007] OJ C306/1, Article 345.
[495] A C Bartoccioni, *L'interpretazione della Corte Europea del combinato disposto degli art. 345 e 63 del TFUE,* Unione Europea e Cooperazione Internazionale (Gazzetta Amministrativa, N. 3 2013), p. 47.
[496] B Akkermans and E Ramaekers, *Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations* (2010) 16 European Law Journal 292, p. 293.
[497] Recommendation of the European Parliament and of the Council of 30 May 2002 concerning the implementation of Integrated Coastal Zone Management in Europe (2002/413/EC) [2002] OJ L148/24.
[498] See, for example, Case C-483/99, *Commission v. France* [2002] ECR I-4781; Case C-503/99, *Commission v Belgium* [2002] ECR I-4809; Case C-302/97, *Klaus Konle v Republik Österreich* [1999] ECJ I-3099.

especially where national rules regulating property interfere with market access or grant unjustified advantages to certain undertakings.[499] Accordingly, Article 345 TFEU is to be understood as limiting the EU interference in property regimes, but not as an exclusionary clause shielding Member States from the broader obligations stemming from the Treaties.

"*The wording of Article 345 TFEU represents one of the most unclear provisions of the Treaties*"[500]. The CJEU, however, did not rely on this ambiguity to adopt a flexible interpretation, but preferred a cautious approach instead: across several rulings, it has characterised Article 345 as embodying a "principle of neutrality" with respect to the choice between public and private ownership. On the other hand, it has also systematically rejected Member States' attempts to invoke it as a justification for derogating from the principles of free movement or other Treaty obligations.[501]

From the perspective of the EU institutions, the European Commission has followed the same path, interpreting Article 345 as an affirmation of the neutrality principle and using it to assert that decisions regarding ownership structures fall within the exclusive domain of Member States.[502] This institutional stance reinforces the view that while the Treaties remain neutral with regard to the domestic systems of property ownership.

Meanwhile, the interpretation of Article 345 TFEU by the Court of Justice has evolved significantly overtime, particularly in cases concerning the interaction between national property regimes and the fundamental freedoms of the internal market.

Indeed, in the *Commission v Portugal* ruling, the Court affirmed that "*Article 222*[503] *[…] merely signifies that each Member State may organise as it thinks fit the*

[499] See B Akkermans and E Ramaekers, *Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations* (2010) 16 European Law Journal 292.
[500] A V Rocchi, *Article 345 TFEU and the Right to Property: a Possible Obstacle to Free Movement? The Analysis of the Jurisprudence of the European Union* (2013) 2 Costituzionalismo.it.
[501] ibid.
[502] European Commission, *Communication from the Commission to the Council and the European Parliament on Integrated Management of Coastal Zones: A Strategy for Europe,* COM (95) 511 final.
[503] Editor's note: due to a widespread historical and didactic error in doctrine, linked to a confusion between two different numbering of articles in the European Treaties, the current Article 345 TFEU is referred at times as former Article 222 and other times as former Article 295. Actually, it was originally Article 222 of the EEC Treaty, then transformed into Article 295 EC with the renumbering made by the Treaty of Amsterdam in 1997.

system of ownership of undertakings whilst at the same time respecting the fundamental freedoms enshrined in the Treaty"[504].

This approach was further developed in the *Essent* judgment, where the CJEU explicitly stated that "*Article 345 TFEU is an expression of the principle of the neutrality of the Treaties in relation to the rules in Member States governing the system of property ownership*"[505]. Accordingly, the Treaties do not, in principle, prohibit either the nationalisation or the privatisation of undertakings.[506] However, in a significant clarification of its prior case law, the Court held that this neutrality does not entail that such national rules fall outside the scope of EU law. Actually, it explained that "*Article 345 TFEU does not mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty, which rules include, inter alia […] freedom of establishment*"[507].

This reasoning has been consistently upheld in the so-called "golden shares" jurisprudence, where the Court recognised the Member States' discretion in structuring enterprise ownership; nonetheless, such discretion must not infringe upon core Treaty principles. Article 345 TFEU, therefore, cannot be relied upon to justify national measures that are incompatible with the internal market's legal framework.[508]

The Court's interpretation is further reinforced by the Opinion of AG Darmon in *Robert Fearon*[509]: he affirmed that "*Article 222 cannot therefore be interpreted as excluding the rules in Member States governing the system of property ownership from the field of application of the general principles of Community law"*[510]. Rather, national regulation in this domain must always comply with the Treaties; this interpretation underscores that Member States remain bound by the fundamental freedoms enshrined in the EU legal order, even when exercising their competence in the field of property

[504] Case C-367/98, *Commission v Portugal* [2002] ECR I-4731, para 28.
[505] Joined Cases C 105/12 to C 107/12 *Essent and Others* [2013] ECLI:EU:C:2013:677, para 29.
[506] ibid, para 30.
[507] ibid, para 36.
[508] See A V Rocchi, *Article 345 TFEU and the Right to Property: a Possible Obstacle to Free Movement? The Analysis of the Jurisprudence of the European Union* (2013) 2 Costituzionalismo.it.
[509] Case 182/83 *Fearon v Irish Land Commission* [1984] ECLI:EU:C:1984:335.
[510] Opinion of AG Darmon, Case 182/83 *Fearon v Irish Land Commission* [1984] ECLI:EU:C:1984:335, delivered on 4 October 1984, p. 3689.

ownership.[511] "*The case of Fearon shows how the interpretation of the ECJ is very different from the general interpretation of the European Commission"*[512].

Therefore, it can be preliminarily concluded that Article 345 TFEU neither grants competences to the European Union nor to the Member States.[513] Rather, it operates as a limiting clause, stating that the Treaties do not prejudice national rules governing systems of property ownership. However, this does not exempt such national systems from the scope of EU law: Article 345 merely limits the Treaties' reach without precluding their application, particularly where national rules affect the functioning of the internal market or infringe upon fundamental freedoms.[514]

In this respect, while Member States retain the prerogative to define the regime of property ownership, this autonomy must be exercised in conformity with EU law. Accordingly, national measures governing the management of public assets, such as maritime concessions[515], must comply with the Treaty provisions on competition and the four fundamental freedoms.

Thus, the European legal framework is competent to impose obligations and limitations on the use and allocation of public goods where national regulations distort competition, restrict market access, or hinder the full effectiveness of the internal market.[516] This interpretative approach ensures the primacy and uniform application of EU law, even in areas traditionally regulated by national property regimes.

3.1 The principle of property neutrality: reassessing Article 345 TFEU in the context of maritime concessions

The debate surrounding the application of Article 345 TFEU has gained renewed attention in light of the legal controversies over the management of maritime state property in Italy, particularly in relation to seaside concessions.

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[511] A V Rocchi, *Article 345 TFEU and the Right to Property: a Possible Obstacle to Free Movement? The Analysis of the Jurisprudence of the European Union* (2013) 2 Costituzionalismo.it.
[512] B Akkermans and E Ramaekers, *Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations* (2010) 16 European Law Journal 292, p. 309.
[513] ibid.
[514] A V Rocchi, *Article 345 TFEU and the Right to Property: a Possible Obstacle to Free Movement? The Analysis of the Jurisprudence of the European Union* (2013) 2 Costituzionalismo.it.
[515] *See infra*, Section 3.6.1.
[516] See B Akkermans and E Ramaekers, *Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations* (2010) 16 European Law Journal 292.

As previously discussed, while the European Union "*is not allowed to interfere directly in rules that regulate the ownership of coastal assets in Member States*"[517], it may, in accordance with the competences conferred by the Treaties and guided by the principle of proportionality, influence the exercise of ownership rights. Implementing this competence, the EU has dedicated particular attention to the condition of coastal zones and the challenges associated with their structure and governance.[518] Notably, in 1995, the European Community initiated a programme[519] aimed at identifying and testing mechanisms and tools capable of promoting sustainable development along the European coastline.

Effectively, EU law is not concerned with the ownership regime of public goods in the Member States, as reaffirmed by Article 345 TFEU, but rather with the regulation of the services (*'service activity'*) carried out on those public goods. This distinction lies at the heart of the conflict between Italian legislation and EU law regarding seaside concessions.[520]

The economic activity performed by the concessionaire, although of a private nature, must respect and enhance the "*objectively public nature*"[521] of the underlying asset. Accordingly, the allocation of services related to the use of state-owned coastal assets must comply with the principles of competition law: to ensure that the national legal framework provides adequate safeguards, "*the principles of transparency of procedures and equal treatment of bidders must be respected*"[522]. A failure to open the market to new potential candidates amounts to a form of direct discrimination and, as such, constitutes a violation of the freedom to provide services as protected under EU law.[523]

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[517] C Benetazzo and S Gobbato, *Italian State Beach Concessions and Directive 2006/123/EC in the European Context*, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, p. 17 (n.38).
[518] ibid.
[519] European Commission, *Communication from the Commission to the Council and the European Parliament on Integrated Management of Coastal Zones: A Strategy for Europe*, COM (95) 511 final.
[520] A Monica, *Background and Future of the Case Law on Italian State-Owned Maritime Concessions and the Preliminary Ruling C-348/22 Comune di Ginosa* (REALaw Blog, 24 November 2023).
[521] A Monica, *Squaring the Circle: Why the Comune di Ginosa Case (C-348/22) Matters for Other Member States* (REALaw Blog, 23 February 2024).
[522] ibid.
[523] See Case C-458/03 *Parking Brixen* [2005] ECLI:EU:C:2005:605, para 55.

