

# The influence of European Union law on certain national solutions regarding the concessioning of nautical tourism ports

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Tuhtan Grgić, Iva; Bulum, Božena; Petit Lavall, Maria Victoria

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# THE INFLUENCE OF EUROPEAN UNION LAW ON CERTAIN NATIONAL SOLUTIONS REGARDING THE CONCESSIONING OF NAUTICAL TOURISM PORTS

**IVA TUHTAN GRGIĆ<sup>1</sup>**  
University of Rijeka  
ituhtan@pravri.hr

**BOŽENA BULUM<sup>1</sup>**  
Adriatic Institute of the Croatian Academy  
of Sciences and Arts  
bbulum@hazu.hr

**MARIA VICTORIA PETIT LAVALL<sup>2</sup>**  
University Jaume I  
petit@uji.es

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### **Abstract**

The distinctive feature of nautical tourism ports is that the shore and associated sea area, seabed and subsoil are economically exploited for the construction and use of a port to provide services in nautical tourism. This paper presents and analyses legal regimes for nautical tourism ports in four Mediterranean countries, members of the European Union: Croatia, Spain, Italy and Malta. The common characteristic of these legal regimes is that their shores and ports are under the legal regime of a common or public maritime domain, i.e. either *extra commercium* or property owned by the state, but inalienable and incapable of being the subject matter of private ownership or other real rights. Consequently, the economic exploitation of the maritime domain is possible exclusively by means of concession. It is in this context that the authors analyse the applicable national legal rules, their interpretation and enforcement having in mind in particular the specific impact of the European Union rules and the case-law of the Court of Justice of the European Union.

### **Keywords**

Nautical-tourism ports; duration of concessions; prolongation of concessions; concessions upon request; Directive 2014/23/EU; Croatian law on concessions; Spanish law on concessions; Italian law on concessions; Maltese law on concessions.

## **LA INFLUENCIA DEL DERECHO EUROPEO EN DETERMINADAS SOLUCIONES NACIONALES RELATIVAS A LAS CONCESIONES DE LOS PUERTOS DEPORTIVOS**

### **Resumen**

El rasgo distintivo de los puertos deportivos es que la costa y las aguas marítimas asociadas, los fondos marinos y el subsuelo se explotan económicamente para la construcción y uso de un puerto que proporciona servicios de turismo náutico. El presente trabajo analiza el régimen jurídico de los puertos deportivos en cuatro Estados mediterráneos miembros de la Unión Europea: Croacia, España, Italia y Malta. La característica común de todos ellos es que sus costas y puertos son bienes de dominio público marítimo, es decir, bienes *extra commercium* o de propiedad del Estado inalienables, sin que puedan ser de propiedad privada o de otros derechos reales. En consecuencia, la explotación económica del dominio marítimo solo es posible mediante concesión. Es en este contexto en el que los autores analizan las legislaciones de dichos Estados, su interpretación y aplicación, teniendo en cuenta, en particular, la influencia del derecho europeo y las sentencias del Tribunal de Justicia de la Unión Europea.

**Palabras clave**

Puertos deportivos; duración de las concesiones; prórroga de las concesiones; concesiones a solicitud o a instancia de persona interesada; Directiva 2014/23/UE; legislaciones croata, española, italiana y maltesa sobre concesiones.

**L'INFLUENCE DU DROIT DE L'UNION EUROPÉENNE SUR CERTAINES SOLUTIONS NATIONALES CONCERNANT LA CONCESSION DES PORTS DE PLAISANCE**

**Résumé**

Le trait distinctif des ports de plaisance est que la côte et les eaux maritimes associées, les fonds marins et le sous-sol sont exploités économiquement pour la construction et l'utilisation d'un port fournissant des services de tourisme nautique. Cet article analyse le régime juridique des ports de plaisance dans quatre États méditerranéens, membres de l'Union européenne: la Croatie, l'Espagne, l'Italie et Malte. Leur caractéristique commune est que leurs côtes et leurs ports sont des biens appartenant au domaine public maritime, c'est-à-dire des biens *extra commercium* ou des biens inaliénables de l'État, sans pouvoir appartenir à des particuliers ni à d'autres droits réels. Par conséquent, l'exploitation économique du domaine maritime n'est possible que par concession. C'est dans ce contexte que les auteurs analysent les règles de droit national applicables, leur interprétation et leur application, en tenant compte notamment de l'incidence spécifique des règles de l'Union européenne et de la jurisprudence de la Cour de justice de l'Union européenne.

**Mots clés**

Ports de plaisance; durée des concessions; prorogation de concessions; concessions sur demande; Directive 2014/23/UE; législations croate, espagnole, italienne et maltaise sur les concessions.

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## I. AN INTRODUCTORY NOTE ON EU LAW ON THE AWARDING OF CONCESSIONS

Before the entry into force of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts<sup>3</sup>, rules on concessions were part of EU public procurement directives<sup>4</sup>. In these directives, a distinction was made between two types of concession: public services concessions and public works concessions. Only

<sup>3</sup> Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (hereinafter, Directive or Directive 2014/23/EU or Concessions Directive), OJ L 94, 28 March 2014, p.1, as amended by the Corrigendum to Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, (OJ L 114, 5 May 2015, p. 9).

<sup>4</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30 April 2004, p. 1. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, (OJ L 134, 30 April 2004, p. 114).

the awarding of public works concessions of a value equal to or greater than EUR 5 million was subject to the rules of Directive 2004/18/EC, while the awarding of services concessions with a cross-border interest was subject only to the basic principles of the TFEU<sup>5,6</sup>. These are, in particular, the principle of the free movement of goods, freedom of establishment, and freedom to provide services, as well as principles deriving from these principles, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency<sup>7</sup>. According to the judicial practice of the European courts, general principles which stem from the TFEU must also be complied with when a contracting authority decides to award a concession contract. These principles take precedence over national legislation. In this sense, in the *Ernst Engelmann* case<sup>8</sup>, the CJEU stated that the general principles of the TFEU, such as freedom of establishment (Art. 49) and freedom to provide services (Art. 56), apply to concessions.

The principle of transparency provides for openness in procedures. In order to ensure compliance with this principle, a sufficient degree of publicity must be ensured during the awarding procedure. This is a precondition to guarantee that all potential competitors have been informed about the selection procedure<sup>9</sup>.

<sup>5</sup> Treaty on the Functioning of the European Union (consolidated version), (OJ C 202, 7 June 2016, p. 47), (hereinafter, TFEU).

<sup>6</sup> Consequently, public works concessions in the utilities sector, public works concessions in the classic sector of a value under EUR 5 million, and public services concessions in both sectors, independently of their value were not regulated by secondary law provisions.

<sup>7</sup> See Recital 4 of the Preamble of Directive 2014/23/EU and Judgement of the Court of 7 December 2000, *Teleaustria and Telefonadress v Telekom Austria*, 324/98, EU:C:2000:669. This was a landmark judgment in which the Court of Justice of the European Union (hereinafter: CJEU) confirmed that contracting authorities need to comply with the TFEU principles of equal treatment and transparency when awarding concession contracts.

<sup>8</sup> See Judgement of the Court of 9 September 2010, *Ernst Engelmann*, 64/08, EU:C:2010:506.

<sup>9</sup> In *Commission v Ireland* case the Court stated that the transparency principle has an ancillary but not subordinate role with respect to the principles of equal treatment and non-discrimination on the grounds of nationality. In order to verify that equal treatment and non-discrimination principles have been complied with, it is necessary to examine whether the principle of transparency has been respected. See Judgement of the Court of 18 November 2010, *Commission v Ireland*, 26/09, EU:C:2010:697, paragraph 36.

The principle of non-discrimination on the grounds of nationality is a general principle of EU law and a fundamental right<sup>10</sup>. In the field of public contracts and concessions, compliance with this principle means that there are no barriers to entry to the concessions market for economic operators established in a Member State outside the one where the concession is to be awarded.

The principle of equal treatment requires that the legal rules must be known in advance and must be equally applied to everybody. With regard to the awarding of concession contracts, this means that in the selection of the economic operators, objective criteria must be established in advance in order to avoid any risk of arbitrariness and discrimination against economic operators by the competent authorities (Usai, 2014: 230).

With regard to the duration of concession contracts, in the *Müller* case<sup>11</sup> the Court decided that an unlimited duration cannot be considered as legal under EU law, as it is necessary to ensure the effectiveness of the principle of competition (Art. 106 TFEU). For that reason, the concession contract must be rendered by the expiry of the prescribed period of concession. The principle of the limited duration of concession contracts has also been accepted in the Concessions Directive (Art. 18/1). The provisions of this Directive include express prohibitions of restriction or distortion of competition in all phases of the awarding of concessions<sup>12,13</sup>.

Different interpretations of the principles of the TFEU by national legislators and national courts in the EU Member States has caused legal uncertainty and many disputes regarding different aspects of the institute of concessions. The CJEU has only partially addressed these issues related to the awarding of concession contracts<sup>14</sup>.

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<sup>10</sup> See Art. 21 of the Charter of Fundamental Rights of the EU (OJ C 83, 30 March 2010, p. 1).

<sup>11</sup> See Judgement of the Court of 25 March 2010, *Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben*, 451/06, EU:C:2010:168. See also Judgement of the Court of 19 June 2008, *Presstext Nachrichtenagentur GmbH v Republik Österreich*, 454/06, EU:C:2008:351, paragraph 73.

<sup>12</sup> See the provisions of Directive 2014/23/EU on conflicts of interest (Art. 35), procedural guarantees (Art. 37/3), selection and qualitative assessment of candidates (Art. 38), provision of information to candidates (Art. 40) and award criteria (Art. 41).

<sup>13</sup> On exceptions, see Sánchez Graells (2015: 136).

<sup>14</sup> “Just like international rules and documents on public contracts such as the WTO Government Procurement Agreement or the UNICTRAL Model Law on public procurement, EU law has been traditionally focused on contract award... Contract implementation tends to be left to domestic law. Non-discrimination concerns may however spill over in the phase of the implementation of the contract. More specifically,

The majority of CJEU rulings have concerned the clarification of the concept of concessions itself. In particular, the distinction between public contracts and concessions<sup>15</sup>, and between concessions and unilateral acts, such as licenses and authorisations, was disputable. For that reason, it was often difficult to know which legal regime applied to a given contract<sup>16</sup>. This situation confirmed the need to pass EU legislation in the field of concessions. The Concessions Directive was issued in February 2014 as part of an EU public procurement package consisting of several directives<sup>17</sup>.

Until the new EU public procurement directives came into force, the whole EU legal system regarding the modification of public contracts,

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contracting authorities may be tempted to change the scope of a contract to the benefit of a – usually domestic – contractor or to prolong its duration, thus denying an opportunity to other economic operators. Limits to the possibility to change the contract without opening it again to competition were already laid down in the case law.” (Caranta, 2015: 391-460). See also Judgement of the Court, *Pressetext Nachrichtenagentur GmbH* case, cit.; Judgement of the Court of 13 April 2018, *Wall AG v La ville de Francfort*, 91/08, EU:C:2010:182.

- <sup>15</sup> Unlike public contracts, a concession always includes the transfer to the concessionaire of an operating risk of an economic nature involving the possibility that it will not recoup the investments made and the costs incurred in operating the works or services awarded. For very thorough research on operative risk as the main feature of concession contracts and on potential problems that the application of such a concept can cause (Hernández González, 2016: 51-60).
- <sup>16</sup> Member State acts, such as authorisations or licences, whereby the Member State or a public authority establishes the conditions for the exercise of an economic activity, granted on the request of the economic operator and not on the initiative of the contracting authority or the contracting entity, and where the economic operator remains free to withdraw from the provision of works or services, should not qualify as concessions. On the other hand, concession contracts provide for mutually binding obligations where the execution of the works or services is subject to specific requirements defined by the contracting authority or the contracting entity, and which are legally enforceable. See Recital 14 of the Preamble of Directive 2014/23/EU and the Opinion of Advocate General Szpunar of 25 February 2016, *Promoimpresa srl v Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro and Regione Lombardia*, 458/14 and 67/15, EU:C:2016:122, point 64.
- <sup>17</sup> These are Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28 March 2014, p. 65) and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28 March 2014, p. 243).



including the issue of prolongation as a way of modifying them, was grounded on CJEU rulings in several cases<sup>18</sup>. The legal grounds of these judgments in some cases were “literally converted into the legal provisions of the Directive on concessions” (Olivera, 2015: 35-49)<sup>19</sup>. For this reason, in the new Directive many undefined legal concepts could be found. As a consequence, the interpretation and transposition of the Concessions Directive into the legal systems of the Member States could be challenging.

