

COMPETITION DECREE AND THE LONG-STANDING ISSUE OF STATE PROPERTY CONCESSIONS

After years of automatic and generalised extensions, the Competition Bill (legge annuale per il mercato e la concorrenza 2021) has been finally approved.

In particular, this new legislation - in addition to introducing important legal provisions on the subject of State property concessions - constitutes a milestone in the implementation of the commitments undertaken in the Recovery Plan.

In the Recovery Plan, the protection and promotion of competition are considered essential elements to promote efficiency and economic growth and to ensure recovery after the pandemic; in order to receive *Next Generation EU* funds, the Government has therefore committed itself to bringing Italian regulations into line with those of the European Union.

One of the provisions that has aroused the greatest concern in public opinion is Article 3, by which **the deadline for the effectiveness of maritime State property concessions** for the exercise of tourist-recreational and sporting activities - until now automatically extended - is set **at 31 December 2023**.

Indeed, this is a term already identified by the Plenary Session of the Council of State in rulings nos. 17 and 18 of 9th November 2021: the judges of Palazzo Spada had considered illegitimate the multiple extensions to maritime State property concessions ordered by the Italian legislature, for violation of European Law and, specifically, of Article 49 of the Treaty on the Functioning of the European Union (freedom of establishment) and Article 12 of the Bolkestein Directive¹, highlighting the urgency of a necessary compliance to the European legislation. At the same time, the lower courts had also reached the same result, with an almost unanimous orientation (see, *ex multis*, T.A.R. Toscana-Firenze, Section II, 8 March 2021 no. 363; T.A.R. Campania - Napoli, Section III, 14 January 2021 no. 265).

However, an exception to the 2023 effectiveness deadline has been introduced; the expiry date of existing concessions may indeed be postponed by a few months – but, in any case, no later than 31 December 2024 – where there are objective reasons preventing the conclusion of the selective procedure (e.g., a pending litigation and/or objective difficulties related to the execution of the public tender).

Within the novella we also find the delegation to the Government, on the basis of the principles and criteria set forth in Article 4, for the adoption of a legislative decree containing the organic regulation of public procedures for the awarding of concessions. Thus, the Government shall: **(a)** establish uniform criteria for the identification of the areas susceptible to be entrusted in concession and the quantification of the fees²; **(b)** define the prerequisites and cases for the possible

¹ The article 12 of the Directive 2006/123/CE provides 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 and completion of the procedure; [...] authorisation shall be granted for an appropriate limited period and may not be open to automatic renewal nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider».

² The fees should consider the actual profitability of the asset, the natural value of the shoreline and any activities carried out there. As pointed out by the Court of Auditors (report of 21 December 2021), concession fees are currently derisory compared to the benefits obtained and the investments made.

fractioning into small plots of the State-owned areas to be entrusted in concession, in order to favour the maximum participation of micro and small companies; **(c)** take into account the technical and professional experience already acquired in relation to the activity subject to concession and the position of the subjects who have used a concession as a prevailing source of income for themselves and their families **(d)** provide for social clauses aimed at promoting the employment stability of the personnel employed in the activity of the outgoing concessionaire; finally, **(e)** ensure that, for the purpose of choosing the concessionaire, account is taken of the quality of the service offered, the usability and collective accessibility of the state property, as well as the reduced environmental impact and the preference for removable works.

With regard to the duration of maritime State property concessions, it shall not be *«longer than necessary to guarantee the concessionaire the amortisation and fair remuneration of the investments authorised by the granting body, at the time the concession is awarded, and, in any case, to be determined on the basis of the extent and economic importance of the works to be carried out, with an express prohibition of extensions and renewals, including automatic ones»*.

Therefore, the regulation aims at pursuing important objectives, such as:

- (i)** access to micro and small companies, which today represent a solid reality in our country, by providing for the fractioning of concessions into small plots, so as to prevent - even by setting a maximum number of concessions in the hands of the same subject - the centralisation of concessions in the hands of a large multinational company;
- (ii)** the protection of employment, especially where the concession is the main source of family income;
- (iii)** the safeguarding - in the context of the tender - of the technical and professional skills already acquired by the concessionaire, who may therefore, without this constituting an obstacle to the entry of other operators (in the presence of objective technical skills and know-how not to be found in other operators and functional to the asset being granted the concession), be preferred to others.

Now, all that remains is to wait for the practical applications of the new legislation.

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