It is noteworthy to mention, as a particularly relevant source, the response letter - signed by Professor Condinanzi - issued by the Italian Government[524] in reply to the letter of formal notice from the European Commission, regarding the infringement procedure No. 2020/4118. The letter highlights, pursuant to Article 345 TFEU, that "*it is well known that the European legal order does not interfere with the proprietary aspects of what, under Italian law, are commonly defined as public domain assets, as the ownership status (public or private) of such assets is irrelevant for EU law purposes*"[525].

Nonetheless, it acknowledges that the European Union is concerned with the economic exploitation of these assets and the provision of productive activity through them. Consequently, when an administrative act (such as a concession) allows a private operator to derive profit (e.g., a fee) from a public domain asset, EU law requires all interested parties to be allowed to compete for the allocation of the concession title. This is especially required when there is scarcity of the natural resources and when there exists a clear cross-border interest.[526]

The letter further addresses the interpretative doubts and criticisms that have emerged, also within the case law of the Court of Justice itself[527], regarding the extent to which seaside concessions fall within the material scope of Directive 2006/123/EC. In the *Promoimpresa* judgment, the Court of Justice clarified that the applicability of the Services Directive depends on the national court's assessment of whether the resource in question is indeed limited.[528] Similarly, in *Comune di Ginosa*, the Court recognised that the Directive "*confers on the Member States a degree of latitude as to the choice of criteria for assessing the scarcity of natural resources*" [529].[530] The same reasoning applies to the presence of a cross-border interest, which must also be evaluated on a case-by-case basis by the referring national court. In *Promoimpresa*, the Court delivered

[524] Presidency of the Council of Ministers, Ministry for European Affairs.
[525] M Condinanzi, *Procedura di infrazione n. 2020/4118 "Concessioni balneari" – Risposta alla lettera di costituzione in mora ex art. 258 TFUE* (Presidenza del Consiglio dei Ministri – Ministro per gli Affari Europei, Struttura di missione per le procedure di infrazione, 2021).
[526] ibid.
[527] See, for example, Case C-174/06 *Ministero delle Finanze v. CO.GE.P. Srl* [2007] ECLI:EU:C:2007:634.
[528] Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558, para 43.
[529] Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312, para 46.
[530] Editor's note: in Italy, this task has been assigned to the Technical Advisory Table on Concessions.

two different solutions in the joined cases, for only one of the referring courts had provided sufficient elements to assess the existence of such an interest.

In conclusion, the letter argues that the *Promoimpresa* ruling confirms that maritime concessions can't be classified as concessions of services or as "authorisations" within the meaning of the Services Directive. As a result, the Italian government would retain the discretion to regulate the matter, with the Bolkestein Directive applying only in specific cases concerning certain maritime public domain concessions for tourism and recreational purposes.[531]

In support of the argument that maritime concessions should fall outside the scope of the Services Directive, further observations have been made regarding Recital 57 of the Directive.[532] It states that "*this concerns neither decisions by competent authorities to set up a public or private entity for the provision of a particular service nor the conclusion of contracts by competent authorities for the provision of a particular service which is governed by rules on public procurement, since this Directive does not deal with rules on public procurement*"[533]. On the ground of that, it has been argued that the Directive doesn't apply to seaside concessions.

In her Opinion in Case C-598/22[534], AG Capeta clarified that the issue at stake relates to the internal policy choices of the national government regarding the management of public domain concessions.[535] According to her, "*the concessions related to a decision to keep certain land in the public domain have some inherent features. One feature is that the economic activity for which the concession is granted is inseparable from the public nature of that domain*"[536].

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[531] M Condinanzi, *Procedura di infrazione n. 2020/4118 "Concessioni balneari" – Risposta alla lettera di costituzione in mora ex art. 258 TFUE* (Presidenza del Consiglio dei Ministri – Ministro per gli Affari Europei, Struttura di missione per le procedure di infrazione, 2021).
[532] V De Michele, *Alle concessioni demaniali marittime, lacuali e fluviali, non si applicano la Bolkestein e il diritto primario Ue sulla libertà di concorrenza e stabilimento*, News Balneari (2024), p.3.
[533] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36, Recital 57.
[534] Case C-598/22 *Società Italiana Imprese Balneari Srl v Comune di Rosignano Marittimo and Others* [2024] ECLI:EU:C:2024:567.
[535] V De Michele, *Alle concessioni demaniali marittime, lacuali e fluviali, non si applicano la Bolkestein e il diritto primario Ue sulla libertà di concorrenza e stabilimento*, News Balneari (2024), p. 7.
[536] Opinion of AG Ćapeta, Case C-598/22 *Società Italiana Imprese Balneari (SIIB) v Comune di Rosignano Marittimo* EU:C:2024:134, delivered on 8 February 2024, para 80.

These premises, as also emphasised by Professor Condinanzi in the aforementioned letter of response to the EU Commission, support the legitimacy of the emergency legislation adopted in Italy in this field.[537]

Nevertheless, as discussed in the previous chapters, this interpretative approach was already rejected at the national level by the twin judgments of the Italian Council of State delivered in 2021[538]. In these rulings the administrative court, even if allowing a temporary extension of existing concessions until December 2023, held that:

- national judges and public authorities are under an obligation to disapply national legislative provisions incompatible with EU law;
- existing concession holders do not possess a vested right to the continuation of their concessions.

In conclusion, a preliminary ruling request is currently pending before the Court of Justice, submitted by the Giudice di Pace of Rimini[539], which raises critical issues regarding the applicability of EU law to concessions of State-owned coastal land. Specifically, the referring court seeks clarification on whether such concessions fall within the scope of Directive 2006/123/EC, and how Article 345 TFEU should be interpreted in this context. One of the questions explicitly addresses whether Article 195 TFEU, read in conjunction with Article 345 TFEU and Article 1(5) of the Services Directive, should be understood as excluding concessions of publicly owned coastal land used for tourism and recreational purposes (such as those granted to private operators) from the scope of harmonisation directives such as Directive 2006/123/EC. Hopefully, the Court's forthcoming decision will furtherly clarify this legally and politically sensitive issue.

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[537] V De Michele, *Alle concessioni demaniali marittime, lacuali e fluviali, non si applicano la Bolkestein e il diritto primario Ue sulla libertà di concorrenza e stabilimento*, News Balneari (2024), p. 17.

[538] Council of State, Plenary Assembly, Judgment No 17 e No 18 [2021].

[539] Case C-464/24 *Balneari Rimini v Comune di Rimini*, Request for a preliminary ruling from the Giudice di pace di Rimini (Italy) lodged on 1 July 2024, C/2024/5404.

CHAPTER IV

THE CURRENT SITUATION IN ITALY: A LEGAL, ECONOMIC AND COMPARATIVE PRESPECTIVE

1. The legislative stalemate

The issue of seaside concessions in Italy has long been mired in legislative uncertainty, creating a protracted stalemate between national and European legal obligations. As it was discussed in the previous chapters, despite the repeated calls from the European Commission and several rulings by the Court of Justice[540], affirming the direct effect of the Services Directive, the Italian legislator is still failing to adopt a coherent and definitive framework for the allocation of concessions. The following sections will examine the main consequences of this legislative impasse, focusing on expected escalation of legal disputes triggered by the disapplication of domestic laws and the critical role entrusted to municipalities in the transitional management of concession procedures. Additionally, a comparative analysis with other EU Member States will be provided, in order to contextualise the Italian situation within a broader European framework and assess whether alternative models adopted elsewhere could offer viable solutions for reforming the current system.

1.1 Impact of the legislation on current seaside concessions: intense litigation as a consequence of the disapplication

The numerous judgments delivered by the Court of Justice, confirming the direct effect of the Bolkestein Directive and the subsequent duty to disapply conflicting national legislation, have led to considerable legal uncertainty within the Italian legal system. This confusion stems from the evolving interpretation adopted by national courts, particularly the Italian Council of State (Consiglio di Stato), regarding the legal status of administrative acts in contrast with EU law.