As regards transposition of Directive 2014/23/EU into the legal systems of the Member States, Member States were obliged to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016 and also to deliver to the European Commission the text of these national acts (Art. 51 of the Directive).

In order to understand the importance of the fact that the subject is regulated by a directive transposed into national laws, it is necessary to understand the effects of directives on national legislation. A national court is obliged to construe the national law in accordance with a directive, regardless of whether the piece of national legislation has been enacted before or after the directive, and regardless of whether the piece of legislation is intended to transpose the directive into national law or not<sup>20</sup>. Such an obligation is even stronger if the applicable national legislation has been already harmonised with the directive<sup>21</sup>. The national court is obliged, when applying the provisions of the national law enacted for the purpose of transposition of the obligations determined by the directive, to consider the entire system of rules of a particular national law and to construe such rules, as far as possible, in the light of the wording and purpose of the directive, all with the view of obtaining a result in accordance with the objective which the directive strives to achieve<sup>22</sup>. The obligation to interpret the law in accordance with EU law encompasses compatibility with primary law and conformity with secondary law. The legal

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<sup>18</sup> See cases *Pressetext Nachrichtenagentur GmbH* case, cit., Judgement of the Court of 15 October 2009, *Acozet SpA v Conferenza Sindaci*, 196/08, EU:C:2009:628, and *Wall AG v La ville de Francfort*, cit.

<sup>19</sup> See *infra* 2.1.

<sup>20</sup> See Judgement of the Court of 13 November 1990, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, 106/89, EU:C:1990:395.

<sup>21</sup> Judgement of the Court of 16 December 1993, *Teodoro Wagner Miret v Fondo de Garantía Salarial*, 334/92, EU:C:1993:945.

<sup>22</sup> Judgement of the Court of 5 October 2004 in joined cases *Bernhard Pfeiffer* (397/01), *Wilhelm Roith* (398/01), *Albert Süß* (399/01), *Michael Winter* (400/01), *Klaus Nestvogel* (401/01), *Roswitha Zeller* (402/01) and *Matthias Döbele* (403/01) v *Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, EU:C:2004:584.

basis for the obligation of interpretation in accordance with Union law arises from the practice of the CJEU, which finds the basis for such interpretation in the definition of directives itself (Art. 288/3 TFEU), as well as the principles of loyalty and mutual sincere cooperation (Art. 4/3 Treaty on European Union<sup>23</sup>). An interpretation that did not consider EU law would represent an infringement of not only Union law but also international treaties. The obligation to interpret the law in accordance with Union law arises from the Constitutions of the Member States.

The issue of interpretation has already been raised with regard to Recital 15 of the Preamble of Directive 2014/23/EU, according to which

certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land or any public property, in particular in the maritime, inland ports or airports sector, whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services, should not qualify as concessions within the meaning of this Directive.

Some Member States consider this provision to be a legal basis for the exclusion of concessions for the economic exploitation of the maritime domain (including maritime domain concessions for the construction and use of nautical tourism ports) from the scope of application of Directive 2014/23/EU. We are of the opinion that concessions for nautical tourism ports are not contracts establishing only general conditions, but concessionaire has to procure specific works and services in compliance with concession-granting decision and concession contract. For that reason, the condition in Recital 15 of the Preamble of the Directive “without procuring specific works and services” is not fulfilled, and consequently, the application of Directive 2014/23/EU cannot be excluded.

In addition, the applicability of Directive 2006/123/EC on services in the internal market<sup>24</sup> to maritime domain concessions for nautical tourism ports is questionable. This paper discusses whether construction and/or managing and rendering services in nautical tourism ports are works and services for which authorisation is needed or whether they should qualify as concessions. Arguments in favour of the applicability of this Directive are based on the preliminary ruling of the CJEU on Joined Cases C-458/14 and C-67/15 of 14 July 2016, where the Court took the position that maritime domain concessions

<sup>23</sup> OJ C 202, 7 June 2016, p. 13 (consolidated version, hereinafter, TEU).

<sup>24</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27 December 2006, p. 36, hereinafter, Directive 2006/123/EC).

for tourism and recreational purposes can be characterised as ‘authorisations’ within the meaning of the provisions of Directive 2006/123/EC, irrespective of their characterisation in national law<sup>25</sup>. However, extending the scope of the application of the Directive by analogy to nautical tourism ports is, in our opinion, incorrect. Concession contracts in the case of nautical tourism ports provide for mutually binding obligations where the execution of the works or services is subject to specific requirements defined by the contracting authority or the contracting entity which are legally enforceable. Concessionaires of nautical ports do not remain free to withdraw from the provision of works or services, and thus the legal title for providing these services should be qualified as concessions and not authorisation (see: Recital 14 of the Preamble of Directive 2014/23/EU).

## II. APPLICABLE NATIONAL LAWS ON CONCESSIONS FOR NAUTICAL TOURISM PORTS

### 1. CROATIAN LAW

Art. 52 of the Constitution of the Republic of Croatia<sup>26</sup> states that the sea, shore and islands are of interest to the Republic of Croatia, and therefore enjoy its special protection. The Constitution does not provide for a special legal regime for these assets, but it states that the manner in which they are used and exploited will be regulated by law. The special law regulating the legal regime of the maritime domain is the Maritime Domain and Seaports Act<sup>27</sup>, which explicitly prescribes that ports, including nautical tourism ports, are part of the maritime domain. According to this Act, Art. 5/2 MDSPA, the maritime domain is confirmed as a common good of interest to the Republic of Croatia, over which the right of ownership or any other property right cannot be acquired on any basis<sup>28</sup>. Anything that is permanently attached

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<sup>25</sup> Judgement of the Court of 14 July 2016 in joined cases *Promoimpresa srl v Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro and Others*, 458/14 and 67/15, EU:C:2016:558.

<sup>26</sup> Constitution of the Republic of Croatia, Official Gazette of the Republic of Croatia, nos. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.

<sup>27</sup> Maritime Domain and Seaports Act (hereinafter, the MDSPA), Official Gazette of the Republic of Croatia, nos. 158/2003, 100/2004, 141/2006, 38/2009, 123/2001, 56/2016.

<sup>28</sup> The Ownership and Other Real Rights Act, as a general proprietary regime law prescribes that the sea and shore are common goods and do not have the capacity of being

to such a part of the land on its surface or underneath it has the same legal status of maritime domain. Since the maritime domain has the legal status of *res extra commercium* and *res communes omnium*, the MDSPA prescribes that it may be used and economically exploited only on the basis of granted concessions<sup>29</sup>.

The national law regulating concessions and transposing Directive 2014/23/EU into the Croatian legal system is the Concessions Act<sup>30</sup>, enacted in July 2017. This Act aims at improving concession-granting procedures and making them transparent and applicable to all types of concessions. The legislator clearly intended to make it the umbrella law for all concessions. In spite of Recital 15 of Directive 2014/23/EU, all maritime domain concessions, including those for ports are explicitly included in its scope of application (Art. 8/1/4 CA). The CA regulates, in a very detailed manner, concession-granting procedures, concession agreements, termination of concessions, legal remedies in concession-granting procedures, concession policies and other issues related to concessions. The CA envisages the subsidiary application of special laws in matters which are not regulated by the CA itself (Art. 1/2 CA), as well as in cases where the CA refers to the provisions of a special law.

The *lex specialis* regarding maritime domain concessions, and hence nautical tourism ports, is the MDSPA. The procedure for granting a maritime domain concession is regulated in more detail by the Regulation on the Procedure of Granting a Maritime Domain Concession<sup>31</sup> as a subordinate piece of legislation passed on the basis of the MDSPA.

The relationship between the provisions of the CA (which is a very detailed *lex generalis* and *lex posterior*) and those of the MDSPA (which is an insufficiently detailed *lex specialis* and prior piece of legislation) is unfortunately not unambiguous (Staničić and Bogović, 2017: 73-104; Tuhtan Grgić and Bulum, 2018: 304-307). In fact, the provisions contained in the MDSPA

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the subject matter of the right of ownership and other real rights (Art. 3/2 OORRA). See Official Gazette of the Republic of Croatia, nos. 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 90/2010, 143/2012, 152/2014 (OORRA). For detailed analysis of the status of maritime domain and nautical ports specifically see Tuhtan Grgić (2016: 273-297).

<sup>29</sup> Arts. 6/5 and 7/1 MDSPA.

<sup>30</sup> Concessions Act (hereinafter, CA), Official Gazette of the Republic of Croatia, no. 69/2017.

<sup>31</sup> Regulation on the Procedure of Granting a Maritime Domain Concession (hereinafter, Regulation), Official Gazette of the Republic of Croatia, nos. 23/2004, 101/2004, 39/2006, 63/2008, 125/2010, 102/2011, 83/2012, 10/2017).

and the Regulation, on the one hand, and the CA on the other are sometimes contradictory. Since the CA has been in force for only a year and a half, there is still no available judicial practice with regard to its relationship to the provisions of the MDSPA. Nevertheless, the practice created during the application of the previous Concessions Act of 2012 did not uphold the interpretation of the MDSPA in accordance with the general act on concessions<sup>32</sup>. Croatian concession grantors continued with the practice that had been established during the validity of the 2012 CA, giving precedence to the provisions of the MDSPA<sup>33,34</sup>.

The disparity between the MDSPA and the Regulation on the one hand and the CA on the other puts those who need to apply these provisions in a very unfavourable position and creates legal uncertainty which negatively affects all those for whom these provisions are intended: concession grantors and concessionaires (potential and actual).

When considering the relationship between the CA and MDSPA, it is important to take into account the fact that the provisions of the CA are in line with Directive 2014/23/EU, whilst the MDSPA in a number of its

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<sup>32</sup> When it comes to legal remedies and the procedure preceding the decision on the awarding of a concession, the above view gave precedence to the MDSPA and its subordinate legislation (because they are considered *lex specialis*) although, even at that time, one could (and should) have applied the interpretation in accordance with the CA (2012 and now 2017). The State Commission for Supervision of Public Procurement Procedures refused to take jurisdiction in a series of appeals related to maritime domain concessions, invoking the MDSPA as the *lex specialis*. When deciding upon the relationship between the MDSPA and CA 2012, the Administrative Court of Rijeka stated: “taking into due consideration the general legal principle *lex specialis derogate legi generali*, the Court concludes that the said procedure of granting a maritime domain concession is primarily regulated by the MDSPA as special piece of legislation regulating maritime domain concessions, and also by the Regulation, and only subordinately by the Concessions Act as a general law regulating concessions.” Source: judgment and resolution no. 5 Usl-1972/14-4, dated 13 November 2015, available at <http://www.iusinfo.hr>.

<sup>33</sup> According to the appeal guidance enclosed with all decisions on granting maritime domain concessions issued during 2018, appeals must be lodged with the Ministry of the Sea, Transport and Infrastructure as the competent authority under the MDSPA (and not the CA).

<sup>34</sup> On the contrary, according to the Report on the audit of the efficiency of the governance of the maritime domain written by the State Audit Office, Rijeka Office (Class: 041-01/17-10/13, No: 613-10-17-7 of 6 December 2017, retrieved from <http://www.revizija.hr/hr/izvjesca>), questions regarding maritime domain concessions are regulated by the CA.

provisions contains rules not in conformity with the Directive. As discussed above, an obligation has been created for all those applying the rules relating to concessions in Croatia to construe not only the CA but also the entire Croatian legislation (including the MDSPA) in a manner that achieves the objective and purpose of Directive 2014/23/EU. Therefore, the correct approach requires applying the provisions of the MDSPA only to the extent to which such provisions do not contravene the objective and purpose of Directive 2014/23/EU<sup>35</sup>.

