

**CONCESSIONS OF PUBLIC GOODS AND THE PRIVATIZATION
PROCESS**

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1. INTRODUCTION

In the Italian legal system, public utility which are intended for the public and unavailable domain may be pursued through an exclusive use by the Administration itself,

through a *general* purpose, by any public or private entity, and through a *particular* use, by public or private entity which is reserved for a certain use of the property.

This reserve of the right to use may result from the law or from an administrative measure such as the concession, and can exclude other individuals from any use of that property, or just from particular uses of it.

In line with the principles expressed in art. 823 Civil Code, the state property rights may be subject to a third party only in the manner and within the limits set by the rules of public and private law. It seems, however, that, especially for assets not available, the foreclosure towards the use of private law instruments is destined to fall due to the favor of the law no. 15/2005, expressed in the text of art. 1, paragraph 1-bis of law no. 241/1990, for the private tools of administrative activity that do not adversely affect the purposes of public interest aim of the property.

2. THE ADMINISTRATIVE MEASURE OF CONCESSION FOR PUBLIC DOMAIN

As for the ways of use for the assets governed by public law, particular attention must be paid to the administrative concession, which normally takes the configuration of the concession-contract.

This case is complicated by the convergence of a unilateral and authoritative act, the concession, and a supplementary agreement with contents of private nature, that is a bilateral contractual relationship source of mutual rights and obligations between the public body and the private.

The owners of the concession exercise special rights on properties and activities usually unavailable to private and reserved for public bodies. In some cases, dealers get some real monopoly rights on property awarded.

It follows that, those who use, in particular via, public properties because of a concession measure, holds a right of exclusion on third parties from the use of the same properties, right that can protect both with the means and the measures of common law, as with the executive powers of self-defense. The concession is in fact characterized by the transfer from a public to a private of public power, ie those particular situations that provoke subjective unilateral acts of authoritative character.

Public properties subject to concession are "public property in an objective sense, " originally given to the public power. As Massimo Severo Giannini wrote: "If a river channel change, the new channel is public. If a flood creates a beach, where the first was water, it is now public. As soon as the road comes to life, it is public good"¹. The public nature of these assets, therefore, still remains after the concession measure.

3. CRITICAL POINTS IN THE CONCESSION DISCIPLINE

The discipline of administrative concessions is characterized by a series of critical.

The choice of the concessionary, first of all, should be transparent and based on the criteria of objectivity. In the practice of concessions, however, this is rarely the case: sometimes, in fact, even the law that sets out in detail the subjective and objective requirements of future concession, allowing, in essence, a finding in advance.

In many cases the decision is entrusted to the wide discretion of the grantor. In a few cases, announce tenders for the selection of the concessionary. The latter, for example, have taken shape in port services and water integrated services, but in too many areas there

¹ M.S. Giannini, *Diritto pubblico dell'economia*, Bologna, 1977, 24.

is none yet track. The resistance depends shortcomings in the law, either by a lack of practice².

The supervision on concessionaries in second place, should be continuous and specialized. In fact, except for some cases where there is a specific control of public authorities (for example, in the energy sector control over the granting missionaries is pervasive and is largely entrusted to the Authority for Electricity and Gas, an independent highly qualified body), there are not adequate public bodies for regulating and controlling the management procedures of the asset granted: is the case, for example, of highways, airports, railways.

With respect to the property aspects and, in particular, the license fees, that is, the premiums paid by licensees to public administrations, difficulties arise, first of all, from the competence order in this subject, that are often heterogeneous and a-systematic. As for the port concessions, for example, the determination of fees rests with individual port authorities. For the concessions on natural resources, furthermore, the skills are characterized by a high degree of decentralization, burdened by substantial irrationality. The public water, for example, is mostly state property, but the competences are decentralized to the regions and local authorities, both with regard to the levying of charges and the collection of the same. We can apply some common criteria set by state law dating (RD 1775/1933), but they are very general, providing that the fee is proportioned with the amount of water withdrawn or the extension of irrigated land.

² With reference to sea state concessions in this regard, the European Community launched January 29, 2009 n.2008/4908 the infringement procedure against Italy, asking that public tendering procedures for the granting of concessions.

Common state criteria, to be fixed with you an interministerial decree, are also provided for the concession in the field of integrated water services (Legislative Decree no. 152/2006).

The maritime domain is state property: also in this field management is decentralized, but the State directly determines the fees. This has a significant impact on the uniform definition of the fees paid by concessionaries.

As for the concession measures relating to mineral resources, the skills to determine the royalties belong to the regions, except for so-called royalties on the production of hydrocarbons.

Where skills are regional, the general state criteria are also in this field relied on dating rules (in particular, rd 1443/1927) and this is unsatisfactory, because bound to the surface subject of the concession.

The discipline of concessions of public properties, in short, needs a rationalization about the legislative and administrative skills, concerning the establishment and collection of license fees.

3.1 The reform of bathing concessions in the light of the "Development Decree" of 2011.

Pending its conversion into law by the Chambers, the Decree Law of 13 May 2011, No 70, introduces substantial and, in some respects, controversial changes on the regulation of maritime state concessions for touristic and hotel purposes, contained in the Code of Navigation.