Initially, domestic jurisprudence classified such acts as merely voidable, implying that their annulment required specific procedural steps. However, in order to

[540] *See supra*, Chapter II.

circumvent the temporal limits imposed by Article 21-nonies of Law No. 241/1990[541], Italian administrative courts began reinterpreting these acts as merely declaratory in nature: that is, as recognising a legislative framework that was itself inapplicable *ab origine* due to its incompatibility with EU law.[542]

This reasoning led to the conclusion that such acts should be treated as they never legally come into existence (*tamquam non essent*).[543] Nonetheless, in order to mitigate the severe institutional and economic disruptions that would have resulted from an immediate and total disapplication, the courts introduced a gradual approach, effectively delaying the full application of EU law by several years.[544]

This judicial balancing act has led to a paradox: the very rulings that declared Italian legislation incompatible with EU law simultaneously enabled the continuation of the generalised extension of concessions whose legitimacy they had just denied. Predictably, this situation has generated substantial litigation risks.[545]

On one hand, existing concessionaires may initiate compensation claims against the State or the relevant granting authorities, alleging that they were led to rely on the legal stability of their concessions. On the other hand, if only some of the public administrations were to refrain from granting further extensions, they could face lawsuits from concessionaires excluded from the benefit of such renewal. Furthermore, this legal uncertainty may result in civil litigation from parties who have entered into contracts involving the transfer or sub-concession of such rights.[546]

However, concessionaires benefiting from extensions might argue that they had every reason to believe in the legitimacy and endurance of their position, reinforced by

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[541] Law No 241 of 7 August 1990 on Administrative Procedure, Article 21-nonies, governing revocatory self-protection, which refers to the power of the Public Administration to annul its own acts either on grounds of unlawfulness or in pursuit of the public interest.
[542] See also, on this matter, R Dipace '*L'incerta natura giuridica delle concessioni demaniali marittime: verso l'erosione della categoria'* (2021) DeS vol 3, Editoriale Scientifica SRL, pp. 419-439.
[543] M A Sandulli, '*Introduzione al numero speciale sulle "Concessioni balneari" alla luce delle sentenze NN. 17 e 18 del 2021 dell'Adunanza Plenaria'* (2021) DeS vol 3, Editoriale Scientifica SRL, p. 353. See also Council of State – Plenary Assembly, Judgment No 17 [2021], para 48; on this matter, R Rolli and D Sammarro, *'L'obbligo di "disapplicazione" alla luce delle sentenze n. 17 e n. 18 del 2021 del Consiglio di Stato (Adunanza Plenaria)*', Diritto e Società, No. 3, 2021, pp. 489–506.
[544] Council of State – Plenary Assembly, Judgment No 17 [2021], para 47. *See supra*, Chapter II, section 2.4.1.1.
[545] M A Sandulli, '*Introduzione al numero speciale sulle "Concessioni balneari" alla luce delle sentenze NN. 17 e 18 del 2021 dell'Adunanza Plenaria'* (2021) DeS vol 3, Editoriale Scientifica SRL, p. 354.
[546] ibid, pp. 354-355.

repeated legislative interventions and even some judicial statements[547].[548] From their perspective, only individuals with specific expertise in EU and administrative law could have reasonably anticipated the inconsistency of their expectations.[549]

1.2 The role of municipalities in implementing EU and Italian legislation

The Court of Justice, in *AGCM v Comune di Ginosa*, established a principle of considerable practical relevance: "*Article 288 TFEU must be interpreted as meaning that the assessment of the direct effect of the obligation and of the prohibition provided for in Article 12(1) and (2) of Directive 2006/123 and the obligation to disapply conflicting national provisions lie with the national courts and with the administrative authorities, including municipal authorities*"[550].

Similarly, the Council of State, in its twin rulings of 2021, confirmed that "*the Plenary Assembly considers that the obligation to disapply national law contrary to EU law lies with the administrative apparatus, even in cases where the dispute concerns a self-executing directive. […] the existence of a duty not to apply also on the part of the Public Administration represents an established approach within both European and national case-law*"[551].

Consequently, "*national law that conflicts with EU standard having direct effect, even if contained in a self-executing directive, cannot be applied either by the judiciary or by the public administration*"[552].

The practical implication of this principle, affirmed at both EU and national levels, is the responsibility of individual local authorities to correctly apply the rules governing maritime state concessions, in accordance with the hierarchy of norms as

[547] See, for instance, TAR Puglia (Regional Administrative Court), Section I, Judgment No 268/2025 [2025] and Council of State, Section VII, Judgment No 4479/2024 [2024].
[548] M A Sandulli, '*Introduzione al numero speciale sulle "Concessioni balneari" alla luce delle sentenze NN. 17 e 18 del 2021 dell'Adunanza Plenaria'* (2021) DeS vol 3, Editoriale Scientifica SRL, pp. 354-355.
[549] See, on this matter, the considerations expressed by the Investigating Judge (GIP) of the Genoa Tribunal in the order of 3 December 2021 revoking the seizure of the "Bagni Liggia" bathing establishment. Tribunale di Genova, Ordinanza del GIP 3 December 2021, n 108/21 RR Sezioni, available at https://www.bagniliggia.it/RR%20108S%2021%20ORD.pdf
[550] Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312, para 79.
[551] Council of State – Plenary Assembly, Judgment No 17 [2021], para 32.
[552] ibid, para 36.

outlined in the aforementioned case law (namely, the primacy of EU law over national legislation)[553].

However, the transition from theoretical principles to the actual implementation presents significant challenges for municipalities. Actually, local authorities - tasked with the competitively award of seaside concessions - often lack the human resources and expertise necessary to navigate the unresolved legal and doctrinal debate.

Indeed, many local administrative operators are unable to reconcile the obligations arising from EU law with conflicting domestic legislation, especially in the absence of harmonised interpretative guidance. The scale and capacity of municipalities vary remarkably across the Italian country: while some entities (such as the Municipality of Rome) govern populations exceeding one million, others (such as the Municipality of Sperlonga) have fewer than 3,000 inhabitants.

This imbalance has a direct impact on the administrative resources available for preparing public procurement procedures and managing existing concessions. In particular, smaller municipalities rarely employ a dedicated legal expert capable of navigating the complex and evolving legal framework shaped by EU and national authorities. Interestingly enough, many of Italy's most attractive seaside destinations (such as Portofino and Porto Cervo, each with only around 400 residents) fall within these smaller municipalities, despite their central role in "elite" coastal tourism.

The inability of Italian municipalities to identify a unified approach in applying EU law has led, in recent years, to considerable discrepancies in the management of procedures for granting maritime concessions. This lack of consistency has, in turn, triggered a significant increase in litigation before both first and second instance administrative courts.

A potential solution to this issue could be drawn from the preliminary ruling mechanism established under Article 267 TFEU. According to this procedure, national courts that harbour doubts regarding the correct interpretation of the Treaties in relation to domestic legislation (when there is an apparent conflict with EU law) may - in the case of courts of last instance, must - refer questions to the CJEU. The latter then

[553] *See supra*, Chapter III.

provides authoritative guidance on how EU law should be correctly interpreted and applied.[554]

This mechanism has been described by some scholars as a form of "*covert review of national legislation*"[555], since the CJEU is not institutionally empowered to interpret national provisions or assess their compatibility with EU law. Nevertheless, national courts frequently resort to this avenue to clarify complex interpretative questions and borderline scenarios. Indeed, the Court of Justice has, *de facto*, on several occasions delivered rulings on the compatibility (or lack thereof) of national law with European law in the context of preliminary rulings.[556]

It would therefore be desirable, in the author's opinion, to establish a similar mechanism at the EU level that would allow administrative authorities (so, not only judicial bodies) of Member States to submit questions to a designated European body when they face uncertainty regarding the correct legal framework to apply. The fundamental purpose of this entity would be to illustrate the correct way to implement effectively the administrative procedure, specifically in relation to the particular case under consideration. This institutional body should be easily accessible to public authorities and vested with sufficient authority to ensure that the guidance it provides is consistent with the principles of EU law, as interpreted by the CJEU. Such a mechanism could help reduce legal uncertainty, enhance uniformity in administrative practices across the EU and mitigate the growing volume of litigation.

2. The economic and social impact

The topic of maritime concessions extends beyond the legal and institutional domains, producing significant economic and social repercussions. As it will be explored in this section, the problem of compensation for outgoing concessionaires lies at the heart of a broader tension between market liberalisation, as mandated by EU law, and the protection of legitimate expectations nurtured under national legislation. The economic value embedded in existing concessions (often representing the livelihood of families and small businesses) intersects with principles of fair competition and public

[554] Treaty on the Functioning of the European Union [2007] OJ C306/1, Article 267.
[555] R Calvano, '*La Corte di Giustizia e la Costituzione Europea*' (CEDAM 2004), p. 244.
[556] *See supra*, Chapter II.

interest. Understanding the financial implications of reallocating concessions – as well as the mechanisms through which compensation might be addressed - is essential for assessing the overall sustainability and equity of the reform process.

2.1 The legitimate expectations of stakeholders: the problem of compensation

A particularly sensitive issue in the field that we are discussing concerns the question of compensation ('indennizzi') for current concession holders. As national authorities move toward implementing EU law - especially following the Court of Justice's interpretation of Article 12 of the Services Directive - questions have arisen about the consequences of disapplying national provisions that granted automatic renewals. This sub-section explores the legal basis, political debate, and practical implications of potential compensation claims by outgoing concessionaires, including the challenges of balancing legitimate expectations with the obligation to restore competition and align with EU internal market rules.

One of the main legal topics that has emerged in recent years regarding seaside concessions in Italy concerns the treatment of non-removable structures and the potential compensation owed to outgoing concessionaires. This matter was already addressed in *AGCM v Comune di Ginosa*: the referring judge asked the CJEU whether the direct effect of Article 12 of the Services Directive required national authorities to disapply Italian provisions, which provide for the automatic transfer of structures on public coastal land to the State without compensating the outgoing concessionaire.[557]

Moreover, the compatibility of this national provision with Article 17 of the Charter of Fundamental Rights of the European Union (thereinafter 'the Charter') has been called into question.[558] Article 17 guarantees that "*no one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest*"[559].