Another point that should be highlighted regarding the implementation of Directive 2014/23/EU in Croatian law is the fact that the Croatian legislator, when transposing the Directive into the CA, adjusted Croatian law further than the Directive required. It did so in several ways. As mentioned above, concessions for the maritime domain and ports are explicitly included within its scope of application. In addition, the provisions of the CA are applicable to all concessions, irrespective of their estimated value, even though different procedures are prescribed depending on the value of the concession<sup>36</sup>. Furthermore, the concept of ‘concession’ as defined by the CA is broader than the one in the Directive, since the CA, besides works and services concessions, applies to ‘concessions for the economic use of the common domain’<sup>37</sup>, which is not envisaged by Directive 2014/23/EU. This

<sup>35</sup> For detailed review of concession awarding procedure for nautical tourism ports under Croatian law see Tuhtan Grgić (2019: 51-90).

<sup>36</sup> The Directive strives to ensure a real opening-up of the market in cases of clear cross-border interest which, according to the Directive, exist when the value of the concession equals or exceeds the threshold of EUR 5.225 million. Art. 1 of Commission Delegated Regulation (EU) 2015/2172 of 24 November 2015 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts (OJ L 307, 25 November 2015, p. 9).

<sup>37</sup> Concessions for the economic use of the common domain are, according to the CA, defined as an “administrative contract, in written form, the subject of which is the economic exploitation of the common or other domain which is defined by the law as being of interest to the Republic of Croatia, and which does not represent either the execution of works from Paragraph 4 or the providing and management of services in Paragraph 5.” According to the CA, the term ‘economic exploitation of the common domain’ does not imply any usage of the maritime domain which has an economic effect. In fact, it refers only to the economic exploitation of the resource, i.e. of the domain itself. Contrary to the CA, the (still valid) MDSPA uses the term ‘economic exploitation of the maritime domain’ in a significantly wider sense, also including in this term the provision of services and execution of works in the maritime domain

consequently raises the question of the necessity of interpreting the applicable law (i.e. the MDSPA) in accordance with the objective and purpose of the Directive in cases of awarding concessions which are beyond the scope of the Directive. In cases where the national legislator spontaneously adjusts national law further than envisaged by the Directive (a so-called 'spill-over effect' into national law), there is no obligation for harmonious interpretation, although this will, in fact, be desirable from the perspective of the coherence of the national legal system<sup>38</sup>.

A concession for building a new nautical tourism port will not always only be a concession for the economic use of the common domain but also a concession for works (and services) exceeding the indicated threshold. Furthermore, it is prescribed by Art. 7 of the CA that in cases of such mixed concession contracts, a complex procedure aligned with Directive 2014/23/EU will apply. It is therefore indisputable that such a concession is of cross-border interest and needs to be awarded in accordance with the objective and purpose of the Directive. It could be questionable whether a concession for the economic use of an already constructed nautical tourism port would exceed the Directive's threshold<sup>39</sup>.

In addition to the abovementioned sources, the concession-granting procedure would be subject, to an appropriate extent, to the application of the Public Procurement Act<sup>40</sup> (when so indicated by the CA). The PPA would be exclusively and entirely applicable in the case of mixed contracts containing the elements of procurement contracts and concession agreements, provided that the estimated value of the procurement of the goods, works or services equals or exceeds the thresholds for application of the PPA (Art. 10/5 PPA), regardless of the value of the concession.

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with a view to achieving certain financial interests (Tuhtan Grgić, 2017; Tuhtan Grgić and Bulum, 2018: 308-311).

<sup>38</sup> On voluntarily broadened or 'spontaneous' harmonisation, see Hartkamp *et al.* (2017: 20-21).

<sup>39</sup> In terms of the number of procedures, based on an estimate provided by DGMARKT, fewer than 20% of public procurement procedures in the EU Member States are subject to the provisions of EU Public Procurement Directives. As far as the value of works, goods or services is concerned, 80% of the tender procedures in the EU Member States are conducted below the thresholds. See European Commission, Commission Staff Working Document, Annual Public Procurement Implementation Review, SWD (2012) 342 final, 9-10-2012 (Dragos and Vornicu, 2015: 187).

<sup>40</sup> The Public Procurement Act (hereinafter, the PPA), Official Gazette of the Republic of Croatia, no. 120/2016.

Should it be established that the concession has the features of a public-private partnership, the legislation governing public-private partnerships would be applicable (Art. 26 CA)<sup>41</sup>.

Directive 2006/123/EC did not have any impact on concession-granting procedures for nautical ports under Croatian law. It seems that such an approach is correct, since a nautical port concession is about much more than just services according to the Directive (Tuhtan Grgić and Bulum, 2018: 312-319).

A brief overview of the current legal framework in Croatia dealing with concessions in the maritime domain, including nautical tourism ports, clearly demonstrates a disparity. As will be analysed later, the CA and Directive 2014/23/EU on the one hand, and the MDSPA and Regulation on the other, differ in certain important segments<sup>42</sup>, which causes and will continue to cause problems not only in theory but also in practice (Tuhtan Grgić, 2019: 51-90).

The accomplishment of the objective and purpose of Directive 2014/23/EU may and should be achieved by applying the CA, which transposes the Directive into the national law of Croatia, and also with the appropriate application of the provisions of the MDSPA and Regulation, where possible, i.e. where these provisions do not contravene the objective and purpose of the Directive. The application and interpretation of the provisions of the CA, the MDSPA and the Regulation should, in our opinion, be uniform, regardless of the scope of application of the Directive.

## 2. SPANISH LAW

Directive 2014/23/EU was incorporated into the Spanish legal system by Act 9/2017 of 5 November on Public Sector Contracts, which transposed the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU of 26 February 2014 into Spanish law<sup>43</sup>. The PSCA entered into force on 9 March 2018 pursuant to its sixteenth and final provision.

<sup>41</sup> The Public-Private Partnership Act (hereinafter, the PPPA), Official Gazette of the Republic of Croatia, nos. 78/2012, 152/2014.

<sup>42</sup> Many of the above problems should be removed with the passing of the new MDSPA, currently in preparation. Harmonisation with the CA is definitely one of the objectives to be achieved with the new MDSPA. Nevertheless, in spite of intense preparatory work, the date when the new MDSPA will be enacted, as well as its final contents, is still unknown.

<sup>43</sup> Act 9/2017 of 5 November on Public Sector Contracts, by which the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU of 26



In accordance with its first transitional provision, the PSCA applies to procurement procedures that commenced after its enactment. On the contrary, procurement procedures initiated and contracts awarded before its enactment are governed with regard to their effects, fulfilment and cancellation, duration and extension by the previous regulations. However, it should be noted that the transposition of the Directive into the domestic legal system was belatedly carried out, since according to Art. 51 of the Directive the period for this ended on 18 April 2016. Therefore, following the doctrine of the CJEU the direct vertical effect of the non-transposed Directive has been applied (Gimeno Feliu, 2017: 1 and 2016: 8).

In accordance with the Explanatory Memorandum of the Act, the PSCA pursues increased transparency in public procurement and the best value for money. Although the transposition of Directives 2014/23/EU and 2014/24/EU into Spanish law was the main reason for passing the Act, it was not the only one. On the contrary, it was explained that “it seeks to design a more efficient, transparent and complete public procurement system, by means of which a better compliance with public objectives can be achieved, both through the satisfaction of the needs of the contracting authorities, and through an improvement in the conditions of access and participation in public tender procedures of economic operators, and, of course, through the provision of better services to users” (González García, 2017: 1).

The PSCA introduces important new features in the field of concession contracts. Thus, public service management contracts are replaced with the new services concession contract. Consequently, the concession contract is subdivided into two contractual types: works concessions and services concessions, whose common denominator is that there must be a transfer of operational risk from the administration to the concessionaire (Art. 14).

Under the PSCA, concession contracts concluded by the entities listed in Art. 3 are subject to it and, consequently, also those concluded by the administrations of the autonomous communities (Art. 3.1.a). Specifically, the application of the PSCA to contracts concluded by the autonomous communities must be carried out using the terms set forth in the final provision (Art. 2.3). As a result, most of the provisions of the PSCA constitute basic legislation issued under Art. 149.1.18.<sup>a</sup> of the Spanish Constitution in terms of basic legislation on administrative contracts and concessions and, consequently, are of general application to all public administrations and agencies, and the entities dependent on them. In this way, if the object of the concession is the

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February 2014 are transposed into Spanish law, *B.O.E.* no. 272, 9 November 2017 (hereinafter, PSCA).

construction and operation of a marina, we are dealing with a works concession contract regulated by Arts. 14 and 247 *et seq.* PSCA. On the contrary, if the exploitation of the marina, i.e. the provision of services to sports and recreational vessels, is the object of the contract, it will be a services concession contract, whose regime is contained in Arts. 15 and 284 *et seq.* PSCA (Zambonino Pulito, 2010: 59).

However, Art. 9 of the PSCA excludes concessions regarding public domain goods from its scope of application. Consequently, since the construction or provision of marina services requires the occupation of the maritime-terrestrial and port public domains, works and services concession contracts imply a corresponding public domain concession, which is governed by Art. 4 of the PSCA and its special rules (Zambonino Pulito, 1997: 180).

As far as ports are concerned, the provisions on concessions regarding public domain goods are contained in Arts. 81 *et seq.* of the Consolidated Text of the State Ports and Merchant Navy Act,<sup>44</sup> whereas works concession contracts that require the occupation of the public domain are regulated in Art. 101 of the SPMNA. However, the SPMNA only applies to ports under the jurisdiction of the General State Administration (Art. 1.a) and not to marinas. These fall under the competence of the relevant autonomous communities. This competence is a consequence of the division of powers between the Spanish state and the autonomous communities contained in the Spanish Constitution. In fact, the Spanish Constitution in Art. 148.1.6<sup>a</sup> authorises the autonomous communities to assume powers in the area of marinas.

Marinas are public domain goods owned by an autonomous community and built on the public maritime-terrestrial domain assigned to the autonomous communities by the state administration. According to Art. 5 SPMNA and Art. 49 Coasts Act their use and management, appropriate to their purpose and subject to the relevant provisions, lie with the autonomous communities (Zambonino Pulito, 1997: 93, 116 and 2010: 50; Arroyo Martínez, 2017:394; Pulido Begines, 2009: 701; González-Deleito Domínguez, 2017:3)<sup>45</sup>.

Consequently, at present, marinas are regulated by the relevant regional or autonomous acts. In fact, all autonomous communities that have a coastline have done this in their respective statutes of autonomy and have

<sup>44</sup> *Ley de Puertos del Estado y de la Marina Mercante*, approved by Royal Legislative Decree 2/2011 of 5 September, (*B.O.E.* no. 253, 20 October 2011), (hereinafter, SPMNA).

<sup>45</sup> Act no. 22/1988 of 28 July on Coasts, *B.O.E.* No. 181, 29 July 1988 (hereinafter AoC).

promulgated their own port and marina acts<sup>46</sup>. In all of them, the means foreseen for the construction and/or operation of marinas by a third party (indirect management) is a concession contract. Therefore, the concession regime for the construction and/or operation of marinas is contained in greater or lesser detail in different regional acts, with the SPMNA being applied with a supplementary character, as provided for in Art. 49.1 of the AoC, as well as the corresponding regional heritage protection acts. In any case, the principles of the PSCA are ultimately applied to solve any doubts and loopholes that may arise (Art. 4 PSCA). In effect, the AoC does not apply to marinas. This is recognised in the preamble of the Act and in Art. 6.3 of Royal Decree 876/2014 of 10 October, which approves the General Coasts Regulation, stipulating that “The ports and port facilities which fall within the competence of autonomous communities shall be regulated by their specific legislation, without prejudice to the state ownership of the goods assigned” (González-Deleito Domínguez, 2017: 2; Santiago Fernández, 2011: 71 -72).