The system of competences in such concessions is structured, as defined by the Code, as follows: the region performs the functions of planning and addressing for the purpose of tourism and recreation, including bathing establishments. But Commons are

responsible for the issue and renewal of state-owned maritime concessions, permissions on the beaches, the permission for the operation of maritime trade on public lands and the cleaning of beaches.

In case of several applications, art. 37 of the Navigation Act established the so-called "right to insist, " ("law of persistence") and preference was given to previous concessions already granted, compared to the new instances.

The EC, however, launched on January 29, 2009 , the infringement proceeding No. 2008/4908 against Italy, asking that the concessions were put outlawed. Italy has therefore had to repeal the "law of persistence" by Act No. 25 of 26 February 2010 (Article 1, paragraph 18) by extending the duration of existing concessions until December 31, 2015.

Until now, the decision on concessions has been characterized by a period exceeding four years, in order to shield them against possible cancellation, in whole or in part, as a result of the maritime authority discretion (article 42 Code Nav.).

The concessions over four years, or that otherwise have difficult facilities to remove, in fact, are revocable only for specific reasons related to public use of the sea or other reasons of public interest, according to the maritime authority discretion.

On expiry of the extension determined by law no. 25/2010, therefore, in the event of failure to renew the license without an appropriate competitive process, will apply the art. 49 Cod Nav. according to which 'except as otherwise established in the concession, when come to an end the concession, works non-detachable, built on state-owned area, are acquired to the State, without any compensation or refund, prejudice to the possibility of the licensing authority to order the demolition with the return of public property in the former condition'.

To deal with this inevitable solution, the decree in question is intended to allow the existing buildings along the coasts (including the bathing establishments) can be protected by applying them to the 'surface rights' for ninety years, and providing for an annual payment determined by the Land Agency on the basis of market values.

From a first reading of the provisions of development decree, however, emerge a number of contradictions with the current rules contained in the Code of Navigation, as well as in the Civil Code: the surface rights, governed by articles 952 ff. of the Civil Code, consist in building and maintaining a building above (or below) of a ground owned by others. You can sell the property of the existing construction separately from land ownership, transferring only the surface rights. If, moreover, it is expected that the right has a term, at the expiry of that period the surface right is extinguished and the owner of the ground would become the owner of the building.

The two legal situations (the concessionary and the owner of surface rights) are therefore not comparable, as this would lead in the expiry of any power of revocation, especially the lack of reasoned "public use of the sea or for other reasons of public interest" by the competent maritime administration.

This would have, therefore, difficult situations to adjust with the principles of the legal order, in which the holder of surface rights that occludes access with its facilities or the only visibility of the sea on land owned by the State, can not have recalled for any reason, the decision granting in his favor, as required by art. 42 of the Navigation Act.

4. THE PROCESS OF DEVELOPMENT AND DISPOSAL OF PUBLIC REAL ESTATE

In an attempt to put a stop to the process of gradual devaluation of the public real estate, Governments that have taken place in recent years have taken various and disharmonious actions to enhance and/or sale of public assets that have recently resulted in the Legislative Decree no. 85 of 2010, that is a law that stands not only for being the first intervention really organic in this matter, but also because, in a highly innovative logic than previous reforms, expresses the will of the lawmaker to create a real "federal state property."
"

The activity of selling properties owned by the state since the early eighties was included in the ordinary management of state assets, the legislation then in force gave a connotation of public and social nature, rather than economic and productive, aiming to achieve the primary objective of meeting the public interest.

Far more significant is the intervention performed by art. 9, co. 6 of the Law of 24 December 1993 no. 537, which provided for the adoption, by appropriate DPR of rules intended to dispose of public assets, including those covered by the concession, not intended for general or collective environmental and cultural interest, with priority for the alienation of land and buildings of improper or unnecessary utilization. The rule also required the provision of social security institutions dedicated program for the disposal of its housing stock by income, beginning with the living one.

Since then, manifested a tendency, confirmed in the legislation of the next decade, to prefer interventions aimed at streamlining and enhancing the use of public property, anticipating the sale of only those that are not strictly functional purpose of the institutions or can not be managed efficiently.

5. THE PRIVATIZATION AND SECURITIZATION OF PUBLIC DOMAIN

It is in D.L. September 25, 2001, No. 351 that may instead find that the main regulatory framework of the privatization processes, as well as the starting point of measures to enhance the public trust.

Article 1 of the Decree requires the Property State Agency to identify, through its executive decrees, individual assets belonging to the State Assets (distinguishing between public real and patrimonial estate), assets of public non-territorial, non-instrumental properties previously allocated to companies in total public participation, direct or indirect, recognized as State-owned and, finally, assets located abroad, to be submitted to the processes of reorganization, management and development. They are chosen on the basis of

records available in the archives and public offices and on the basis of lists drawn up by the public bodies.