[557] Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312.
[558] A Nato, '*Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa'* (2023) Eurojus.it no 4, p. 51.
[559] Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Article 17.

Similarly, Article 52 of the Charter establishes that "*any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*"[560].

In the *Comune di Ginosa* case, however, the Court declined to answer the preliminary question submitted by the national judge, finding that the referring court had failed to provide sufficient factual and legal context to enable a useful response. Furthermore, the Court observed that the core of the dispute appeared to concern the renewal of concessions, rather than the rights of outgoing concessionaires.[561]

Nevertheless, the question of compensation remains central to the discussion. As it has been noted, "*the long duration of the concessions and the legitimate expectations created by repeated legislative extensions over time have implicitly constituted the counterpart to the investments made by concessionaires in enhancing the public asset*"[562]. Therefore, the absence of a compensation mechanism upon the termination of concessions could give rise to "*significant concerns of unlawfulness*" [563], particularly in light of fundamental rights protections under EU law. As such, any reform of the concession regime must carefully consider the legal and economic implications for existing operators.

Indeed, in the absence of new legislative provisions, the matter would fall under Article 42 of the Italian Shipping Code[564]. This provision only foresees the possibility of compensation in the case of early revocation of concessions (so it doesn't encompass the case under discussion). In any event, as stated by Article 49[565], immovable structures

[560] ibid, Article 52.
[561] Case C-348/22 *AGCM v Comune di Ginosa* [2023] ECLI:EU:C:2023:312, paras. 81-83.
[562] A Circolo, '*L'epilogo della proroga ex lege delle concessioni balneari'* (2021) *Studi sull'integrazione europea* XVI, p. 585.
[563] A Nato, '*Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa'* (2023) Eurojus.it no 4, p. 52.
[564] Italian Shipping Code, Royal Decree No 327/1942, Article 42.
[565] ibid, Article 49.

erected on public land are automatically acquired by the State without compensation.[566] The rationale behind this Article lies in the intention that those structures should revert to the full availability of the public administration once the concession ends, thereby "*allowing for their efficient management in the public interest and optimal use of state-owned property*".[567]

However, the same provision does allow for the possibility of compensation for investments made by outgoing concessionaires, where this is explicitly stipulated in the concession agreement.[568] Anyhow, the regulation entrusts such decision to the discretion of the granting authority, to be determined on a case-by-case basis: this approach "*inevitably raises concerns with respect to compliance with the principle of equal treatment, as well as the protection of the right to property*"[569].

Further inconsistencies emerge when comparing this treatment to other similar legal regimes. For instance, Article 703(5) of the Shipping Code[570], which applies to airport concessions, provides that, at the natural expiration of a concession, the incoming concessionaire is obligated to pay the outgoing operator the so-called "succession value".[571]

Finally, as Professor Nato has observed[572], the exclusion of compensation would be at odds with the reasoning adopted by the Italian Constitutional Court in judgment No. 157/2017. Therein, the Court acknowledged that, upon the expiration of a concession, some protection of the investments made by the concessionaire may be recognised; even more so if such investments were carried out in a certain period, in

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[566] A Police, A M Chiariello*, 'Le concessioni demaniali marittime: dalle sentenze dell'Adunanza Plenaria al percorso di riforma. Punti critici e spunti di riflessione'*, Luiss Law Review (2022), pp. 115-116.
[567] M Calabrò, '*Concessioni demaniali marittime ad uso turistico-ricreativo e acquisizione al patrimonio dello Stato delle opere non amovibili: una riforma necessaria'* (2021) 3 Diritto e Società, p. 443.
[568] "*unless otherwise stated in the grant act […]",* Italian Shipping Code, Royal Decree No 327/1942, Article 49.
[569] A Police, A M Chiariello*, 'Le concessioni demaniali marittime: dalle sentenze dell'Adunanza Plenaria al percorso di riforma. Punti critici e spunti di riflessione'*, Luiss Law Review (2022), p. 116.
[570] Italian Shipping Code, Royal Decree No 327/1942, Article 703(5).
[571] A Nato, '*Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa'* (2023) Eurojus.it no 4, pp. 52-53.
[572] ibid, p. 53.

which reliance on the stability of the concession was justified by the right of preference or repeated legislative extensions granted *ope legis*.[573]

From a European law perspective, since the automatic extensions of concessions have been deemed unlawful, the recognition of compensation for outgoing concessionaires became essential to safeguard private economic initiative: the lack of such compensation would violate Articles 49 and 56 TFEU.[574] In *Laezza*, the Court of Justice held that those Articles "*must be interpreted as precluding a restrictive national provision […] which requires a licensee to transfer, free of charge, on the cessation of business as a result of the expiry of the final term of the licence, the rights to use tangible and intangible assets which he owns*"[575].

The Court highlighted that a national provision such as the one at stake "*may render the exercise of that activity less attractive. The risk that an undertaking may have to transfer, without financial consideration, the rights to use the assets in its possession may prevent it from obtaining a return on its investment*"[576]. A rule of this kind would be, therefore, anticompetitive, as it could discourage market participation: even the Advocate General, in his Opinion, further highlighted that such a provision "*may indeed deter it [the undertaking] from participating in that call for tenders for the award of a licence*"[577].

Therefore, the absence of compensation entails harm not only to the outgoing concessionaire, but also broader discriminatory effects: it may reduce the number of prospective participants (as their investments would not be acknowledged) or discourage new concessionaires from investing adequately for fear of unrewarded expropriation at the end of their term.[578]

A similar principle was affirmed in *Hubert Wachauf*: "*Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation,*

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[573] Judgement No 157/2017, Italian Constitutional Court, 23 May 2017, ECLI:IT:COST:2017:157, para 4.
[574] A Nato, '*Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa'* (2023) Eurojus.it no 4, p. 53.
[575] Case C-375/14 *Criminal proceedings against Rosanna Laezza* [2016] ECLI:EU:C:2016:60, para 44.
[576] ibid, para 23.
[577] Opinion of AG Wahl, Case C-375/14 *Criminal proceedings against Rosanna Laezza* [2016] ECLI:EU:C:2015:786, delivered on 26 November 2015, para 62.
[578] G Morbidelli, *'Stesse spiagge, stessi concessionari?'* (2021) DeS vol 3, Editoriale Scientifica SRL, p. 394.

of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order"[579].

Hence, the national legislator is required to establish a compensation mechanism capable of safeguarding, at the same time, both the principle of equal treatment among bidders and the protection of the outgoing concessionaire.[580] However, it must be emphasized that such compensation cannot take the form of an automatic statutory extension of the concession.[581]

The legitimate expectations of private parties may be taken into account only when the context and content of a pre-existing legal norm induce its addressees to rely on the continued stability of the regulatory framework; in such cases, any legislative intervention that disrupts this framework must not be disproportionate.[582] However, with regard to the current holders of seaside concessions, the existence of a legitimate expectation may be open to question.[583]

One of the proposals advanced in this area suggests that municipalities might grant outgoing concessionaires an additional bonus based on the value of the investments they have made. Another suggestion is the inclusion of clear criteria for calculating potential compensation within the public tender documents.[584] These proposals, however, must be carefully evaluated in light of the position of the European Commission.

Indeed, in the context of the infringement procedure initiated in 2020 against the Portuguese government, the Commission stated that the granting of preferential rights

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[579] Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECLI:EU:C:1989:321, para 19.
[580] A Nato, '*Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa'* (2023) Eurojus.it no 4, p. 53.
[581] The issue had already been addressed in the earlier *Promoimpresa* judgment, for the Italian government had attempted to justify the automatic extension of concessions on the basis of the need to recover the investments made by concession holders; the argument was rejected by the Court. See Joined Cases C-458/14 and C-67/15 *Promoimpresa Srl and Others* [2016] ECLI:EU:C:2016:558, paras 52-56.
[582] See V Cerulli Irelli, '*Sul principio del legittimo affidamento'* (2014) Rivista Italiana di Scienze Giuridiche 255.
[583] A Police, A M Chiariello*, 'Le concessioni demaniali marittime: dalle sentenze dell'Adunanza Plenaria al percorso di riforma. Punti critici e spunti di riflessione'*, Luiss Law Review (2022), p. 120.
[584] A Nato, '*Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa'* (2023) Eurojus.it no 4, pp. 53-54.

to previous concession holders in tender procedures for the renewal of concessions is incompatible with Article 49 TFEU and the Services Directive. Such an advantage, according to the Commission, would discourage undertakings from other Member States from offering their services.[585]

Similarly, the Italian Constitutional Court has stressed that any such recognition must not result, even indirectly, in an unjustified restriction of competition.[586] While acknowledging the need to ensure adequate remuneration, the Court has rightly clarified that the granting of automatic extensions cannot, in any case, be considered a legitimate form of compensation.[587]

The issue of compensating outgoing concessionaires has also been addressed by the Italian Council of State, particularly in the landmark twin rulings delivered in 2021. In these judgments, the Court explicitly recommended that future public tender notices should include a provision for indemnity, aimed at safeguarding the legitimate expectations of concessionaires and enabling them to recoup the investments made during the concession period.[588] Furthermore, the Council of State outlined a set of criteria to guide the legislator in designing such compensation mechanisms - some of which were subsequently incorporated into the Italian Competition Law No. 118/2022[589].