However, it should be noted that according to the repeal provisions of the PSCA any provision contrary to the provisions of the PSCA is expressly repealed. Therefore, the provisions of regional acts regulating marinas that are incompatible with the new state legislation should be considered repealed.

Thus, the indirect management of marinas can be carried out either through a public domain concession or through a works concession contract (as foreseen, for example, by the Ports of the Community of Valencia Act, the Ports of Galicia Act or the Ports of Andalusia Act), which will depend on the private or public use of the public domain. In this second case, there is

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<sup>46</sup> Act no. 5/1998 of 17 April on the Ports of Catalonia (*B.O.E.* no. 127, 28 May 1998); Act no. 14/2003 of 8 April, on the Ports of the Canary Islands (*B.O.E.* no. 134, 5 June 2003); Act no. 10/2005 of 21 June on the Ports of the Balearic Islands (*B.O.E.* no. 179, 28 June 2005) and Act no. 6/2014 of 18 July amending Act no. 10/2005 of 21 June on the Ports of the Balearic Islands (*B.O.E.* no. 202, 20 August 2014); Act of Cantabria no. 5/2004 of 16 November on the Ports of Cantabria (*B.O.E.* no. 298, 11 December 2004); Act no. 21/2007 of 18 December on the Legal and Economic Regime of the Ports of Andalusia (*B.O.E.* No. 45, 21 February 2008); Act no. 6/2017 of 12 December on the Ports of Galicia (*B.O.E.* no. 36, 9 February 2018); Act no. 2/2014 of 13 June on the Ports of the Generalitat Valenciana (*B.O.E.* no. 165, 8 July 2014); Act no. 3/1996 of 16 May on the Ports of the Autonomous Community of the Region of Murcia (*B.O.E.* no. 238, 2 October 1996) and Act no. 3/2017 of 14 February amending Act no. 3/1996, of 16 May on the Ports of the Autonomous Community of the Region of Murcia (*B.O.E.* no. 57, 8 March 2017); Act no. 2/2018 of 28 June on the Ports and Maritime Transport of the Basque Country (*B.O.E.* no. 187, 3 August 2018).

no double concession comprising one for occupation of the natural domain and another one for the construction and operation of a marina (González-Deleito Domínguez, 2017:3).

On the contrary, as the Supreme Court has declared, concessions for the construction and operation of marinas have “the nature of a mixed concession, of public service and publicly-owned property, since the concessionaire for providing the public service is using public domain goods, and therefore we are faced with the concurrence of a concession for public domain goods and another one for public services ... in which the so-called ‘principle of attraction of public concessions’ does not take place but instead gives rise to the phenomenon of concessional after the fact by subordinating the concession of the public domain to that of the service”<sup>47</sup>. That is to say, concessions for the construction and/or operation of marinas enable the concessionaire to occupy and exclusively use public land in order to build the marina’s facilities and to exploit them by means of indirect management (Santiago Fernández, 2011: 56, 73).

### 3. ITALIAN LAW

Under Italian law, the maritime domain, which explicitly includes ports, is considered to be under public ownership and cannot be the subject matter of common private property rights<sup>48</sup>. Buildings and other structures located within the maritime domain are considered to be part of the domain itself (Art. 29 NC)<sup>49</sup>. General rules on maritime domain concessions are provided for in Art. 36 of the NC, which prescribes that the maritime administration, to the extent compatible with the requirements of public use, may grant the occupation and use, including the exclusive use, of the maritime domain for a certain period of time. However, the NC only provides for general regulation

<sup>47</sup> Decision of the Supreme Court (Contentious-Administrative Chamber, Section 3) 6 June 1997, RJ 1997\5219. See also Decision of the Supreme Court (Contentious-Administrative Chamber, Section 7) 16 October 2014 (RJ 2014\53719); High Court of Justice of the Canary Islands (Contentious-Administrative Chamber, Section 2) 15 May 2008 (JUR 2008\310297).

<sup>48</sup> Art. 822 of the Italian Civil Code (Codice civile), and Art. 28 of the Navigation Code (Codice della navigazione, hereinafter, NC). On the special status of the maritime domain in Italian law, see Righetti (1987: 667-720; Carota, 2017:883-902; Turco Bulgherini, 2015: 154-170).

<sup>49</sup> *Diritto di superficie* can be established on structures built by concessionaires (Righetti, 1987: 667-720).

concerning the concession-granting procedure, which is regulated in more detail by the executive regulations of the NC<sup>50</sup>.

The Italian NC was amended by Law no. 84 of 28 January 1994<sup>51</sup> stipulating rules on the reorganisation of the port sector. Reorganisation was necessary in order to align the port sector with the basic principles of the European Community<sup>52</sup>. According to Art. 4, seaports were classified with regard to their geo-economic importance and with regard to their function. One of the functions explicitly provided for was tourism and leisure. In accordance with Art. 18 of Law 84/1994, the Italian legislator should have issued a decree establishing the procedures for the assignment and renewal of concessions which would meet the standards set by the basic principles of EU law: providing a transparent and non-discriminatory procedure.

However, the Italian legislator failed to do this in a comprehensive manner (Benetazzo, 2016: 2-35)<sup>53</sup>. In order to simplify and speed up the concession-granting procedure for infrastructure dedicated to leisure navigation, the Italian Government approved presidential decree no. 509 in 1997<sup>54</sup>. The basis for issuing it was not Art. 18 of Law 84/1994 but another legislative act (Law 59 of 1997)<sup>55</sup> regulating the reform of public administration. The legislator took the opportunity to delegate or assign functions and administrative tasks regarding concession-granting procedures for tourism ports to the regions and other public administrative authorities<sup>56</sup>. In Art. 2, definitions of different infrastructure dedicated to leisure navigation were given. One of these was for 'marina', *porto turistico*, which is defined as a complex of movable and immovable structures built on land and sea in

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<sup>50</sup> DPR 15 February 1952, no. 328.

<sup>51</sup> Reorganisation of Port Legislation Act (hereinafter, Law 84/1994).

<sup>52</sup> On the historical development of ports in Italy and the necessity of adopting a new regime in compliance with the basic principles of European law, see D'Ovidio *et al.* (2016: 151-158).

<sup>53</sup> On 31 May 2018, the Regulatory Authority for Transportation issued Resolution no. 57/2018 (hereinafter: Resolution 57/2018) in order to fill the gaps that had existed for more than 20 years.

<sup>54</sup> DPR no. 509 of 1997. *Gazzetta Ufficiale*, 18 February 1998, no. 40, the so-called 'decreto Burlando' (hereinafter, DPR 509/1997).

<sup>55</sup> Law of 15 March 1997, no. 59, *Gazzetta Ufficiale*, 17 March 1997, no. 63.

<sup>56</sup> For a detailed overview of changing administrative competences (Turco Bulgherini, 2015: 154-167).

order to serve solely or mainly recreational navigation and nautical tourists, including the provision of complementary services<sup>57</sup>.

Several years later, as a result of the reform of Title V of the Italian Constitution,<sup>58</sup> the matter of ports and airports fell under the competing legislative competences of the state and regions. The consequence of this constitutional reform is that legislative power in these matters belongs to the regions, except for the determination of fundamental principles, which is reserved for the state<sup>59</sup>. The regions are responsible for the regulation of concession-granting procedures, as well as for the location of areas intended for the construction and management of marinas<sup>60</sup>. However, this general rule has exceptions, one of which concerns ports of international and national economic importance and ports in areas of major national interest, where the state has jurisdiction<sup>61,62</sup>. The constitutional reform also confirmed the administrative functions of the regions according to the criteria set out in Art. 118 of the Constitution<sup>63,64</sup>. It should also be noted that in cases where marinas fall within the territorial area of a port authority, concessions are granted by the president of the port authority<sup>65</sup>.

Bearing in mind this transfer of legislative competences to the regions, as well as the mentioned exceptions, it seems that DPR 509/1997 will be

<sup>57</sup> Besides tourism ports, the law is also applicable to tourist landings, which are defined as parts of existing commercial harbours dedicated to leisure navigation and nautical tourists, including the provision of complementary services.

<sup>58</sup> Constitutional Law of 18 October 2001, no. 3, *Gazzetta Ufficiale*, no. 248.

<sup>59</sup> See Constitutional Court, sent. no. 255/07, p. 2.

<sup>60</sup> See, for example, the decision of the State Council (Consiglio di Stato), Chamber 6, 31 October 2011, no. 5816, explaining the relationship between state and regional legislation on the subject, and the precedence of the primary regulatory provisions of Tuscany Regional Law no. 1 of 2005 over the provisions of DPR 509/1997. See also T.A.R. Toscana, Sez. III, 10 July 2013, no. 1087.

<sup>61</sup> Art. 9, Law no. 88 of 16 March 2001, *Gazzetta Ufficiale*, no. 78.

<sup>62</sup> Furthermore, despite the general regionalisation of the area, there are certain constraints deriving from constitutional principles on sincere cooperation between the state and the regions, as well as from those state laws regulating landscape, environmental and cultural protection falling within the exclusive legislative competence of the state.

<sup>63</sup> See Judgments of the Italian Constitutional Court, December 17, 2008, Judgment no. 412.

<sup>64</sup> For a detailed overview of the complicated and not quite clear reforms regarding legislative and administrative competences in the matter of marinas, see Affannato (2012: 67-100), Righi and Nesi (2012). On problems in practice see Grado (2009: 1298-1318).

<sup>65</sup> Art. 2/3 DPR 509/1997, and Art. 8/3/h Law 84/1994.

applicable to concessions for ports of national and international interest, as well as in cases where the regional legislator did not exercise its regulatory competence regarding the concession-granting procedure for marinas or did so but by referring to DPR 509/1997<sup>66</sup>.

In respect of the legal regulation of concession-granting procedures for marinas where the regions have full legislative competence, there are undoubted constraints that derive from EU law. According to Art. 117/4 of the Italian Constitution and the consistent case law of the Italian Constitutional Court, the criteria and procedures for awarding concessions in the maritime domain must be established in accordance with the principles of free competition and freedom of establishment, as provided for in Community and national legislation<sup>67</sup>.

Awareness of the need to align Italian law and practice with EU law is, in the matter of concessions in the maritime domain, substantially the result of the infringement procedure opened against Italy (no. 2008/4908)<sup>68</sup> because of the preferential right granted to existing concessionaires under Art. 37/2 of the NC<sup>69,70</sup>. The European Commission claimed a breach of Art. 43 of the EEC treaty (now Art. 49 TFEU) and Art. 12/2 of Directive 2006/123/EC. In order to avoid possible sanctions, the Italian legislator abolished the preferential right in the contested law, and delegated to the Italian Government the obligation to reorganise and revise maritime domain legislation regarding maritime domain concessions, in line with the prescribed principles and guidelines, by means of a legislative decree<sup>71</sup>. However, on the contrary, the automatic renewal of existing concessions was introduced as a transitional,

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<sup>66</sup> For example, in Art. 75 of the Regional Law of Sicily of 16 April 2003, no. 4., it is stipulated that the concession-granting procedure for the construction of structures dedicated to pleasure navigation in the maritime domain is governed by DPR 509/1997, with amendments and additions prescribed by the same article. *Gazzetta Ufficiale della Regione Siciliana*, 17 April 2003, no. 17.

<sup>67</sup> See, for example, Judgments of the Italian Constitutional Court: Judgment no. 213/2011; Judgment no. 171/2013; Judgment no. 40/2017.

<sup>68</sup> Formal notice: Doc C (2009) 0328 del 29 gennaio 2009.

<sup>69</sup> For more detail see Turco Bulgherini (2015: 170-177).

<sup>70</sup> The prolongation was provided for concessions of a duration of less than six years, as well as in Art. 1/2 DL of 5 October 1993, no. 400, modified by the Law of 4 December 1993, no. 494.