The privatization process can also be performed using securitization, a form of devolution of public property introduced and regulated by the same decree. With the technique of securitization can easily convert non-tradable goods (eg. public owned buildings), in financial tools more easily placed on markets.

Goods are sold to vehicle company (in this case indicated by the acronym SCIP³) that the seller pay the fee obtained through the issuance and placement of bonds as a "starting price".

After the company manages and sells real estate on the market⁴.

³ About the nature of SCIP, some jurists have advocated the possibility of these companies to qualify as public bodies. In fact, such an attempt of classification is at least doubtful, expected that the vehicle companies are established exclusively for the execution of securitization transactions, and real estate management is allocated at original owners bodies. It is to be excluded, therefore, that the same may be involved, such as contracting administrations, in tenders for works, supplies and services relating to the properties transferred to them. Furthermore, considering that the car companies have the sole and exclusive corporate purpose is to make the securitization to dispose of public property, the nature of these activities can only be commercial and, therefore, incompatible with the concept of a public body.

⁴ The SCIP, although they can't freely enjoy and dispose of the assets to be securitized, but only alienate them with the obligation to back the increase in revenues, is seen by the majority doctrine, following the above procedure, the owner of those assets. To confirm this assumption, consider that the activities necessary for implementation of securitization transactions, what, precisely, the issue of securities representing ownership, assume ownership of the property.

The application of this system has led to the creation of the State Asset Company, governed by art. 7 of D.L. no. 63 of 2002, as converted by Law no. 112 of 2002.

The aim targeted by the Government was to set up new and more effective asset management arrangements and enhancement of the state budget, creating a more efficient allocation and use of resources.

The institutional purpose of this society is to promote, manage, and dispose of the assets of the state in compliance with the requirements, constraints and aims of public goods and the entire system of protection currently in force.

The legislature has also governed the procedures for monitoring the movement of actions to guarantee the satisfaction of the public interest, in the aim to protect the public property.

Procedures for transferring properties from State assets to the budget of the society are governed by article 7, para. 10 of Law no. 112/2002. The competent Ministry is granted freedom of choice regarding the decision between the transfer or the trust of the assets.

It should be noted that in the latter case the goods would remain in state ownership, thus ensuring both a more streamlined process of devolution and the positive returns even in terms of tax.

6. THE REAL ESTATE INVESTMENT FUNDS AND THE "NEW PHASE" OF THE ENHANCEMENT PROCESS.

The exploitation process can be accomplished through the promotion of real estate mutual funds, carried out by the Ministry of Economy and Finance, in accordance with art. 4 of the D.L. no. 351, as amended by art. 4 of D.L. July 12, 2004, No 168.

The conferment or transfer of real estate, of autonomous administration of State Monopolies and public non-territorial bodies (provided to non-residential purpose) gives life to the fund. The Minister of Economy and Finance identifies such goods with one or more decrees, regulating even in the identification or establishment of the company management, operation and placement of fund units, criteria for allocation of proceeds from the sale of shares.

It should also be recalled that the Finance Act 2007 introduced a new article 3 bis in -DL no. 351/01, which stipulates the possibility of implementing concessions or leases of property from third parties identified under the criteria set by the same decree, for consideration and for a period not exceeding fifty years.

The objective is therefore to retraining and redeployment of assets through recovery, renovation and restoration. This allocation is done through a public procedure and for a period that is capable, at least potentially, the achievement of the economic-financial balance (but not more than fifty years).

The present rules on valuation of assets of public assets included in the budget law for 2007 was later re-integrated by the Finance Act 2008 (Act No. 244 of 2007, art. 1, paragraphs 313-319), with the introduction of the "Plan for the enhancement of public goods for the promotion and development of local systems", formed by all the programs comprise all of the Enhancement Unit Programs, in order to enable significant local development processes through the recovery and reuse of public property assets, consistently with local, economic and social development guidelines, and with the territorial and urban sustainability and quality objectives.

The new phase of the process of privatization of state-owned properties, therefore, can be seen at in terms of separation, on the subjective level, between ownership and management: the owner is and remains public, the subject who is entrusted with the administration - in all its aspects, including proper management - is defined by law "public economic entity".

Unlike the past, manage the real estate no longer means maintaining public function that naturally or artificially given originally to the individual asset, or compromising the destination through the processes of real alienation. The public good is no longer just an instrument for the realization of public purposes, but, rather, is "the object of the activity". as such, the lawmaker will find the best and most efficient use, in relation to public interests identified by law, through processes of rationalization and enhancement consisting mostly assignments for government use free of charge, concessions or leases for public or institutional aims.

With the Finance Act 2010 (Act No. 191 of 2009), finally, have been made new to the framework set out above in respect of recognition, sale and enhancement of public property. In particular, article. 2, co. 222 has the aim to bring together the procedures on leases payable, and to rationalize assets used by the public administration. To this end we have a series of reporting requirements to the Agency relating to property used by national public administrations and reporting requirements by other public administrations. For all the public administrations who use or hold, for whatever reason, real estate owned or owned by their same administration, there is an obligation to transfer to the Treasury Department of the Ministry of Economy and Finance the list containing the identification of such goods.

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