These criteria also take into account a range of additional considerations, such as the protection of small, family-run beach enterprises and the adoption of requirements inspired by the principle of *favor partecipationis*, intended to facilitate access for small businesses.[590] Notably, the measures must not replicate mechanisms that have already been criticised at the EU level, such as preferential treatment for outgoing concessionaires.

However, the interpretation given by the Council of State could appear to be opposed to Article 49 of the Italian Shipping Code and the consistent jurisprudence of the Constitutional Court, which has declared unconstitutional several regional laws that

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[585] ibid.
[586] Judgement No 180/2010, Italian Constitutional,12 May 2010, ECLI:IT:COST:2010:180.
[587] A Circolo, '*L'epilogo della proroga ex lege delle concessioni balneari'* (2021) *Studi sull'integrazione europea* XVI, p. 586.
[588] Council of State, Plenary Assembly, Judgment No 17 e No 18 [2021], para 49.
[589] Law No 118 of 5 August 2022, "Annual Law for the Market and Competition 2021".
[590] F Di Lascio, '*Le concessioni di spiaggia tra diritti in conflitto e incertezza delle regole'* (2022) Diritto Amministrativo no 4, Giuffrè Francis Lefebvre S.p.A.

sought to grant indemnity at the expense of the outgoing concessionaire.[591] These judgments, on the other hand, were primarily based on the infringement of the State's exclusive competence in the field of competition protection: "*the provision of indemnity [...] affects the opportunities for access to the relevant market and its uniform regulation […] the regional legislation under review thus violates the State's exclusive competence in the area of competition protection, as it cannot be qualified as pro-competitive*"[592]. Thereby, the stance of the Council of State doesn't have to be considered in contrast with such case law.[593]

As noted by Professor Morbidelli, European Union law should not be applied "*in a one-sided manner, granting overriding importance to the principle of full competition while disregarding other principles that are equally fundamental to both the EU and the Italian legal orders*"[594]. Among these principles is the protection of legitimate expectations, which is recognised as an imperative reason of general interest.

The Council of State also addressed the necessity to establish a regulatory framework which, "*while respecting the principles of the Union's law and the opposing interests, is able to reconcile the now unavoidable requirements of market and competition protection, with the equally important requirement of safeguarding the outgoing concessionaires*"[595].

As previously noted, the burden of compensating the outgoing concessionaire is expected to fall upon the incoming operator: this could constitute a "*potentially significant component of the overall cost of transition*"[596]. Consequently, such a requirement may deter new operators, thereby creating a barrier to market access that conflicts with the principle of free competition and with the provisions of the Services Directive.

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[591] G Morbidelli, *'Stesse spiagge, stessi concessionari?'* (2021) DeS vol 3, Editoriale Scientifica SRL, p. 390.
[592] Judgement No 157/2017, Italian Constitutional Court, 23 May 2017, ECLI:IT:COST:2017:157.
[593] A Police, A M Chiariello, *'Le concessioni demaniali marittime: dalle sentenze dell'Adunanza Plenaria al percorso di riforma. Punti critici e spunti di riflessione'*, Luiss Law Review (2022), p. 118.
[594] G Morbidelli, *'Stesse spiagge, stessi concessionari?'* (2021) DeS vol 3, Editoriale Scientifica SRL, p. 392.
[595] Council of State, Plenary Assembly, Judgment No 17 e No 18 [2021], para 47.
[596] F Di Lascio, '*Le concessioni di spiaggia tra diritti in conflitto e incertezza delle regole'* (2022) Diritto Amministrativo no 4, Giuffrè Francis Lefebvre S.p.A.

To date, the Italian Council of Ministers has been moving toward a legislative solution that would place the obligation to pay compensation on the incoming concessionaire. The proposed criteria for calculating the indemnity include:

- the unamortised portion of investments made by the outgoing concessionaire with the authorisation of the granting authority;
- the loss of goodwill connected to commercial or tourism-related activities.[597]

This approach, taking into account also the commercial goodwill of the business, appears to be incompatible with the provisions of EU law.[598] However, this reasoning is justified by the fact that the new concessionaire will not only acquire physical infrastructure but also benefit from the outgoing operator's established goodwill, effectively treating the concession as a business asset.[599] As such, it has been argued that outgoing operators who have consistently invested their own resources should receive adequate compensation not only for the tangible investments made but also for the intangible value (the goodwill) that the new concessionaire will inherit and exploit.[600]

The competitive development of the market for seaside concessions will inevitably require the introduction of new procedural mechanisms to ensure a balanced protection of the various interests at stake.[601] On the one hand, there is the need to safeguard the legitimate expectations and long-term investments made by previous concession holders; on the other, there is the imperative to comply with EU law by ensuring open and competitive public procurement procedures.

This shift will require, among other things:

- the strengthening of informational tools that guide administrative inquiries, enabling public authorities to develop a comprehensive understanding of the local context;
- the establishment of a digital database for concessions;

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[597] A Nato, '*Le concessioni balneari, tra mercato interno, armonizzazione e tutela della proprietà: primato, effetto diretto e disapplicazione nella causa Autorità Garante della Concorrenza e del Mercato c. Comune di Ginosa'* (2023) Eurojus.it no 4, p. 54.

[598] A Police, A M Chiariello*, 'Le concessioni demaniali marittime: dalle sentenze dell'Adunanza Plenaria al percorso di riforma. Punti critici e spunti di riflessione'*, Luiss Law Review (2022), p. 122.

[599] See, on this matter, G Morbidelli, *'Stesse spiagge, stessi concessionari?'* (2021) DeS vol 3, Editoriale Scientifica SRL, pp. 387 ff.

[600] M A Sandulli, '*Introduzione al numero speciale sulle "Concessioni balneari" alla luce delle sentenze NN. 17 e 18 del 2021 dell'Adunanza Plenaria'* (2021) DeS vol 3, Editoriale Scientifica SRL, p. 29.

[601] F Di Lascio, '*Le concessioni di spiaggia tra diritti in conflitto e incertezza delle regole'* (2022) Diritto Amministrativo no 4, Giuffrè Francis Lefebvre S.p.A.

- the design of an integrated coordination mechanism between municipal plans for the utilisation of maritime property and regional plans for territorial governance.[602]

2.2 Latest proposal on compensation mechanisms and a potential alternative approach

Thus far, the issue of compensation for outgoing concession holders has not yet been definitively resolved by the Italian legislator. Following the most recent dialogue between Rome and the European Commission, the Italian government adopted the so-called "Salva-infrazioni" decree[603], which, among other things, amended paragraph 9 of Article 4 of Law No. 118/2022[604].

The current version of the provision stipulates that, *"in the event of the awarding of a concession to a new operator, the outgoing concession holder shall be entitled to receive compensation from the incoming operator equal to the value of the investments made and not yet amortised at the end of the concession period […] as well as an amount sufficient to ensure the outgoing concessionaire a fair return on investments made over the last five years. This amount is to be determined based on criteria established by a decree of the Minister of Infrastructure and Transport, in agreement with the Minister of Economy and Finance […]. The value of the investments is to be assessed by an expert or a panel of experts appointed by the granting authority prior to the publication of the tender notice […]. The costs of the expert opinion are borne by the outgoing concessionaire."*[605].

The revised provision further adds that *"in the event of the awarding of a concession to a new operator, the completion of the new concession agreement is conditional upon the prior payment of at least twenty percent of the compensation amount by the incoming operator. The failure to make timely payment […] constitutes grounds for forfeiture of the concession and does not result in the continuation […] of the previous concession relationship."*[606].

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[602] ibid.
[603] Decree-Law No 131 of September 2024, converted into Law No 166 of 2024.
[604] Law No 118 of 5 August 2022, Article 4(9), as amended by Decree-Law No 131 of September 2024, converted into Law No 166 of 2024.
[605] ibid.
[606] ibid.

On the other hand, the European Commission has emphasised that *"EU law does not provide for any compensation for outgoing operators, and even less so at the expense of new operators"*[607], stressing that such a mechanism would discourage potential new entrants, thus constituting a barrier to the principle of free competition. For this reason, *"the implementing decree must avoid any mechanism that transfers to new operators the ordinary business risk already undertaken by the previous concessionaires"*[608].

In particular, the Commission has clearly stated its opposition to including intangible assets in the calculation of compensation. According to the EU, elements such as brand value, goodwill, and overall enterprise value must be excluded from the implementing decree, which should be limited to non-amortised investments in tangible assets, such as authorised structures and equipment.

The calculation must also exclude any structures that were not legally constructed with the necessary authorisations from the competent municipalities, any immovable works that have been subjected to demolition orders by local authorities, and all permanent structures, with the exception of those strictly necessary for service provision and those deemed "difficult to remove" and thus acquired by the State.[609]

At the opposite end, concessionaires have demanded full recognition of the value of their businesses, including both tangible and intangible assets. From their perspective, the valuation of the entire enterprise is a legitimate right, as bathing establishments are privately operated businesses established in accordance with the law, even if located on public land.[610]

As Professor Calabrò has pointed out, the decision to undertake specific investments on State-owned maritime property is typically driven by purely entrepreneurial considerations - namely, the belief that such investments will increase the profitability of the business activities carried out on the concession area. It is,

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[607] European Commission, letter to the Italian Ministry of Infrastructure and Transport on compensation for beach concessions, March 2025. Author's note: the letter has not been officially published by the EU Commission, but it has been discussed and quoted in press articles of various European and Italian important newspapers. See, for instance, https://www.eunews.it/ https://www.ilfattoquotidiano.it/ https://www.ilsole24ore.com/ .