<sup>71</sup> Art. 11/2 L. 15 December 2011, no. 217. Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee - Legge comunitaria 2010.

corrective, measure<sup>72</sup>. These prolongations of existing concession contracts provoked two Italian administrative courts to refer to the CJEU with a question for a preliminary ruling. Decision C-458/14 and C-67/15 of the CJEU, by which the automatic prolongation was declared to be contrary to the basic principles of EU law and Directive 2006/123/EC, strongly influenced the reasoning of Italian courts regarding the prolongation of existing concession contracts (see in detail 3.2.4 below). However, it has to be pointed out that the concessions considered were those for tourism-recreational purposes and not for the construction and management of nautical tourism ports.

Directive 2014/23/EU, on the other hand, did not influence either the provisions on the concession-granting procedures for marinas, or administrative and judicial practice. Namely, one of the standing points of the Italian legislator was that Directive 2014/23/EU should not be applied to ports in line with Recital 15 of Directive 2014/23/EU<sup>73,74</sup>. The whole public procurement package, transposed into Italian legislation by Law D. Lgs. 18-4-2016, no. 50<sup>75</sup>, in Art. 119 prescribes that a special procurement scheme will apply to seaports. For this reason, none of the acts regulating the concession-granting

<sup>72</sup> Art. 1/18 DL no. 194/2009 (the so-called ‘decreto Mille proroghe’) was prolonged once again until 2020 (DL of 18 October 2012, no. 179).

<sup>73</sup> “(15) In addition, certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land or any public property, in particular in the maritime, inland ports or airports sector, whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services, should not qualify as concessions within the meaning of this Directive”.

<sup>74</sup> The argument that concessions in the maritime domain are beyond the scope of Directive 2014/23/EU is based on the decision of the European Court of Justice, C-458/14 and C-67/15 of 14 July 2016. However, it is to be noted that the subject matter of that decision was not related to concessions for tourism ports but to maritime domain concessions for tourism and recreational purposes, in relation to which the Court took the stand that they can be characterised as ‘authorisations’ within the meaning of the provisions of Directive 2006/123/EC, irrespective of their characterisation in national law (p. 41). Concessions for tourism ports cannot be subject to Directive 2006/123/EC, since port services are excluded from its scope (Art. 2/2/(d) and Recital 21 of the Preamble of the Directive).

<sup>75</sup> Gazzetta Ufficiale, 19 April 2016, no. 91, S.O. Implementation of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, on public procurement and on procurement by entities operating in the water, energy, transport and postal services sectors, as well as for the reorganisation of the existing rules on public contracts relating to works, services and supplies, 18 April 2016, no. 50, *Gazzetta Ufficiale*, 5 May 2017, no. 103 (Public Procurement Code).



procedure in the maritime domain for the construction and management of marinas were derogated or modified when the public procurement package was transposed into the Italian legal system.

Nevertheless, in the same Code, as part of the provisions on project finance, alternative administrative procedures for the awarding of public works or services concession contracts are prescribed, expressly including those for structures dedicated to pleasure navigation (Art. 183/15 of the Public Procurement Code).

Finally, Resolution 57/2018, issued by the Transport Regulatory Agency in order to define measures and criteria aimed at ensuring fair and non-discriminatory access to port infrastructure, should be mentioned. Even though the scope of its application, according to Art. 1.1. and 1.2. of the TRA Resolution, is limited to infrastructure concessions issued by the Port System Authorities (*ex Art. 6 Law 84/1994*), with the exception of those relating to the implementation and management of infrastructure works provided for in Art. 18 of Law 84/1994, it is important for those nautical tourism ports that are part of a port under the management of a port authority.

From the brief overview of the legislative framework, it is clear that the question of the applicable law in Italy is extremely complex, with continuity only in constant change, where three different legislative levels intertwine: European, national and regional.

#### 4. MALTESE LAW

In Malta, the entire shore, including ports, is considered to be the public domain and is state property. Property in these domains cannot be transferred to other legal or physical persons. This means that they are *res extra commercium*. Ports in Malta are administered by the Authority for Transport in Malta, whose competences are regulated by the Authority for Transport in Malta Act of 2009. One of its competences is conducting concession-granting procedures. In this regard, it should also be mentioned that the awarding of concession contracts in Malta, including those regarding the public domain, is regulated by the Concession Contracts Regulations of 2016<sup>76</sup>, which are harmonised with the European rules on the awarding of concession contracts and Directive 2014/23/EU. The Maltese CCRs consist of five parts. These are: general provisions, the process, rules on the performance of concession contracts, rules common to concessions which meet or exceed the threshold, and remedies. They also contain thirteen annexes (schedules).

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<sup>76</sup> See the Maltese Concession Contracts Regulations of 2016, L.N. 353 of 2016 (hereinafter, CCRs).

### III. PARTICULAR ISSUES

#### 1. THE DURATION OF CONCESSIONS

##### 1.1. Directive 2014/23/EU

Long-term concessions may hinder the exercise of two fundamental freedoms guaranteed within the EU: freedom of establishment and freedom to provide services. In order to avoid market foreclosure and restriction of competition, Directive 2014/23/EU stipulates that concessions must be limited in time and their duration estimated on the basis of the works or services requested (Art. 18 of the Directive).

With a view to protecting the public interest, Art. 18/2 of the Directive provides that for concessions lasting more than five years, the maximum duration must not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on the invested capital, taking into account the investments required to achieve the specific contractual objectives. Such an estimation should be carried out at the moment of the awarding of the concession. Moreover, the Directive requires that such an estimation include initial and further investments deemed necessary for the operating of the concession, in particular expenditures on infrastructure, copyrights, patents, equipment, logistics, hiring, training of personnel, and initial expenses (Recital 52 of the Preamble of the Directive).

The duration of the concession should be indicated in the bidding documents. Alternatively, it is possible to indicate that the duration of the concession is subject to negotiation<sup>77</sup> (as an award criterion)<sup>78</sup> in the concession-granting procedure (Recital 52 of the Preamble of the Directive).

<sup>77</sup> “In the American procurement system, the negotiations are seen as creating a base for competition and are therefore an *optimizer* of competition. The competition is increased because of the negotiations. In the European system negotiations are seen to *limit*, not optimize competition.... Unlike US legislation, EU law is based on the fear of preferential treatment for domestic economic operators and discrimination against foreign ones. Negotiated procedures are inherently more flexible, and as such they provide greater opportunities for preferential treatment — if not for outright corruption — for instance through selective distribution of information by the contracting authority to the benefit of one economic operator” (Caranta, 2015: 391-460).

<sup>78</sup> “The creation of European rules instituted a specific economic approach which makes the choice of awarding contracts contingent on price considerations only, or on the economically most viable option. The rules allow for non-economic award criteria

## 1.2. Croatian law

The bidding documents, among other things, should contain information on the expected duration of the concession, but only if that is possible (Art. 42/2, Item 2 CA). This interpretation conforms with Directive 2014/23/EU. It appears from the cited article that the duration of the concession does not need to be indicated in the notification on the intention to grant the concession. This option is especially interesting in terms of the possibility of the concession grantor negotiating with the bidders. On the other hand, the MDSPA explicitly stipulates that decisions on public tenders for the awarding of concessions should *inter alia* contain information on the duration of the concession (Art. 18/1, Item 5 MDSPA). Directive 2014/23/EU does not preclude the provisions of the MDSPA. However, *de lege ferenda*, an option for concession duration to be an award criterion should be provided for. In practice, the duration of concessions is always indicated in the public tender. The CA prescribes that concessions are awarded for a certain period of time, always in such a way as to avoid market foreclosure and the restriction of competition as far as possible, on the one hand, and to enable the concessionaire to recoup investments planned in order to perform the concession and to obtain a return on the invested capital on the other. As far as the timeframe is concerned, the CA refers to the provisions of the special law: the MDSPA.

According to the MDSPA, concessions requiring the use and/or construction of new buildings and other infrastructure and superstructure objects may last from 5 up to 99 years (Art. 20 MDSPA). For concessions granted for a period from 5 to 20 years, county governments are concession grantors, while for concessions up to 50 years the concession grantor is the Croatian Government. For concessions of a duration longer than 50 years, it is necessary to obtain the prior consent of the Croatian Parliament.

## 1.3. Spanish law

In principle, since the contract for the construction and/or operation of a marina by a third party (indirect management) is either a concession in the public domain or a works or services concession that directly enables the occupation of the public domain, the duration of contracts provided for in different regional acts must respect the terms stipulated in the SPMNA (referred to in Art. 49.1 AoC) and PSCA, otherwise it must be understood

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only to a limited extent, with narrow exceptions for environmental, employment and social considerations” (Schebesta, 2016: 17).

that the corresponding precepts are expressly repealed (Repealing Order, PSCA).

At present, these durations are: 1) fifty years for concessions in the public domain (Art. 82.1 SPMNA); 2) forty years for works concession contracts and for services concessions that include the execution of works and exploitation of services (Art. 101.7 SPMNA and Art. 29.6 PSCA); and 3) twenty-five years for services concession contracts that include the conducting of a service not related to the provision of health services (Art. 29.6 PSCA).

In effect, concessions for works or services for the construction and/or exploitation of marinas by a third party are also linked on this point by the nature of the space in which marinas are located (the maritime-terrestrial public domain assigned to autonomous communities) (Zambonino Pulito, 2010: 73). Thus, it should be noted that the AoC stipulates in Art. 49.1 that the duration of concessions granted for the assigned assets (the maritime-terrestrial public domain assigned to autonomous communities for the construction, expansion or modification of marinas), including extensions, can in no case exceed the maximum term established in state legislation for concessions for the public port domain in ports of general interest. This term is 50 years, as stated in Art. 82.1 of the SPMNA, for concessions in the public domain or 40 years (Art. 101.7 SPMNA) for public works concession contracts (current works concession contracts) which directly qualify for the occupation of the public domain (Art. 101.4 SPMNA) (González-Deleito Domínguez, 2017: 5).

Thus, the sectoral legislation, i.e. the different autonomous acts on marinas, contains the duration of the concessions granted to third parties for the construction and/or exploitation of the same, referring to the provisions of the state legislation.

This referral to state legislation takes place in various ways.

On the one hand, some autonomous acts on marinas do not make a distinction between public domain concessions and works concession contracts, and nor do they expressly establish the maximum term of the concession. On the contrary, they stipulate that the maximum term of the concession is the one established in the corresponding concession title or in the specific administrative clauses, which cannot be longer than the one provided for in the act, including extensions.

In this sense, the Ports of the Region of Murcia Act foresees that by means of an administrative concession, a third party is authorised to build and operate marinas (Art. 6.1), referring to the regime established in the PSCA (Art. 7). In particular, “the maximum duration of public works concessions and concessions of publicly-owned property may not exceed that provided for

in the state legislation regulating public works concession contracts and the economic regime and service provision of ports” [Art. 12.d)].

In similar terms, the Ports of Catalonia Act (Arts. 40 and 52.2) stipulates that the maximum term of a concession when it involves occupation of the public domain “cannot exceed the maximum set in the legislation applicable to the public port domain”.

Other autonomous acts expressly set the maximum term in a way that is consistent with that provided in the successive modifications of the AoC for the concession of publicly-owned property and its referral to the state act on ports (Art. 82.1 SPMNA), i.e. fifty years (Art. 36.2 Ports of the Basque Country Act), thirty years (Arts. 22.4 and 32.1 Ports of the Generalitat Valenciana Act; Art. 45.3 Ports of the Canary Islands Act), or thirty-five years (Art. 73.1 Ports of the Balearic Islands Act).

A third group of regional acts distinguishes between works concession contracts and public domain concessions. This is the case with the Ports of Galicia Act (Art. 92), which refers to the basic legislation on public sector contracts for public works concession contracts, their duration being conditional upon the maintenance of the public domain in accordance with the AoC, whereas for public domain concessions it establishes the maximum term at fifty years (Art. 67.1 LPG). In the same way, in determining the duration of works concession contracts, the Ports of Andalusia Act (Art. 36.1) refers to the state legislation, stipulating that the duration “may not exceed the maximum term established in the basic state legislation for public works concession contracts and the resulting specific provisions relating to matters of the maritime-terrestrial port public domain”. Likewise, the Ports of Cantabria Act expressly regulates the indirect management of marinas (Arts. 31.1 and 36), referring its regime to the Public Administration Contracts Act, with specificities provided for in the Autonomous Community Act (PSCA), expressly establishing that the duration of the work will be that foreseen in the special administrative specifications clauses, which cannot exceed forty years (Art. 36.2). Moreover, it establishes 35 years as the maximum duration of public port domain concessions (Art. 41.2).