[608] ibid.

[609] ibid.

[610] See, on this matter, Ministry of Infrastructure and Transport (Italy), 'Balneari, riunione del tavolo tecnico presieduto dal Ministro Salvini' (13 March 2024) https://www.mit.gov.it/comunicazione/news/balneari-riunione-del-tavolo-tecnico-presieduto-dal-ministro-salvini .

therefore, a discretionary choice that falls outside the parameters used to determine the amount of the concession fee.[611]

Nonetheless, it is as well indisputable that, upon the expiration of the concession, such investments may prove to be highly advantageous for the public administration. On one hand, they enhance the overall value of the public domain, which becomes enriched by the presence of built structures. On the other, thereby, the existence of such facilities may justify an increase in the concession fee to be paid by the incoming concessionaire.[612]

On several occasion it has been highlighted by administrative jurisprudence[613] that the legal regime (under which structures built on public land revert to State ownership without compensation) fails to account for the economic benefits that these investments generate for the public domain. Consequently, this regime has been described as "*highly detrimental to concessionaires, in regard to investments that could contribute significantly to the enhancement of maritime public assets*".[614]

In the author's view, the solution currently proposed by the Italian government appears not to be in full alignment with the guidance already provided at the EU level. It is quite evident that the criteria set forth in the aforementioned Italian decree impose a disproportionate burden on new concessionaires, exceeding what would be deemed acceptable under the principles of EU law.

A possible alternative solution regarding compensation could involve the following measures:

- the exclusion of any compensation for outgoing concessionaires concerning intangible assets or business goodwill;

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[611] M Calabrò, '*Concessioni demaniali marittime ad uso turistico-ricreativo e acquisizione al patrimonio dello Stato delle opere non amovibili: una riforma necessaria'* (2021) 3 Diritto e Società, p. 448.

[612] ibid, p. 449.

[613] See Council of State, Section VI, Judgment No 626 of 1 February 2013, Foro amm CDS, 2/2013, 491 and Council of State, Section VI, Judgment No 3348 of 26 May 2010, Rivista giuridica dell'edilizia, 5/2010, I, 1623.

[614] M Calabrò, '*Concessioni demaniali marittime ad uso turistico-ricreativo e acquisizione al patrimonio dello Stato delle opere non amovibili: una riforma necessaria'* (2021) 3 Diritto e Società, p. 450.

- the limitation of compensation to documented and lawfully constructed material works, subject to prior approval by the granting public authority - which must assess their strict relevance to the tourism-related purpose of the concession;
- the establishment of national and uniform criteria for the calculation of compensation, to be entrusted to professionals appointed by the public authority.

In particular, the recognition of compensation for business goodwill, which has been the subject of intense debate, is rejected by scholars who argue that seaside concessions cannot be equated with commercial lease agreements involving public property. In the latter context, Italian law does in fact provide for the outgoing tenant's right to compensation for goodwill linked to the commercial use of the leased asset.[615] However, this regulatory framework does not extend to the context of state-owned maritime concessions, thereby precluding a similar entitlement.

Moreover, the payment of compensation, calculated according to the criteria previously outlined, should be borne directly by the public authority in favour of the outgoing concessionaire, given that the true beneficiary of the improvements made to the public asset is ultimately the State. This mechanism, in the writer's opinion, would allow for the inclusion of an additional percentage in the concession fee in future public tenders - borne by the incoming concessionaire - without breaching EU competition principles. Such a percentage would be justified by the enhanced value of the public asset, which has benefited from prior improvements and can now be used more efficiently.

This model appears to be more consistent with the principle of equal treatment among economic operators wishing to participate in the tendering process. At the same time, it allows for a clearer delineation between the issues of compensation for the outgoing concessionaire and the competitive conditions applied to incoming operators.

On one hand, if compensation is paid by the public administration, the outgoing concessionaire is no longer dependent on a private party for payment, thereby removing an element of uncertainty and eliminating the risk of incompatibility with pro-competitive policy. On the other hand, all bidders would face the same financial burden, as the concession fee (adjusted to reflect the added value of the public asset) would

[615] Law No 392, 27 July 1978, *'Fair rent Law',* Article 34.

apply equally to all participants, including the outgoing concessionaire (should they legitimately compete and win again).

It is to be hoped that the Italian government, which has yet to adopt the implementing decrees governing compensation, will reconsider its approach in order to ensure conformity with EU law, facilitating the closure of the ongoing infringement procedure and preventing future legal challenges from the European Commission.

3. Comparative insights: case studies of other EU countries in comparison with the Italian situation

This section provides a comparative perspective by examining how selected EU Member States – namely France, Spain, Portugal, Croatia and Greece - have addressed the management and allocation of coastal concessions, in comparison with the ongoing legal and political controversy in Italy.

These countries were selected for, due to their extensive coastlines and seasonal climates similar to the Italian ones, have experienced a significant development of tourism-related services in the seaside sector, as well.[616] Furthermore, in each of these jurisdictions, the ownership or control of the maritime public domain is vested in the State, while administrative responsibilities are divided between central and regional authorities.[617]

As it was delineated in the previous chapters, the Italian system has faced scrutiny for its repeated extensions of existing concessions and the failure to ensure open, transparent competition in accordance with EU law. At the same time, several other countries in Europe have adopted regulatory frameworks with different degrees of alignment with the principles set out in the Services Directive and other EU legal principles.

By highlighting these different national approaches, this analysis seeks to contextualise the Italian case within the broader European landscape and to assess whether alternative models might offer viable solutions or best practices for reform.

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[616] See also F Di Lascio, '*La concessione di spiaggia in altri ordinamenti'* (2010) Amministrazione In Cammino.

[617] C Benetazzo and S Gobbato, Italian State Beach Concessions and Directive 2006/123/EC in the European Context, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, p. 42.

Four different aspects of the regulatory systems of those Member States will be evaluated[618]:

1) which institutional entity hold the title over maritime domain;

2) the allocation of the competencies for managing the coastal assets, especially regarding the granting of concessions;

3) the procedure followed for the selection of concessionaires;

4) the duration of the concessions.

3.1 France

Starting with France, in this country the maritime public domain is governed by the *Code général de la propriété des personnes publiques*.[619] It defines what constitutes maritime public property and establishes that such property is inalienable and imprescriptible; it further specifies that the maritime domain may either be reserved by law or granted to third parties in accordance with legal provisions. According to a general principle reaffirmed in this legislation, access to and use of beaches must remain free and open to the public: therefore, beach concessions must preserve public access and circulation along a significant portion of the coastline.[620]

An additional key principle of the French system is set out in *Décret* No. 2006-608[621]: it requires that all installations must allow for the area to return to its original condition at the end of the concession period. Consequently, with limited exceptions, only removable or transportable structures are permitted, provided they are compatible with the designated purpose of the public domain. Moreover, the decree mandates that, in relation to the surface area of the concession, at least 80% of the length of the coastline and of the beach area must remain free of any structures, equipment, or installations.[622]

Based on these provisions, it is clear that the French model places significant emphasis on the environmental protection of the maritime public domain, while

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[618] ibid.

[619] *Code général de la propriété des personnes publiques*, enacted by Ordonnance No. 2006-460 of 21 April 2006 (France).

[620] C Benetazzo and S Gobbato, Italian State Beach Concessions and Directive 2006/123/EC in the European Context, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, p. 43.

[621] Décret No. 2006-608 du 26 mai 2006 relatif aux concessions de plage, JO, 27 May 2006 (France).

[622] See also F Di Lascio, '*Le concessioni di spiaggia tra diritti in conflitto e incertezza delle regole'* (2022) Diritto Amministrativo no 4, Giuffrè Francis Lefebvre S.p.A.

simultaneously promoting its general public use. The State, through the prefect, holds the competence to grant concessions for the development, exploitation, and preservation of specific coastal areas. The decision regarding the authorised use of a particular area is based on the nature and vocation of both the concerned area and its surroundings, as well as on the goals of coastal conservation and the protection of biological resources. As a result, the discretion granted to the competent administration is guided by these two criteria in both the planning and management of the maritime domain.[623]

The decree also allows the concessionaire to delegate, by means of a specific exploitation agreement, the activities covered by the main concession to one or more sub-concessionaires. However, the duration of any sub-concession may not exceed the duration of the principal one.[624]

As for the granting and renewal of concessions, these are subject to the completion of a public inquiry (*enquête publique*) conducted by the competent prefect. The prefect is required to notify the public or the relevant association of municipalities of the intention to award or renew a concession, or of having received an application from a party who does not benefit from a preferential right of preference. From the date of such notification, interested parties have a two-month period in which to exercise their rights.[625] If no preferential rights are exercised, the award of the concession is then subject to a comparative assessment procedure.[626]

According to Article 1(1) of *Décret n° 2006-608*[627], the duration of beach concessions aimed at the exploitation, development, and maintenance of specific stretches of coastline may not exceed twelve years. No explicit provision is made concerning the temporal duration of sub-concessions; however, as noted, they cannot

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[623] *Le concessioni demaniali marittime in Croazia, Francia, Grecia, Portogallo e Spagna*, Camera dei deputati, Temi dell'attività parlamentare XVII legislatura, camera.it.

[624] ibid.

[625] C Benetazzo and S Gobbato, Italian State Beach Concessions and Directive 2006/123/EC in the European Context, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, pp. 44-45.

[626] In accordance with Loi n° 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques (Loi Sapin), art 38, JO, 30 January 1993 (France).

[627] Décret No. 2006-608 du 26 mai 2006 relatif aux concessions de plage, JO, 27 May 2006 (France), Article 1(1).

exceed the duration of the primary concession.[628] This time frame (shorter than other European models) is motivated by environmental protection considerations and the need for careful preservation of public coastal property.

As regards infringement procedures, the European Commission has not yet opened a similar procedure against France regarding bathing concessions. However, in the past, France has been involved in infringement proceedings related to hydroelectric concessions due to their non-liberalisation of these concessions[629] (in line, therefore, with the issues raised in infringement proceedings against other States for seaside concessions).

3.2 Portugal

In Portugal, the allocation of maritime public domain concessions is governed by Article 10 of Decree-Law No. 226-A/2007[630], which sets binding criteria for the competent authorities and clarifies that the procedure is initiated upon request by interested parties.

As for the selection process, competitive tendering is mandatory for certain types of licences and for all concessions. Article 24 stipulates that concessions must be granted following a tendering procedure, though it allows for the possibility of direct awards to public undertakings or enterprises through a specific decree-law. These procedures must also comply with the rules governing public procurement.[631] Furthermore, Article 25 provides that the maximum duration of concessions is 75 years, to be determined case by case based on the scale of the investments, namely their economic and environmental significance. Thus, the competent authority enjoys discretionary power in setting the duration. [632]

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[628] *Le concessioni demaniali marittime in Croazia, Francia, Grecia, Portogallo e Spagna*, Camera dei deputati, Temi dell'attività parlamentare XVII legislatura, camera.it.

[629] European Commission, *Freedom of establishment: the Commission calls on France and Italy to amend their legislation on hydroelectric concessions* (Press Release IP/05/920, 13 July 2005).
[630] Decree-Law No 226-A/2007 of 31 May (Portugal), Article 10.
[631] See also F Di Lascio, '*La concessione di spiaggia in altri ordinamenti'* (2010) Amministrazione In Cammino.
[632] C Benetazzo and S Gobbato, Italian State Beach Concessions and Directive 2006/123/EC in the European Context, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, p. 46.

Portuguese law also allows the outgoing concessionaire to exercise a preferential right at the time of reassignment. Within one year prior to the expiration of the original concession, the holder may express interest in continuing use of the asset and will be given preferential treatment, provided that they accept the conditions of the winning offer within ten days of the award. [633] This rule, however, raises concerns about compatibility with EU competition principles, as it creates a clear disadvantage for other participants in the tendering process.

Finally, Article 35(2) establishes that if the original concessionaire has made additional investments beyond those initially agreed and it is demonstrated that such investments have not been recovered, they may request either reimbursement of the unrecovered amount or an extension of the concession, up to maximum 75 years.[634]

In April 2022, the European Commission initiated an infringement procedure against Portugal[635] concerning its national rules on the renewal of seaside concessions. The Commission challenged the provision granting a preferential right to existing concession holders in tendering procedures, arguing that it violates Article 49 TFEU and Article 12 of Directive 2006/123/EC. According to the Commission, such preferential treatment discourages potential competitors from other Member States, thereby undermining the principles of transparency, non-discrimination, and free competition. The procedure remains pending, and the Commission has formally urged the Portuguese authorities to amend the national framework to ensure compliance with EU internal market rules.

[633] *Le concessioni demaniali marittime in Croazia, Francia, Grecia, Portogallo e Spagna*, Camera dei deputati, Temi dell'attività parlamentare XVII legislatura, camera.it.

[634] ibid.

[635] Infringement procedure No. 2020/2022. European Commission, January infringements package: key decisions (Press release, INFR(2022)2020)
https://ec.europa.eu/commission/presscorner/detail/en/inf_23_142

3.3 Spain

As far as Spain is concerned, Article 132(1) of the Constitution[636] establishes that the legal regime of public and municipal property shall be governed by law, based on the principles of inalienability, non-prescription, and immunity from seizure.[637]

Historically, the management of the coastline in this Member State has often proved ineffective. Consequently, in 1988 the Spanish government adopted the *Ley de Costas*[638], aimed at preserving the public nature of the coastal domain and preventing its privatisation. This law regulates the use of the maritime-terrestrial public domain by establishing two distinct authorisations: licences and concessions.[639]

Following criticism and implementation issues, Ley 2/2013[640] introduced substantial amendments to the 1988 legislation. Under this new regime, the renewal of the concessions is subjected to an environmental report assessing the impact of the occupation on the environment and setting conditions to ensure the protection of the public domain.[641]

As for the award procedure, the Ley de Costas leaves it to the discretion of the granting authority whether to initiate a public tender. When such procedures are undertaken, they must respect the principles of publicity, objectivity, impartiality, transparency, and competition, but they are not always a mandatory requirement.[642] Existing concession holders are entitled to retain their rights and may, upon expiration, benefit from the extraordinary extension or request a new concession. Concessions are transferable *inter vivos and mortis causa,* too. In the event of the concessionaire's death,

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[636] Constitution of Spain [1978], Article 132(1).
[637] *Le concessioni demaniali marittime in Croazia, Francia, Grecia, Portogallo e Spagna*, Camera dei deputati, Temi dell'attività parlamentare XVII legislatura, camera.it.

[638] Ley 22/1988 de Costas, BOE no 181, 29 July 1988 (Spain).
[639] C Benetazzo and S Gobbato, Italian State Beach Concessions and Directive 2006/123/EC in the European Context, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, p. 48.
[640] Ley 2/2013, de 29 de mayo, de protección y uso sostenible del litoral y de modificación de la Ley 22/1988, de 28 de julio, de Costas, BOE no 129, 30 May 2013 (Spain).
[641] *Le concessioni demaniali marittime in Croazia, Francia, Grecia, Portogallo e Spagna*, Camera dei deputati, Temi dell'attività parlamentare XVII legislatura, camera.it.

[642] See also F Di Lascio, '*La concessione di spiaggia in altri ordinamenti'* (2010) Amministrazione In Cammino.

successors may inherit the rights and obligations of the concession, provided they notify the administration within four years; otherwise, the concession will be extinguished.[643]

Regarding their duration, the length of concessions varies depending on the intended use: originally limited to 30 years, the maximum term was then extended to 75 years, with the possibility of an additional 75-year renewal after the 2013 reform.[644]

In 2023, the Commission opened an infringement procedure[645], asserting that Spain's legal framework for granting and renewing concessions on the maritime-terrestrial public domain fails to ensure transparent and impartial selection procedures, as mandated by the Services Directive. The Commission contends that the Spanish system may breach EU law by not providing adequate opportunities for competition, potentially deterring operators from other Member States. This procedure remains pending, with the Commission currently reviewing Spain's response to the letter of formal notice.

3.4 Croatia

In Croatia, the legal framework governing the management of coastal areas prioritises environmental conservation over economic development. Article 52 of the Constitution[646] designates the sea, beaches, and islands as natural resources of special interest to the Republic, warranting special protection. The law regulates their use and exploitation, including any limitations imposed on such use.[647]

The State is primarily responsible for managing and protecting the maritime public domain, either directly or through regional and local self-government authorities. These local entities are tasked with the care and oversight of areas designated for general

[643] C Benetazzo and S Gobbato, Italian State Beach Concessions and Directive 2006/123/EC in the European Context, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, p. 49.
[644] ibid, p. 50.
[645] Infringement procedure No. 4141/2022. European Commission, *December infringements package: key decisions* (Press release, INFR(2022)4121)
https://ec.europa.eu/commission/presscorner/detail/it/inf_24_6006
[646] Constitution of the Republic of Croatia [1990], Article 52.
[647] C Benetazzo and S Gobbato, Italian State Beach Concessions and Directive 2006/123/EC in the European Context, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, p. 50.

use, while concession-granting powers are shared between regional and central administrations.[648]

Seaside concessions can be granted either for commercial use or for special, non-commercial purposes. Commercial concessions are subject to public tender procedures, while special-use ones may be granted upon request, potentially following a competitive procedure evaluated by an expert panel.[649] The distinction reflects the differing nature of the two forms: commercial concessions generate private profit, while special-use concessions serve public interests.[650]

Furthermore, structures erected by the concessionaire must be removed at the end of the concession if they are not permanent and if removal can be carried out without significant harm to the maritime domain; otherwise, the structures become part of the public domain.[651]

Concession durations range from five to ninety-nine years. In this wide time frame, economic-use concessions involving regionally significant buildings are limited to twenty years, extendable to thirty years upon government approval if justified by new investment or force majeure. Concessions involving nationally significant structures may last up to fifty years.[652]

However, the European Commission has not yet initiated any infringement procedures against Croatia specifically concerning the allocation or renewal of seaside concessions under the Services Directive.