#### 1.4. *Italian law*

Maritime domain concessions are, by the nature of the institute, limited in time (Art. 36/1 NC). In Art. 2/2 of the DPR 509/1997, it is stipulated that maritime domain concessions for building nautical port structures of a duration of up to fifteen years are granted by the Maritime Director. Granting such concessions for a period of more than fifteen years falls within the competence of the Director-General responsible for the Directorate-General for Mari-

time State Property and Ports of the Ministry of Transport and Navigation (now the Ministry of Infrastructure and Transport). It is interesting to point out that the presidential decree does not contain a provision on the maximum duration of concessions for nautical tourism ports. The potential concessionaire of a nautical tourism port can request the use of the maritime domain for the period of time which they consider to be the most appropriate, and the concession grantor must assess the appropriateness and compatibility of the request.

Currently, without prejudice to the precariousness and temporary nature of the institute of concession, the only limitation set by Italian law is that for concessions for tourism and recreational purposes<sup>79</sup>, where concession can be granted for a maximum of 20 years.

### 1.5. *Maltese law*

Maltese rules on the duration of concession contracts were drawn up under the significant influence of Directive 2014/23/EU. According to the Maltese CCRs, the duration of concessions is limited. As in Directive 2014/23/EU<sup>80</sup>, the contracting authority or contracting entity estimates the duration of concessions on the basis of the works or services requested (Paragraph 72 CCRs). This estimation should already have been made by the time of the publication of the concession notice, as the duration of the concession should be specified in it, but only if this is possible (Schedule 7, Paragraph 4 CCRs)<sup>81</sup>. In any event, the duration of the concession should be indicated in the concession award notice (Schedule 9, Paragraph 5 CCRs). However, no obligation to determine the maximum duration of the concession in concession documents or as an award criterion of the contract is prescribed by the Maltese CCRs. For long-term concessions, which last more than five years, the maximum duration of the concession is determined in the same way as prescribed by Art. 18/2 of the Directive. The investments taken into account for the purpose of the calculation include both initial investments and investments during the life of the concession (Paragraph 73, Items 1 and 2 CCRs).

<sup>79</sup> Art. 3/4. bis DL 5 October 1993, no. 400.

<sup>80</sup> See Art. 18 of Directive 2014/23/EU.

<sup>81</sup> In the case of awarding concessions which meet or exceed the threshold of EUR 5.225 million (for both works and services concessions), contracting authorities and contracting entities wishing to award a concession must make known their intention by means of a concession notice (Paragraph 95, Item 1 CCRs).

## 2. PROLONGATION OF CONCESSIONS

### 2.1. *The Directive*

Before Directive 2014/23/EU came into force, the European Commission promulgated two soft-law documents on concessions<sup>82</sup>. In these documents, it was clearly stated that the prolongation of an existing concession beyond the period originally laid down must be considered equivalent to granting a new concession to the same concessionaire. Consequently, contracting authorities were obliged to retender the contract, otherwise such prolongation was not in accordance with EU principles on competition. The rules of the Directive are a bit more flexible but still rather restrictive with regard to the issue of prolongation of the concession period. According to the Directive, one of the main features of a concession is, as discussed above, the fact that it is limited in time. The duration of a concession should be limited in order to avoid market foreclosure and the restriction of competition. In addition, concessions of a very long duration are likely to result in the foreclosure of the market, and may thereby hinder the free movement of services and the freedom of establishment. Therefore, the EU Member States, in their implementation measures, must ensure that a concession is granted for a limited time.

However, Directive 2014/23/EU (Art. 43/4 c) prescribes that the modification of a concession contract is substantial<sup>83</sup>, *inter alia*, if it extends the scope of the concession considerably<sup>84</sup>. The terms 'scope' and 'considerably' are not defined in the Directive. If the term 'scope' of a concession contract is interpreted to include also the extension of its duration, such a modification of a concession contract would be material only when it is considerable. Additionally, if the possibility of prolongation is provided for in the bidding documents,

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<sup>82</sup> These are European Commission Interpretative communication on concessions under community law (C121 29. April 2000, p. 2) and European Commission, Green Paper on public-private partnerships and Community law on public contracts and concessions, COM (2004) 327 final, 30-4-2004.

<sup>83</sup> The modification of a concession during its term is considered to be substantial within the meaning of point (e) of Paragraph 1 where it renders the concession materially different in character from the one initially concluded (Art. 43/4).

<sup>84</sup> See the *Pressetext Nachrichtenagentur GmbH* case, cit., paragraph 36: "An amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered". In this case, the point of view of the CJEU is literally converted into a legal provision without further explanation of how the terms 'scope' and 'considerably' should be interpreted. See also Art. 43/4 c of Directive 2014/23.

there will be no need to assess whether the prolongation is considerable, since it would be covered by Art. 43/1a. Furthermore, prolongation of less than 10% compared to the original term (which is not provided for in the bidding documents) might be regarded as not being a considerable modification of the concession contract (Art. 43/2ii). Since amendments under these percentages are allowed in other elements of the contract, by analogy amendments to its duration could also be included<sup>85</sup>. Following the same analogy, some authors interpret the provision of Art. 43/1b very broadly so that modification of the concession, including prolongation of the concession under 50% compared to its original term should not be deemed considerable, and consequently it would be allowed by the Directive<sup>86</sup>. In our opinion, such an interpretation could enable a very long duration of concessions and foreclosure of the market in some cases. Considering the above, it seems that the Directive is not as strict as the previously promulgated Commission soft-law instruments with regard to the prolongation of the original concession period.

As regards the possibility of prolongation provided in the bidding documents, it should be noted that such a stipulation in the bidding documents will have an impact on the estimated value of the concession and consequently on the level of the concession fee. For that reason, it probably would not be attractive for potential concessionaries<sup>87</sup>. According to the Directive (Art. 43/1a), concessions may be modified without a new concession award procedure where the modifications, irrespective of their monetary value, have been provided for in the initial concession documents in clear, precise and unequivocal review clauses, which may include value revision clauses, or options. Such clauses must state the scope and nature of possible modifications or options, as well as the conditions under which they may be used. They must not provide for modifications or options that would alter the overall nature of the concession. We agree with certain authors who consider

<sup>85</sup> Following the same analogy, these criteria are also applicable to a reduction of a contract term (Olivera, 2015: 15).

<sup>86</sup> Art. 43/1b regulates modifications of concession contract during its term in cases when additional works or services have become necessary. It prescribes that for concessions awarded for purposes of procuring an activity other than those referred to in Annex II of the Directive 2014/23/EU any increase in value not requiring a new award procedure should not be higher than 50% of the value of the original concession.

<sup>87</sup> When calculating the estimated value of the concession, contracting authorities and contracting entities must, where applicable, take into account in particular: (a) the value of any form of option and any extension of the duration of the concession (Art. 8/3a).



that it is questionable if the modification of a contract can be provided for in the contract itself because “novation has always been characterized by introducing a completely new stipulation to an existing contract” (Olivera, 2015: 40). In addition, very often different deficiencies in a contract, which could not be foreseen previously, can be identified only during its performance.

## 2.2. Croatian law

According to the CA, the concession period may be prolonged if it is due to a change in the concession agreement pursuant to the CA (Art. 17/5 CA in relation to Arts. 62-65 outlining the conditions for changes in the concession agreement), following in its provisions the concept of Directive 2014/23/EU, as outlined above. The CA does not provide transitional provisions for the extension of existing concessions where the bidding documents do not provide for the possibility of such modifications. Regarding the possibility of prolongation of the concession for the economic exploitation of the common domain, the CA additionally refers to the provisions of the special law.

The MDSPA contains a special provision concerning the prolongation of the concession period. According to Art. 22 of the MDSPA, in cases when new investments economically justify it, as well as in cases of *force majeure*, the concessionaire may submit to the concession grantor a request to extend the duration of the concession. In this case, the concession grantor may extend the period of a granted concession to up to thirty years in total for concessions granted by the county assembly, and to up to sixty years in total for concessions awarded by the Croatian government. Of course, such prolongation of concessions will result in amendments to other conditions in the decision on granting the concession and the concession contract.

The reasons indicated in Art. 22 of the MDSPA, based on which the concessionaire may request prolongation of the concession, are very general and do not outline the procedure for allowing the prolongation or the criteria for passing such a decision. Therefore, this decision is left to the discretion of the concession grantor. However, according to Art. 98 of the General Administrative Procedure Act<sup>88</sup>, the decision would need to be explained and decisive reasons provided or reasons given for the request of the concessionaire not being accepted. Due to the lack of elaborated provisions, the exception to the rule that the concession terminates upon the elapsing of the concession term, as envisaged by the MDSPA, can be very useful but also rather unfair to concessionaires. The possibility of prolongation is prescribed

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<sup>88</sup> Official Gazette of the Republic of Croatia, no. 47/2009.

by way of exception but in fact requests are accepted as a rule (Tuhtan Grgić and Bulum, 2018: 322-325).

The possibility of extending the concession based on the CA in case of changes to the concession agreement and the possibility of extending the concession based on the MDSPA are not mutually exclusive. Nevertheless, the question must be raised as to whether the provision of Art. 22 of the MDSPA conforms with the objective and purpose of the Directive. Although Art. 18 of the Directive does not contain an explicit prohibition, according to Art. 22 of the MDSPA an extension could be contrary to the objective and purpose of the Directive (the principles of transparency, non-discrimination and equal treatment).

### 2.3. Spanish law

There are different autonomous acts on marinas that regulate concession extensions if one is requested by the concessionaire. However, in no case may the initial term, together with that of the extension, exceed the maximum period legally stipulated.

In order to allow for the extension of concessions, all acts require this possibility to be expressly provided for in the concession-granting title. However, the majority of acts also allow the extension of a concession even if it is not foreseen in the concession title when certain requirements are met, e.g. if the concessionaire has carried out an investment not foreseen in the concession that, in the opinion of the Port Administration, is of relevance to the exploitation of the port and which exceeds by a certain percentage the updated value of the investment foreseen in the concession title (Art. 32.3 Ports of the Generalitat Valenciana Act; Art. 67.2 Ports of Galicia Act); to restore the economic balance of a contract; or, exceptionally, to satisfy the rights of creditors if the credit rights of the concessionaire have been subject to securitisation in accordance with the basic state legislation regarding public works concession contracts (Art. 36.2 Ports of Cantabria Act).

In this regard, Art. 27.2 of the Ports of Andalusia Act considers that extensions not provided for in the concession title constitute a substantial modification of the conditions of the concession at the request of its holder, and must be processed as a concession application. In any case, following this precept, extensions “may only be granted in exceptional cases, for reasons of strategic or relevant interest to the port, and provided that the person or the concessionaire entity carries out new investments that duly correspond with the requested extension”.

However, it must be taken into account that at present the PSCA, in Art. 29, only allows for the extension of the terms established in the specifications of

works concession or services concession contracts by 15 percent of their initial duration to restore the economic balance of the contract in the circumstances provided for in Arts. 270 and 290. In the same way, the criteria of Art. 205 must be met to extend the contract when this possibility is not contained in the special administrative specifications clauses. Consequently, it should be understood that any provisions contained in autonomous acts that are contrary to the provisions of the PSCA are expressly repealed.