3.5 Greece

Lastly, the Greek system differs significantly from those previously described. The matter is primarily regulated by Law No. 2971 of 19 December 2001, which generally provides for transparent and impartial selection procedures for granting

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[648] ibid, p. 51.
[649] See also F Di Lascio, '*La concessione di spiaggia in altri ordinamenti'* (2010) Amministrazione In Cammino.
[650] *Le concessioni demaniali marittime in Croazia, Francia, Grecia, Portogallo e Spagna*, Camera dei deputati, Temi dell'attività parlamentare XVII legislatura, camera.it.

[651] ibid.
[652] C Benetazzo and S Gobbato, Italian State Beach Concessions and Directive 2006/123/EC in the European Context, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, p. 52.

authorisations to conduct tourism-related activities on coastal land. However, in 2014, the Ministry of Finance issued a decree allowing for the direct allocation of beach concessions, not requiring public tender procedures and delegating the power to grant such rights to municipal authorities and disregarding the applicable EU legal framework.

The Bolkestein Directive was subsequently implemented through Law No. 3544/2010[653]. As a result, all the administrative simplification measures envisaged by the Directive have now become an integral part of Greek domestic legislation.[654] This legislative development formally aligned national law with EU obligations; however, in practice, the application of these rules has remained inconsistent, particularly due to the persistence of direct concession allocations and the limited enforcement of competitive procedures. This divergence between formal compliance and practical implementation continues to raise concerns about Greece's adherence to the principles of transparency and competition required under EU law.

Actually, the European Commission has initiated an infringement procedure against Greece concerning the allocation of seaside concessions. In December 2023, the Commission sent a letter of formal notice to Greece[655], asserting that the Greek legal framework for granting and renewing concessions on the maritime-terrestrial public domain fails to ensure transparent and impartial selection procedures, as mandated by the Services Directive. The Commission contends that the Greek system may breach EU law by not providing adequate opportunities for competition, potentially deterring operators from other Member States. This procedure remains pending, with the Commission currently reviewing Greece's response to the letter of formal notice.

[653] Law No. 3544/2010 (Greece), on the transposition of Directive 2006/123/EC into national law.
[654] *Le concessioni demaniali marittime in Croazia, Francia, Grecia, Portogallo e Spagna*, Camera dei deputati, Temi dell'attività parlamentare XVII legislatura, camera.it.

[655] Infringement procedure No. 2243/2024. European Commission, *December infringements package: key decisions* (Press release, INFR(2024)2243)
https://ec.europa.eu/commission/presscorner/detail/it/inf_24_6006

3.6 EU Member States and coastal concessions: legal obstacles and prospective solutions towards harmonisation

As outlined in the previous section, the regulation of public maritime concessions and the application of the Services Directive concern all EU Member States. While national systems offer different legal and administrative responses to the issue, several points of convergence can be observed across jurisdictions.[656]

One shared feature is the growing focus on integrated coastal zone management, through which environmental protection of maritime public property is pursued as a central objective. Moreover, Member States have generally tried to adopt legislative measures to transpose EU principles into their domestic legal frameworks.[657]

Another common goal among national lawmakers is the overall improvement in the management of public assets, which is primarily pursued by introducing competitive mechanisms for the allocation of concessions. Within this framework, "*it is EU law that imposes […] an efficient use of owned resources in Member States, who are called upon to contribute to the economic development of the European Union*"[658].

At the same time, all legal systems tend to recognise the importance of protecting public goods temporarily entrusted to private operators. This principle translates into specific obligations regarding the preservation of the asset's original condition, its restoration after the concession period, and the guarantee of its accessibility and enjoyment by the public throughout the duration of the concession.[659]

In all the analysed systems, the allocation of administrative functions related to the planning and programming of maritime public property is influenced by processes of administrative decentralisation or legislative federalism. Typically, the State retains ownership of maritime public property, while its administrative management is delegated to local or regional authorities.

Nonetheless, none of the legal frameworks analysed in the previous paragraph seems to embody a system for the management of seaside concessions that could

[656] C Benetazzo and S Gobbato, Italian State Beach Concessions and Directive 2006/123/EC in the European Context, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, p. 56.
[657] With some exceptions, such as the case of Greece.
[658] F Di Lascio, '*La concessione di spiaggia in altri ordinamenti'* (2010) Amministrazione In Cammino, p. 24.
[659] ibid, p. 25.

actually be considered in line with the principles laid down by the European Union. Consequently, they probably won't be of any inspiration to the Italian government to derive a solution for this problem. The key issue that remains unresolved concerns the specific procedure to be followed for the allocation of beach concessions, a matter for which not only in Italy, but in none of the other Member States as well, a fully satisfactory solution has yet been adopted.[660]

[660] C Benetazzo and S Gobbato, Italian State Beach Concessions and Directive 2006/123/EC in the European Context, Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Study for the PETI Committee, European Parliament, 2017, pp. 57-58.

CONCLUSIONS

The regulation of maritime seaside concessions in Italy is currently characterised by a significant legal, institutional, and social complexity, particularly in light of the provisions of European Union law. The conflict between national legislation and supranational obligations has, in recent years, produced a fragmented, unstable, and widely criticised regulatory framework.

At the legislative level, Italy has repeatedly adopted measures aimed at - directly or indirectly - extending existing concessions, thereby attempting to circumvent the application of Articles 49 and 56 of the TFEU and, most notably, Article 12 of Directive 2006/123/EC (the Services Directive).

However, this approach has clashed with repeated rejections by both EU institutions and the case law of the Court of Justice of the European Union, as well as by the Italian administrative courts, as it runs counter to the European principles of competition, transparency, and non-discrimination.

This thesis has aimed to clarify how the apparent short-circuit between EU and Italian legislation must be resolved independently of the desirable future alignment of national law with the above-mentioned principles. It was argued - and this constituted the core of the legal reasoning in this analysis - that Article 12 of the Services Directive, due to its clarity, precision, and unconditional nature, must be recognised as having vertical direct effect. Therefore, it is directly applicable by both central and local administrative authorities, even in the absence of national implementing legislation and even in the presence of conflicting domestic norms.

The practical consequences of this conflict between the principles of direct applicability and the Italian legislator’s attempts to address the peculiar situation developed over time regarding current maritime concession holders are twofold.

Firstly, the legislative deadlock has created a decision-making paralysis among administrative bodies responsible for renewing concessions, and has consequently multiplied litigation, generating widespread legal uncertainty and fragmented application across the country. The central role in the management of these assets is in fact entrusted to municipalities, which often lack - due to their limited dimension - the

resources and technical expertise needed to handle complex public tender procedures. Thereby, it has resulted in heterogeneous and potentially arbitrary local practices.

This reflection has led to a possible solution being proposed in the context of this analysis: the creation of a European interpretative support body for national administrative authorities, inspired by the preliminary ruling mechanism. In the opinion of the author, such an instrument could help reduce legal uncertainty and ensure greater consistency in the application of EU law by local entities.

Secondly, the economic and social impact of a strict application of EU rules has raised the issue of protecting the legitimate expectations developed by many concession holders over the years, based on a legal framework that seemed to offer stability and continuity. The matter of compensation has highlighted the difficulty of reconciling the principles of competition, freedom of establishment, and free movement of services with the need to safeguard the legitimate investments made by outgoing concessionaires.

Subsequently, the current proposal by the Italian government, which imposes on the new concessionaires the burden of compensating the outgoing ones, was examined. This solution appears, in the author's view, to be misaligned with EU law, as it risks discouraging competition and creating a barrier to market entry for new economic operators - both domestic and from other Member States. For this reason, an alternative approach that seems to be more consistent with EU principles was suggested: compensation should be paid by the State, following an assessment of the actual utility derived from improvements made by the outgoing concessionaire. These improvements, being accessory to the public asset and enhancing its utility, would allow the public authority to establish a higher base concession fee in the new tender, as compared to a situation in which no such improvements had been made.

Italy's situation was lastly compared with that of other EU Member States, in order to provide a broader, forward-looking perspective on the issue of seaside concessions. Other countries, too, have had to deal with the direct effect of the Services Directive. The comparative analysis examined the various solutions adopted by Member States in an effort to align their domestic legal frameworks with EU principles. However, even in the national legislations of the countries under review, no fully coherent system was found that strictly complies with the principles of competition, transparency, and non-discrimination laid down at the EU level.

Encouragingly, the recent stance of the Italian government - engaged in an active dialogue with the European Commission - has shown an explicit willingness to align with supranational obligations within a reasonable timeframe.

In conclusion, the analysis carried out in the present work allows to affirm that the harmonisation of national legal systems with the provisions of the EU's single legal framework requires, even if not the overly extended timeframes set by the Italian legislator, at least a reasonable period in which national systems may adjust their rules, taking into account the practical effects that such changes may have on pre-existing situations.

A concept borrowed from the language of business appears particularly fitting to the subject matter of this discussion: *"Coming together is the beginning. Keeping together is progress. Working together is success."* (Henry Ford).

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