#### 2.4. Italian law

The Navigation Code, which regulates the general framework on concessions in the maritime domain in Italian law, once contained interesting protective provisions regarding the legal position of concessionaires whose concession was set to expire. Namely, concessionaires used to have a preferential right to concession in respect of new applicants (so-called '*diritto di insistenza*', former Art. 37/2 NC). The European Commission considered that the national legislation was not in conformity with Community law and opened infringement proceedings against the Italian Republic (no. 2008/4908). In order to align the Italian legal framework on concessions in the maritime domain with EU law, this provision granting the concessionaire a preferential right was erased. However, in order to protect the acquired rights and legitimate expectations of existing concessionaires, Decree Law DL no. 194/2009<sup>89</sup> was enacted, prescribing in Art. 1/18, in respect of concessions in the maritime domain used for tourism and recreational purposes, that "concessions existing on the date of entry into force of the present decree that are due to expire at the latest on 31 December 2015 shall be extended until that date". This provision was amended by Art. 34k of Decree Law no. 179/2012,<sup>90</sup> which extended concessions until 31 December 2020, after which date concessions should be awarded by public tender. The rationale behind the extension under the law was the stated need to ensure the operation of existing concessions pending the enactment of new general and organic regulations (Lageder, 2018: 5).

Three administrative courts raised doubts about the compliance of these prolongations with EU law and the Italian Constitution (Arts. 41 and 117), considering that such measures could not be justified by the principle of adequacy and proportionality in relation to the requirement to preserve the

<sup>89</sup> DL no. 194 of 30 December 2009, enacted as law by Law no. 25 of 26 February 2010.

<sup>90</sup> DL no. 179 of 18 October 2012, enacted as law by Law 221 of 17 December 2012.

financial equilibrium of the concessionaire<sup>91</sup>. At the initiative of two Italian administrative courts, the CJEU addressed the issue of compliance of the legal prolongations of concessions in its judgment of 14 July 2016 in Joined Cases C-458/14 and C-67/15 *Promoimpresa and Melis*. The Court held the provisions on prolongations to be contrary to Directive 2006/123/EC on services in the internal market, as well as being contrary to Art. 49 of the TFEU (freedom of establishment), Art. 56 of the TFEU (freedom to provide services) and Art. 106 of the TFEU (competition). After the cited decision of the CJEU, where *ex lege* prolongation of concession contracts in the public domain (qualified as ‘authorisation’) was declared as incompatible with EU law, a ‘new’ transitional measure was enacted<sup>92</sup>. For the sake of legal certainty and the public interest, relationships already established and pending in accordance with provisions on *ex lege* prolongation remained valid<sup>93</sup>.

In the meantime, due to the imprecise wording of Art. 1/18 of the DL 194/2009, i.e. ‘concessions for tourism and recreational purposes’, the question of the scope of application of the prolongations was raised, precisely in relation to existing concessions for marinas. The Italian Council of State, in its judgments<sup>94</sup> took the position that prolongations provided for recreational-tourism concessions cannot be applied to concessions for marinas. However, the amendment to Art. 1/18 of 2012<sup>95</sup> extended the scope of the application of the prolongation of existing concession contracts to “sports, as well as those intended for marinas, landing places and moorings dedicated to pleasure navigation”. In its subsequent judgment, the Council of State changed the position it had previously taken and explained that the function of the amendment was explanatory or interpretative, and not

<sup>91</sup> TAR Lombardia, 26 September 2014, n. 2401, retrieved from <http://www.quotidianogiuridico.it>.

<sup>92</sup> It is interesting to mention that the Italian legislator in some cases even used the term *concessione per licenza* but only for the institute of authorisation different from concessions, which is of minor importance and shorter duration (Righetti, 1987: 706).

<sup>93</sup> “Pending the revision and reorganization of the matter in accordance with the principles deriving from European law, in order to ensure certainty to the existing legal situations and ensure the public interest in the management of state property without interruption, the relationships already established and pending under Art. 1, Paragraph 18 of Decree-Law no. 194 of 30 December 2009, enacted with amendments by Law no. 25 of 26 February 2010, remain valid”. Art. 24, Paragraph 3-septies, of DL no. 113 of 24 June 2016, enacted into law by Law no. 2016 of 7 August 2016.

<sup>94</sup> State Council, 18 December 2012, no. 6488; State Council, 2151/2013.

<sup>95</sup> Art. 1/547 Law no. 228 of 24 December 2012.

retroactive<sup>96</sup>. The Council of State also referred to the CJEU for a preliminary ruling regarding the compliance of the prolongation of concessions in the maritime domain with EU law but, due to the substantial identity of the issues decided on in the preliminary ruling in Joined Cases C-458/14 and C-67/15, decided to withdraw the referral<sup>97</sup>. Referring to the judgment of the CJEU, the Council of State discussed the subject and decided that, even though the scope of application of the provision on the *ex lege* prolongation of concessions was extended to touristic ports, “the national law on the legal prolongation of concessions in the maritime domain for tourism and recreation purposes, including concessions for berths and ports of nautical tourism, must be disregarded, as it is contrary to Article 12(1) and (2) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and also with Article 49 TFEU”<sup>98</sup>. However, it has to be stressed that in the joined cases the concessions had a tourism-recreational purpose and fell within the scope of application of Directive 2006/123/EC, whilst in the case in hand the purpose of the concession was different, i.e. a concession for a nautical tourism port, which in our opinion does not fall under the scope of application of the Directive on services. Regardless of this, concessions in the maritime domain for marinas (both building and management) is of certain cross-border interest in view of the criteria developed by the Court of Justice<sup>99</sup>, and thus the concept of *ex lege* prolongation constitutes an obstacle to the freedom of establishment granted in Art. 49 of the TFEU.

In the meantime, in order to regulate the matter of concessions in the maritime domain, the regions enacted their own regional laws. These regional laws should have regulated the subject matter in line with EU law. However, some of the laws contained provisions on different mechanisms intended for modifications of existing concession contracts in relation to the possible

<sup>96</sup> Consiglio di Stato, Chamber VI, 20 July 2017, no. 873, retrieved from <https://bit.ly/2WacVAp>, p. 5.

<sup>97</sup> Judgement of the Court of 14 July 2016 in joined cases *Promoimpresa srl and Others v Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro and Others*, cit. And Order of the President of the Court of 13 October 2016, *Regione autonoma della Sardegna v Comune di Portoscuso*, 449/15, EU:C:2016:793.

<sup>98</sup> State Council, Chamber VI, 20 July 2017, no. 873.

<sup>99</sup> Judgement of the Court of 15 May 2008 in joined cases *SECAP SpA (147/06) and Santorso Soc. coop. arl (148/06) v Comune di Torino*, EU:C:2008:277; Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ C 179, 1 August 2006, p.2).

prolongation of the duration of contracts. These provisions were contested in front of the Italian Constitutional Court as contrary to national and European law, since the automatic renewal of existing concessions prevents any form of selective procedure aimed at identifying possible new concessionaires from being carried out<sup>100</sup>. The Italian Constitutional Court was right to find that the regions had exceeded their competences when prescribing such instruments<sup>101</sup>, since the matter of protection of competition is the exclusive legislative competence of the State.

Finally, in the context of the legal prolongation of concessions, one of the transitional and final provisions of DPR 509/1997 has to be mentioned. This is a provision on the possible prolongation of the concessions which were in force on 1 January 1990 (Art. 10/3). According to this article, a concession can be extended, without prejudice to any other conditions of the concession, at the request of the concessionaire if it appears that they have been unable to carry out, for reasons for which they are not responsible, works or substantial parts of the works envisaged, or if new works are necessary to upgrade the port facilities or to maintain their functionality. In the same provision, it is prescribed that the period of extension is determined by the granting authority, taking into account the size of the original and the added investment. Apart from this transitional provision, DPR 509/1997 does not contain any provision on the prolongation of concessions for marinas.

## 2.5. *Maltese law*

As a national measure passed with the aim of implementing Directive 2014/23/EU, the Maltese CCRs also prescribe that concessions must be granted for a limited time<sup>102</sup> in order to prevent foreclosure of the concessions market in Malta. Like the EU Directive, the Maltese CCRs do not explicitly mention the possibility of prolonging the concession period. However,

<sup>100</sup> See Judgment of the Italian Constitutional Court no. 180/2010 (Art. 1 of the Region of Emilia-Romagna Act, no. 8/2009); Judgment no. 233/2010 (Art. 36/2 of the Region of Friuli-Venezia Giulia Act, no. 13/2009); Judgment no. 340/2010 (Art. 16/2 of the Region of Toscana Act, no. 77/2009), Judgment no. 213/2011 (Arts. 1 and 2 of the Region of Abruzzo Act, no. 3/2010; Art. 5 of the Region of Veneto Act, no. 13/2010; Art. 4/1 of the Region of Marche Act, no. 7/2010); Judgment no. 171/2013 (Art. 1 of the Region of Liguria Act, no. 24/2012); Judgment no. 40/2017 (Art. 14/8 and 9 of the Region of Puglia Act, no. 7/2015).

<sup>101</sup> Judgment of the Constitutional Court, no. 213 of 4 July 2011 p. 13 and Judgment of the Constitutional Court, no. 40/2017.

<sup>102</sup> See Paragraph 72, Item 1 CCRs.

prolongation of a concession is possible as a way of modifying it but only when it has been provided for in the initial concession documents in clear, precise and unequivocal review clauses (Paragraph 85, Item 1a CCRs). In the same way as in the EU Directive, modifications or options that would alter the overall nature of the concession are not allowed by the Maltese CCRs.

### 3. CONCESSIONS UPON REQUEST

#### 3.1. *The Directive*

Directive 2014/23/EU does not explicitly mention the possibility of awarding a concession upon request. Nevertheless, this issue is indirectly addressed in Art. 31 of the Directive concerning the publication of concession notices. Pursuant to Art. 31/4, contracting authorities or contracting entities are not required to publish a concession notice where the works or services can be supplied only by a particular economic operator for any of the reasons prescribed by that article, such as the aim of the concession being the creation or acquisition of a unique work of art or artistic performance, the absence of competition for technical reasons, the existence of an exclusive right, or the protection of intellectual property rights and exclusive rights<sup>103,104</sup>. Another case in which the award of a concession without publishing a concession notice is allowed is a situation when no applications (or suitable applications) or tenders (or suitable tenders) have been submitted in response to a prior concession procedure, provided that the initial conditions of the concession contract are not substantially altered and that a report is sent to the Commission if it requests one (Art. 31/5). In these exceptional cases, concessions can be awarded directly to an economic operator without publishing a concession notice. Apart from these cases, directly awarding concessions is strictly forbidden because it represents a serious violation of the TFEU principles of transparency and competition. Concessions can be awarded directly either upon the request of an economic operator or by means of a decision of the contracting authorities or contracting entities. Even when a contract is granted upon the request of an economic operator and not on the initiative of the contracting authority or the contracting entity, it will qualify as

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<sup>103</sup> This provision is not applicable to the exclusive rights defined in point (10) of Art. 5 of the Directive 2014/23/EU.

<sup>104</sup> These exceptions only apply when no reasonable alternative or substitute exists, and the absence of competition is not the result of an artificial narrowing down of the parameters of the concession award.

a concession (not as an authorisation or licence) if it provides for mutually binding obligations for its parties and if the execution of the works or services is subject to specific requirements defined by the contracting authority or the contracting entity and which are legally enforceable<sup>105</sup>.

### 3.2. *Croatian law*

Granting a concession upon request is an exemption which must already be envisaged in the preparation phase of the bidding documents (Art. 39 CA). This option can be provided for, for example, in cases in which the concessionaire wants to extend the concession to a location which represents an inseparable technical or functional unit of the object of the concession and serves only for the performance of an economic activity. This is particularly interesting for those marinas that are inseparable technical or functional units of hotels. It is true, however, that such an exemption does not exist in the Directive.

The MDSPA, on the other hand, does not envisage a concession for the 'economic use of the maritime domain' being awarded upon request (apart from the possibility of an extension of the concession period). However, a person interested in becoming a concessionaire may submit an initiative to the concession grantor.

### 3.3. *Spanish law*

The different autonomous acts allow the procedure for granting a concession to be initiated not only *ex officio* by the administration but also at the request of an interested party (Art. 43.3 Ports of the Canary Islands Act; Art. 38.1 Ports of the Basque Country Act; Art. 34 Ports of the Generalitat Valenciana Act; Art. 34.3 Ports of Cantabria Act; Art. 60.1 Ports of the Balearic Islands Act). However, in accordance with Art. 135 PSCA the initiation of the procedure at the request of an interested party must respect the regime currently envisaged in the PSCA and, in particular, invitations to tender should be published (Zambonino Pulito, 2010: 77). This is established in greater or lesser detail by the different autonomous port acts (e.g. Art. 41 Ports of the Basque Country Act; Art. 36 Ports of Cantabria Act).

It should be noted that a procedure at the request of an interested party is different from a negotiated procedure without the prior publication of a tender notice in works concession and services concession contracts

<sup>105</sup> See Recital 14 of the Preamble of Directive 2014/23/EU.



(Art. 170 PSCA). In fact, this procedure constitutes an exception to the general rule of the necessary publication of negotiated tender procedures (Art. 169 PSCA).

In summary, a negotiated procedure without publishing a concession notice is only admissible, in accordance with Directive 2014/23/EU when: a) no offer, no adequate offer, no request for participation, or no request for appropriate participation in response to an open procedure or a restricted procedure has been submitted; b) when the works or services can only be entrusted to a specific entrepreneur because there is no competition for technical reasons; and c) when the contract has been declared secret or reserved, or when its execution must be accompanied by special security measures in accordance with current legislation [Art. 168. a) PSCA]. The procedure is regulated in Arts. 169 and 170 PSCA.

### 3.4. *Italian law*

DPR 509/1997 regulates the concession-granting procedure in a specific way, based on the concept of a 'one-stop shop'. The administrative procedure is divided into several stages. The initiative for the concession-granting procedure comes from the person interested in the concession: either for the management (and renovation) of an already existing marina or for the building and managing of a new port. This act regulates the concession-granting procedure for the construction of structures dedicated to pleasure navigation based on the 'one-stop shop' concept. The stakeholder submits an application to the maritime authority competent for the area concerned and notifies the municipality accordingly (Art. 3/1 DPR 509/1997). The application must be accompanied by a preliminary draft of the project and the data needed to identify and assess the main effects that the project may have on the environment. In the following stage, the application with all the supporting documentation has to be published by posting it in the register of the municipality where the requested property is located and by publishing the excerpt in the legal announcements of the province (Art. 4/1 DPR 509/1997).

The order has to contain an invitation to all interested parties to submit comments on the project in question, which the administrations taking part in the procedure are required to assess. Within the same period of time, not shorter than 30 days and no longer than 90 days, competing applications can be submitted. These competing applications also have to be published for the purpose of being subject to comments from the concerned public (Art. 4/2 DPR 509/1997).

After publication, all the applications received must be sent by the maritime authority within thirty days to the mayor of the municipality concerned, who is responsible for organising a services conference (*conferenza di servizi*). All the administrative bodies responsible for the protection of specific public interests have to be invited to participate: the region, the municipality, the authority competent to grant the concession, and the customs agency (Art.5/2 DPR 509/1997). The authorities invited to participate at the conference are given at least 90 days to analyse the project(s). At this point of the administrative process, the authorities participating at the conference may ask for modifications to the preliminary projects submitted. Once modified, a preliminary project may be either declared admissible or rejected by the conference. In the case of several projects, only one can proceed to the next phase. The mayor has to invite the promoter to submit a final project, which is, for a final time, analysed by all the authorities involved.

In the final approval stage of the procedure, two scenarios are possible: the classical one, when the project is in line with physical and urban plans, and another when the project is not in compliance with these plans. In the latter case, the project can be approved by 'programme agreement', by means of which the plan can be modified (Art. 6 DPR 509/1997).

The Council of State, in judgment no. 6488/2012<sup>106</sup>, confirmed the validity of the decree as an operational tool for concession-granting procedures, which should, however, be enhanced by laying down preference criteria (Turco Bulgherini, 2015: 170-177).

Alternative administrative procedures for awarding public works or services concession contracts are prescribed in the Italian Public Procurement Code in the provisions on project financing. Structures dedicated to pleasure navigation are expressly included, and contracting authorities, as an alternative to awarding concessions under Part III of the Code, are authorised to award a concession on the basis of a call for tenders for a feasibility project through the publication of a call for tenders covering the use of resources fully or partially at the expense of the proposing parties. Art. 183/15 of the Public Procurement Code allows private operators to submit project financing proposals to the contracting authorities that include concession agreement schemes and economic and financial plans which, if considered to be of public interest, are reference documents used in the subsequent procedure. However, it is not clear from the provision which procedure is applied: the one prescribed by the Public Procurement Code or that prescribed by the regional law (or, where applicable, by DPR 509/1997).

<sup>106</sup> State Council, 18 December 2012, no. 6488.

### 3.5. *Maltese law*

In conformity with Directive 2014/23/EU, the CCRs do not explicitly mention the possibility of awarding a concession upon request. As a rule, contracting authorities and contracting entities wishing to award a concession which meet or exceed the threshold of EUR 5.225 million<sup>107</sup> (for both works and services concessions) are obliged to make known their intention by means of a concession notice (Paragraph 95, Item 1 CCRs). Concession notices are published by the Publications Office of the European Union (Schedule 11). For concessions which do not meet this threshold, there is no such obligation and the contracting authority or contracting entity can commence the concession award procedure, for instance by contacting economic operators in relation to the concessions<sup>108</sup>. In the same manner as Directive 2014/23/EU, Maltese rules prescribe that contracting authorities or contracting entities are not required to publish a concession notice even for concessions which meet or exceed the threshold of EUR 5.225 million in two cases. First, where the works or services can be supplied only by a particular economic operator, and second where no applications, no tenders, no suitable tenders or no suitable applications have been submitted in response to a prior concession procedure (Paragraph 95, Items 4 and 5 CCRs).

## IV. CONCLUSION

The aim of this paper was to examine to what extent EU law has influenced Croatian, Spanish, Italian and Maltese national laws in the matter of concessions in the maritime domain for the construction and provision of services in nautical tourism ports. The analysis of the legal frameworks and judicial practice in these legal systems has proved the hypothesis that, when granting concessions, public authorities are bound to comply with the fundamental rules of the European Union in general. However, the analysis has also raised several questions. The first set of questions relates to the applicability of Directive 2014/23/EU on the award of concession contracts, and the other on the applicability of Directive 2006/123/EC on services in the internal market.

Regarding the question of the applicability of Directive 2014/23/EU on concessions for nautical tourism ports, the answer lies in a sub-question: what

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<sup>107</sup> The threshold values are prescribed by Schedule 3 of the CCRs and comply with the Directive.

<sup>108</sup> See Paragraph 54, Item 1 CCRs.

is the significance and scope of the Directive's Recital 15 of the Preamble?  
 Pursuant to Recital 15

certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land or any public property, in particular in the maritime, inland ports or airports sector, whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services, should not qualify as concessions within the meaning of this Directive.

According to one interpretation of Recital 15, supported by the Italian legislator, ports are beyond the scope of the Directive, and thus beyond the scope of the national law transposing it. A similar solution has been adopted in Spain, where the act which incorporated Directive 2014/23/EU into the Spanish legal system excludes concessions regarding public domain goods from its scope of application. If this was the intention of the European legislator, then the Croatian and Maltese legislators extended the scope of application of the Directive, producing a 'spill-over' effect. Even if this approach is correct, the courts should, in order to preserve the coherence of national legal systems, interpret these provisions, even when applied to ports, in line with the objective which the Directive strives to achieve.

However, in our opinion Recital 15, if read and interpreted as a whole, is not meant to exclude the maritime domain as a whole (including ports) from the scope of application of the Directive but only those agreements which do not encompass the procuring of specific works and services, i.e. those legal relations called concessions not because they have the purpose of procuring specific works and services but to give the legal title for commercial exploitation of the public domain. If this latter interpretation is correct (and it seems to be the one followed in the Spanish system), then the question as to whether the Italian legislator has correctly incorporated the provisions of the Directive into national law can be raised. The Croatian and Maltese legislators have incorporated this Directive into their national legal systems, prescribing the applicability of these norms in the maritime domain, and ports as well, even in cases that should have been excluded according to Recital 15, i.e. where concessions are granted without procuring specific works and services. However, in Croatian practice resistance to giving precedence to a general act on concessions, harmonised with Directive 2014/23/EU, over a special but not harmonised act still prevails. Such a practice could and should be questioned for the sake of the coherence of the legal system.

The second set of questions raised on the basis of the analysis of the legal frameworks for concessions in the maritime domain for nautical tourism

ports refers to the applicability of Directive 2006/123/EC on services in the internal market. Arguments in favour of the applicability of this Directive are based on the preliminary ruling of the CJEU on Joined Cases C-458/14 and C-67/15 of 14 July 2016, where the Court took the stand that maritime domain concessions for tourism and recreational purposes can be characterised as ‘authorisations’ within the meaning of the provisions of Directive 2006/123/EC, irrespective of their characterisation in national law. However, extending the scope of application of the Directive to nautical tourism ports by analogy is, in our opinion, incorrect. This analogy derives from a provision of Italian national law on the prolongation of existing concessions that governs both types of concessions: those for tourism and recreational purposes and those for tourism ports. However, construction and/or managing and rendering services in nautical tourism ports are much more than works and services for which mere authorisation is needed. Concessionaires of nautical ports do not remain free to withdraw from the provision of works or services, and thus the legal title for providing these services should be qualified as a concession and not authorisation.

As regards the issue of the duration of concessions, Directive 2014/23/EU stipulates that concessions should be limited in time. In all the compared legal systems, the duration of concessions is limited, although significant differences are present regarding the methods and criteria used for the determination of the duration. According to the Directive, the duration should be estimated on the basis of the works or services requested, although the prescribed criteria are general. For this reason, the uniform application of these criteria in different Member States is questionable.

The duration of concessions, as established by acts and concession contracts, as a rule cannot be subject to prolongation. However, this issue is addressed in the part of the Directive that regulates the modification of concession contracts during their term. Provisions in line with the Directive are present in Croatian and Maltese law as well. The prolongation of a concession as a way of modifying it is allowed if the possibility of prolongation is provided for in the bidding documents. Additionally, a prolongation by less than 10% (not provided for in the bidding documents) compared to the original term might not be regarded as a considerable modification of the concession contract. Furthermore, certain authors interpret the provision of Art. 43/1b very broadly so that modification of a concession including a prolongation by less than 50% compared to its original term should not be deemed considerable and consequently should be allowed. In our opinion, such an interpretation could enable a very long concession duration and the foreclosure of the market in some cases. Considering the above, it seems that the Directive is not as strict as the previously promulgated Commission

soft-law instruments with regard to the prolongation of the original concession period. In Italian case law, the interpretation of domestic law in line with Directive 2006/123/EC and the fundamental principles of the EU has resulted in prohibition of the prolongation of concessions.

Directive 2014/23/EU does not explicitly mention the possibility of awarding a concession upon request. Nevertheless, this issue is indirectly addressed in Art. 31 of the Directive concerning the publication of concession notices, but these possibilities are not really applicable to nautical port concessions, apart from cases in which the awarding of a concession without publishing a concession notice is allowed in situations when no applications (or suitable applications) or tenders (or suitable tenders) have been submitted in response to a prior concession procedure (Art. 31/5). An interesting option, though one not in line with Directive 2014/23/EU, is provided by Croatian law for cases in which the concessionaire wants to extend the concession for a location which represents an inseparable technical or functional unit of the object of a concession, and the concession serves for the performance of an economic activity, for example a nautical tourism port with shore-side access only from a hotel.

Considering the fact that the issue of concessions in the maritime domain in the compared legal systems is, as a rule, regulated by several legal acts that are sometimes not in accordance with each other, it is not surprising that legislators in the different Member States of the European Union have modified, to various extents, the provisions of their national laws under the influence of EU law. These differences are partially the result of differences in the concept of concessions traditionally used for the economic exploitation of the maritime domain in Mediterranean countries and the concept of the institute of concession as regulated by Directive 2014/23/EU.

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